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ERRATA.

At the end of line 5, page 711, *ante*, insert the following :

“ And the grand inquest aforesaid upon their oaths aforesaid do further present that the said James J. Titus on the said eighth day of April, in the year aforesaid, at the said town of Hackettstown aforesaid in said county, and within the jurisdiction aforesaid, in and upon one Matilda Smith, in the peace of God and this State then and there being, did commit rape, and in attempting to commit rape and in committing rape in and upon her the said Matilda Smith, did kill the said Matilda Smith, contrary to the form of the statute in such case made and provided against the peace of this State, the government and dignity of the same.”

THE EASTERN REPORTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

HAYDEN *v.* HAYDEN.

October 21, 1886.

GIFT — MERE INTENTION TO MAKE NOT SUFFICIENT.

A mere vote taken by the trustees of a trust fund to make a gift to a party of his promissory note which they held — which in their discretion they were authorized to do — would not alone amount to a gift of the note.

In order in such a case to constitute a present valid gift there must have been not only an intention to make the gift but something must have been done to execute and carry out such intention.

Action of contract against the defendant, William M. Hayden, The Northampton Institution for Savings, and The Trustees of the Smith Charities, being summoned as trustees. The writ was dated June 24, 1884, and the two trustees were duly served and summoned on the same day. At the trial in the superior court the jury returned a verdict for the plaintiff against the principal defendant of \$411.90. The Northampton Institution for Savings answered that it had no funds belonging to the defendant. Written interrogatories were filed to said institution and the material answers thereto were as follows:

On July 2, 1879, the institution received a deposit of \$500 from the clerk of the Smith Charities, and, at his request, the book issued therefor was entitled "Wm. M. Hayden, payable only to the order of the Smith Charities;" that the officers of the institution did not know the defendant; that the defendant had no other connection with the bank; that the interest was paid to the clerk of the Smith Charities, as follows: March 26, 1884, \$50.25; June 6, 1884, \$25; and that the officers were unable to say whether the deposit was made directly or indirectly for the benefit of the defendant; that the deposit of \$500 was made by the Smith Charities as before stated, and the sums already stated were withdrawn by them. The circumstances of the withdrawals were that the clerk of the Smith Charities presented the book to the institution at its banking-house, received the money and, after the usual entry thereof was made, took the pass-book or deposit-book away.

The trustees of the Smith Charities answered that they had no funds of the defendant at the time of the service of the writ upon them; that they are incorporated to carry into effect the will of Oliver Smith;

that by the provisions of said will the sum of \$500 was lent by said trustees to the principal defendant, and to secure the payment of said sum, the defendant gave the trustees his promissory note, and deposited in the Northampton Institution for Savings, the sum of \$500, as collateral security for said note; that the defendant having complied with the provisions of the will, the trustees, in pursuance of the provisions of said will, voted to cancel and give up said note to the principal defendant, and that the vote was passed before the service of the writ upon them in this action.

In answer to interrogatories the trustees further answered, that the \$500, mentioned in the answer of the institution for savings, was the same referred to by them in their answer; and in answer to the question, whether they now had any interest in said sum, stated that the note given to the trustees has never been surrendered to Wm. M. Hayden; that, if the vote and record of the trustees, as set forth in their answer, without any surrender of the note to the principal maker, is such an act as released all their claim to said money or on said note, then they did not claim any interest in said money, except as they may hold it for said Wm. M. Hayden, or as trustees in this suit.

By the will of Oliver Smith, provision was made for the selection of certain boys by the trustees, to be bound out as apprentices, on certain terms and conditions, until their arrival at the age of twenty-one years, and the clause of the will authorizing the loan to the present defendant was as follows: "Each of said boys, who shall have been bound out as aforesaid, and who shall apply therefor, at any time within six years after his arriving at the age of twenty-one, and who shall have conducted himself well and faithfully during his apprenticeship, and also until the time of such application, shall, at the discretion of said trustees, receive a loan of money from the income of this fund, not exceeding \$500, for a term not over five years, on his furnishing good and satisfactory security for the repayment of the same at the expiration of said term, with the interest thereon annually. And if at the end of the said term, the interest shall have been punctually paid, and the conduct of the borrower shall have been such as to satisfy the said trustees that he will in future make a good use of the money, the obligation shall be canceled and given up without the payment of any further sum than the interest aforesaid."

A copy of the vote referred to in the above answers of the trustees is as follows:

"June 24, 1884, voted to surrender the apprentice notes of Lewis A. Day, William H. Hayden, Charles H. Waite and Orson P. Smith, they having paid the interest punctually, and the trustees being satisfied that they will make good use of the money in the future."

In answer to a second set of interrogatories, the trustees further answered, among other things, that they withdrew the interest due from the savings institution, and applied it each time it was drawn to the payment of interest due on the defendant's note, and that, at the time of the service of the writ on them, there was due from the savings institution \$27.19, interest upon the \$500.

At the hearing in the superior court, it appeared in evidence, from

the testimony of certain of the trustees, that the custom was, at the monthly meeting of the trustees, that the notes becoming due that month would be voted, and that, after that, inquiry as to character would be instituted, and a certificate of the beneficiary filed; that the vote was passed with the understanding that the note was not to be surrendered until the five years had expired; that no certificate of character was filed in this case, and the note was not surrendered, and was still in the hands of the board. The superior court ordered that the Northampton Institution for Savings, and the trustees of the Smith Charities be severally discharged, and the plaintiff alleged exceptions.

J. B. O'Donnell, for plaintiff. *T. G. Spaulding*, for Northampton Institution for Savings. *D. W. Bond*, for trustees of Smith Charities.

C. ALLEN, J. The plaintiff relies on the vote of the trustees of the Smith Charities, passed on June 24, 1884, as creating an obligation to the principal defendant, of which he might avail himself. The question arises out of the somewhat peculiar method adopted by the trustees of administering their trust in respect to the loan to the defendant. Instead of lending the money for a fixed term, not over five years, during which the beneficiary would know that he could have the use of it, the trustees took from him a note, payable in five years, or on demand, at their own option; and instead of making a loan, of which during its continuance the beneficiary could make a beneficial use, the whole amount of the money lent was held in the savings bank as collateral security for its repayment, yielding a lower rate of interest than the beneficiary was required to pay to the trustees. Thus the loan, instead of being a benefit to him, would be a burden, unless at its maturity the trustees should see fit to cancel and give up his note. If the note had been made payable at the end of five years without the further provision making it payable on demand at the option of the trustees, it is quite plain that they would have no authority to cancel or give it up before the end of the five years. This is fully covered by the decision in *Smith Charities v. Northampton*, 10 Allen, 498. In that case the trustees sought the instructions of this court as to their duty and power in respect to loans made by them under the same clause of the will which authorized a loan to the present defendant in cases where the borrowers died before the expiration of the terms for which the loans were made, and it was then assumed, both by the trustees in seeking instructions and by the court in expounding the will, that in the execution of their trust the trustees would, as a matter of course, make loans only for fixed terms. It is not necessary for us in the present case to make a final determination of the question, whether the trustees had any authority to make a loan upon the terms contained in the note taken from the defendant, or whether, assuming that they had such authority, they could cancel and give up the note before the expiration of the five years without, at least, first making a formal demand for its payment; because, even if, merely for the sake of the argument, such power were to be conceded, we are of opinion that, upon the facts stated, the trustees, by the vote of June twenty-fourth, did not intend to make a present gift of the money to the defendant, and that, if they did so intend, they

did not do enough to make a completed gift to him. Construed in the light of all the facts disclosed and especially in the light of their power and duty under the will, as heretofore explained to them by this court, their vote does not import an intention to surrender the note at once, or before the expiration of the five years, so as to give to the defendant a present absolute right to its surrender, and to a transfer to himself of the money held by the savings bank. There is nothing but the mere language of the vote itself which goes to show such intention. That language does not necessarily lead to that inference. It is consistent with an intention to give up the note at the end of the five years, which term would expire three days later; and the circumstances disclosed lead us to suppose that such was in point of fact their intention. But whatever their intention at the time, the mere vote would not, of itself alone, amount to a gift of the money to the defendant. There was no previous understanding that such a vote should be passed. The defendant knew nothing of it. Nothing was done in pursuance of it prior to the commencement of the plaintiff's action. The plaintiff appears to have obtained early information, in some way not disclosed, of the vote, and to have taken prompt action with a view to availing himself of it. The vote, however, was merely a voluntary act to which the defendant was in no way a party or privy, and no surrender or transfer was made to him or to any person in his behalf. In order to give him a present absolute right to the money there must have been, not only an intention to make a present gift of it to him, but enough must have been done in execution of such an intention to make the gift complete. *Scott v. Berkshire Co. Savings Bank*, 140 Mass. 157, 166; *Sherman v. New Bedford Five Cent Savings Bank*, 138 id. 581; *Id. v. Pierce*, 134 id. 262; *Gerrish v. New Bedford Savings Bank*, 128 id. 159; S. C., 35 Am. Rep. 365; *Cummings v. Bramhall*, 120 Mass. 552, 564; *Shurtleff v. Francis*, 118 id. 154; *Clark v. Clark*, 108 id. 522; *Brabrook v. Boston Five Cent Savings Bank*, 104 id. 228.

Exceptions overruled.

CHADWICK v. DAVIS.

October 23, 1886.

HIGHWAY — BOUNDARY LINE — MONUMENTS.

Plaintiff claimed title to the middle of an old highway which had been relocated by the county commissioners. The description in plaintiff's title deeds began as follows: "Beginning at a stake and stones on the county road," and then continued by courses and distances back to the road, and thence on the said road to the point of beginning. The location of the stake and stones was in dispute. The court charged the jury that if the land in question was a part of the old highway, and they found that the stake and stones were upon the side of the road, on the side line, then the plaintiff's deeds included no part of the highway; but if they were unable to locate the stake and stones, then that the language of the deeds was sufficient to give plaintiff title to the middle of the road. *Held* no error.

Action of trespass *quare clausum*. The land in question is a triangular piece of land situated on the north-westerly side of Maple street in Warren. Maple street is an old county road leading from Warren to Springfield. Some time in 1883 it was relocated by the county com-

missioners, upon a petition reciting that the boundaries of the road were unknown, and the north-westerly side of Maple street, as relocated, is now the south-easterly line of the disputed tract of land. The north-westerly line of the disputed tract is adjacent to plaintiff's land, and its north-easterly line is adjacent to the defendant's land.

At the trial in the superior court the plaintiff introduced in evidence a chain of title consisting of many deeds, including the Nye and Bliss deeds hereinafter mentioned, beginning with the deed of Tyler Burroughs to Cyrus Hutchins in 1815, in which the description was as follows: "Beginning at a stake and stones, on the county road leading from Western (now Warren) to Brimfield; thence running westerly, bounded northerly on land of Daniel Batcheller and James Trask, till it comes to a white oak stump, being a corner of Trask's land on the north-west corner of the piece aforesaid; thence southerly five rods to a cross road; thence running north-easterly to the first bound; and bounding south-easterly on said county road, with all the privileges and appurtenances." The description in her other deeds is substantially the same. It was contended by the plaintiff that these deeds carried the title of the plaintiff to the center of the highway and thereby included the land in question. It was contended by the defendant that the deeds excluded the fee of the county road and that the land in question was a part of the county road, as the same existed previous to its relocation in 1883.

The evidence was conflicting as to the existence of any stake and stones and as to their exact location. The defendant asked the court to rule as follows: "The description in the plaintiff's title deeds 'beginning at a stake and stones on the county road' and continuing by various courses and distances back to the county road and thence by said road to the point of beginning, entirely excludes the road from the grant."

The court refused so to rule and instructed the jury, "If you find this land was a part of the highway, then the next question is to see whether the plaintiff had any deed of it. It is not claimed by the plaintiff that she had any deed of any portion, except that which is west of the middle line of the highway; and, if this was a part of the highway, the plaintiff claims it was all west of the middle line of the location of the highway, and that upon the relocation of Maple street, it fell back, clear of the public easement and public travel to her as the owner of the fee. She says she got the fee by these deeds. Now as to this deed, which I read to you, as beginning at a stake and stones on the highway. If you can find where these were, start there. If you find these stakes and stones to have been on the line of the highway, on the side line, then I instruct you that the deeds to Nye and Bliss include no part of the highway, and that the plaintiff has no record title shown here to any part of the highway. She begins at a stake and stones; if these stakes and stones were upon the side of the road, the side line of the highway, then [the deed includes no part of the highway. If, however, you are unable to fix where these stakes and stones were, and cannot ascertain that starting point at all, cannot find it, then I instruct you that the language of the plaintiff's deeds — the

Bliss Nye deeds — is strong enough to convey the title to the middle line of the highway, as it existed, at the time those deeds were made. If you cannot find those stake and stones, then I instruct you that the deed gives to the middle of the road.”

Upon the point whether the grantors in these deeds owned to the middle line of the highway at the time of executing the deeds the evidence was conflicting. The court ruled, in substance, that it was incumbent upon the plaintiff to prove not only that the description in the deeds was in language apt to include the land to the middle of the highway, but that the grantors in those deeds owned to the middle of the highway, and left it to the jury upon the evidence to find whether the grantors did so own.

The jury found for the plaintiff and the defendant alleged exceptions.

F. P. Goulding and *E. C. Sawyer*, for plaintiff. *Rice, King & Rice*, for defendant.

FIELD, J. If the stake and stones were upon the side of the road, the ruling of the court was sufficiently favorable to the defendant; if they were not, or if the jury could not find that they were, the ruling of the court was correct. *White v. Godfrey*, 97 Mass. 472; *O'Connell v. Bryant*, 121 id. 557; *Peck v. Denniston*, id. 17; *Dodd v. Witt*, 139 id. 63; *Gould v. Eastern L. R. Co.*, 142 id. 85; S. C., 6 East. Rep'r, 116.

Exceptions overruled.

BARRIE v. EARLE.

October 23, 1886.

EVIDENCE — RESCISSION OF CONTRACT FOR FRAUD — OFFER TO RESTORE.

Defendant subscribed for one copy of the plaintiff's "Art Treasures of America," in ten portfolios of \$15 each, the portfolios to be issued at intervals of about two months, and payments to be made for each portfolio upon delivery. Plaintiff delivered to defendant two portfolios, which were paid for; but defendant refused to accept or pay for any further deliveries, claiming that his signature to the contract was obtained by fraud. In an action by plaintiff to recover of defendant the price of the remaining eight numbers, *held*, that the contract was one entire agreement, and not a contract containing ten distinct agreements; and that the defendant could not avoid the contract, or give evidence tending to show the fraud alleged until he had returned, or offered to return, the two portfolios which he had received and paid for.

Action of contract to recover a balance alleged to be due from the defendant under a special contract for delivery to him of a copy of the Art Treasures of America. The contract declared on is as follows:

"May 24, 1883.

"To GEORGE BARRIE, Philadelphia:

"SIR.— I hereby subscribe for one copy of the Art Treasures of America, in ten portfolios, at \$15 each, as published on the following terms of subscription, which terms of subscription cannot be altered or modified:

"First. The Art Treasures of America, to be completed in ten portfolios, at \$15 each.

"Second. Each portfolio to contain sixteen impressions of photographic plates — India proofs, lettered — and fifty pages of text, or full page with engravings.

"One of the two selections to be canceled at time of subscribing.

"Third. The portfolios to be issued at intervals of about two months.

"Fourth. The edition is limited to twelve hundred copies, but no more copies will be issued than are subscribed for; and the publisher reserves the right at any time to advance the price to new subscribers.

"Fifth. Each copy of the work to contain a special title, bearing name and address of its subscriber; and the publisher guarantees to furnish impressions and paper equal in all respects to the specimens shown.

"Sixth. Portfolios to be delivered, carriage prepaid. Payments only to be made for each portfolio after such delivery.

"Seventh. No terms, conditions or representations other than here printed, will be binding on subscriber or publisher; and the subscriber hereby acknowledges receipt of a copy of these terms.

"ENOCH EARLE,

"21 Woodland St., Worcester, Mass."

At the trial in the superior court the plaintiff introduced evidence tending to show that he delivered, by express, the first portfolio under the contract, some time in June, 1883, and received from the defendant a check of \$15 therefor; that some time in August or September following, the plaintiff delivered a second portfolio under said contract, for which he also received a check for \$15; that some time in October following, the plaintiff sent to the defendant's house, by express, another portfolio, which the defendant refused to take; that the remaining seven portfolios were never delivered to the defendant, but that the plaintiff had been ready to deliver the same, but the defendant refused to accept them, and notified the plaintiff of his refusal. The defendant offered evidence to show that the defendant's signature to said contract was obtained by false and fraudulent representations, made by the plaintiff's duly authorized agent to the defendant, upon which representations the defendant relied, but it being admitted by the defendant that the defendant had neither returned, nor offered to return, the portfolios received, the court excluded the evidence. To this exclusion the defendant excepted.

The defendant also offered evidence of certain statements, made by the plaintiff's agent to the defendant, as to the place where the defendant's name and address would appear upon the portfolios, and the way and manner in which said name and address would be printed and would appear, as provided in the fifth clause of said contract; which evidence was excluded against the defendant's exception. It appeared or was admitted by the parties that one Prentice, who occupied a tenement in the same house with the defendant, had made with the plaintiff a similar contract; that the portfolios for both Prentice and defendant were sent in one package and so delivered at the house; that after arriving at the house, they were separated, and by mistake those with Prentice's name on the title page were delivered to the defendant, and those with

the defendant's name to Prentice, the books being in all other respects alike, and that these facts were known both to Prentice and the defendant, but that neither the defendant nor Prentice ever notified the plaintiff of these circumstances, and the plaintiff did not know of the mistake until after suit brought.

The court ruled that good faith upon the part of the defendant required that, if he intended to rely upon these circumstances as a non-delivery under the contract, he should have notified the plaintiff, and that, not having notified the plaintiff, he must be considered as having waived the defect, if there was any, in the delivery. The verdict was for the plaintiff, and the defendant alleged exceptions.

T. G. Kent and *G. T. Dewey*, for plaintiff. *Blackmer & Vaughan* and *J. R. Thayer*, for defendant.

FIELD, J. The first exception is to the exclusion of evidence that the defendant's signature to the contract was obtained by false and fraudulent representations. This evidence was excluded upon the general ground that the contract was entire, and the defendant could not avoid it, except by returning the two portfolios, which he had received and paid for. The same question of law is involved in the last exception. A majority of the court think that this is such a contract as is described in *Badger v. Titcomb*, 15 Pick. 409, 413, where, "although the agreement is entire, the performance is several," or as is said in *Denny v. Williams*, 5 Allen, 14, a contract, "one and entire in its origin, and yet looking to the performance of different things, at different times, may be divisible in its operation;" that an action, under it, could be maintained for the price of each portfolio, when each was delivered, but that the contract is one entire agreement, to take one copy of a publication, made up of ten parts, or portfolios, which together should constitute "the Art Treasures of America," and that it is not a contract containing ten distinct and independent agreements to the ten different portfolios, one under each agreement. See *Vinton v. King*, 4 Allen, 562. The defendant's evidence went to the whole contract, and was offered for the purpose of avoiding the whole contract, and he could only avoid the contract for fraud in its inception by rescinding it *in toto* and by restoring to the plaintiff the portfolios which he had already received. If the defendant had a right to avoid the contract and exercised that right, he had a defense to this action and could recover in an action brought by him the \$30 he has paid, and the portfolios would all belong to the plaintiffs, but the defendant could not retain part of the portfolios under the contract and avoid the contract as to the rest. *Clark v. Baker*, 5 Metc. 452; *Morse v. Brackett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 id. 350; *Young & Conant Mfg. Co. v. Wakefield*, 121 id. 91.

It does not follow from this that the defendant is required to receive any portfolios that are not such as the contract calls for, or that, if the plaintiff did not, from time to time, offer to the defendant ten portfolios, each of which satisfied the description contained in the contract, the defendant might not recover damages for a breach of the contract by the plaintiff.

The defendant also offered evidence, which was excluded, of "certain statements made by the plaintiff's agent" as to the place where the defendant's name and address would appear, as provided in the fifth clause of said contract. It does not appear that the defendant offered evidence that the portfolios, in respect to the special title and the printing therein of the defendant's name and address, were not in conformity with the statements of the agent. The fifth clause of the contract was "each copy to contain a special title, bearing name and address of the subscriber, and the publisher guarantees to furnish impressions and paper equal in all respects to the specimens shown." This evidence was, not that the portfolios did not contain a special title, bearing the name and address of the subscriber, or were not "equal in all respects to the specimens shown," at the time the contract was made; and it did not appear that the specimens shown did not contain an impression of a special title complete in all respects, except the name and address of the subscriber. The contract itself provided that "No terms, conditions or representations, other than here printed, will be binding on subscriber and publisher." It does not appear that the defendant ever complained of the manner in which his name and address were printed in the special title, or that this was the ground of his refusing to receive the portfolios. Under these circumstances we are not called upon to determine the extent and the application to the various conceivable facts of this case of the principle declared in *Stoops v. Smith*, 100 Mass. 63. The defendant clearly has not shown that the evidence was admissible.

We are not certain that we understood the third exception. The two portfolios which the defendant had received and paid for could not be considered as undelivered, so long as the defendant retained them. If the exception relates to those two portfolios, they are not a subject of controversy in this suit. But if this exception relates to the third portfolio, it appears that this was sent to the defendant's house and the defendant "refused to take it." It also appears that after the package, containing two portfolios, one for the defendant and one for Prentice, "who occupied a tenement in the same house with the defendant," had been received at the defendant's house, the copy with Prentice's name on it, by the mistake of somebody was delivered to the defendant, and the defendant's copy was delivered to Prentice. The two portfolios were "in all other respects alike." This mistake was unknown to the plaintiff until after the suit was brought, and was known to both the defendant and Prentice, and it does not appear that the defendant could not have taken possession of his copy, whenever he wished. As the defendant absolutely refused to receive this portfolio, as well as the seven remaining portfolios, and notified the plaintiff of his refusal, and gave no notice of this mistake and did not indicate in any manner that he relied upon it, in refusing to receive the portfolios he must be held to have waived it.

Exceptions overruled.

COMMONWEALTH v. CHADWICK.

October 23, 1886.

CRIMINAL LAW — INTOXICATING LIQUORS — EVIDENCE.

A complaint charging defendant, who had a license of the first class, with selling intoxicating liquors "without any authority of law," is sufficient where the sale was made after eleven o'clock at night, or over a public bar.

Defendant's admission that he was the proprietor of the place where the liquor was sold and had a license of the first class to do business there is evidence for the jury that the sales were made by him or by his authority.

Complaint against the defendant for an illegal sale of intoxicating liquor on July 5, 1886, to some person to the complainant unknown. At the trial in the superior court, on appeal, the government offered the evidence of one Van B. Kenney, to the effect that he knew where the defendant kept a public-house on Mainstreet, in Clinton; that he was there July fifth, and saw liquors sold thereon that day between eleven fifteen and eleven thirty, P. M.; that he did not go in; that he saw a wire screen door, through which he looked; that three men stood in front of the bar; one man leaning on the bar who called for lager beer; that the man behind the bar furnished it, and it was paid for. On cross-examination he testified that he saw one of the men before the bar take out money and lay it on the counter; that he knew none of the parties; that he did not know the defendant and could not identify him; and that the sale he testified to in the lower court was the same sale, and was a sale made after fifteen minutes past eleven on the night in question; and at said trial there was no evidence of any other sale. It was admitted that the defendant was proprietor of the place, and had a license of the first class to do business thereat.

The government rested its case, and the defendant asked the court to rule that there was no evidence upon which the jury could find the defendant guilty, but the court refused so to rule, and instead ruled that there was such evidence. Defendant excepted.

The defendant offered the evidence of himself and other witnesses, tending to show that he was at said place of business during the evening in question, but at eleven o'clock, P. M., he himself extinguished the lights, and closed and locked the door, and that he did not open or enter the saloon that night, or know that it was so entered or opened; that he had no agent authorized to do so, and that he sat at said door long after eleven o'clock. There was evidence tending to show that defendant kept a public bar, and that the sale testified to by Kenney was made at and over said bar. After both sides rested, the defendant asked the court to rule that there was no evidence in the case that would warrant the jury in finding the defendant guilty, but the court refused so to rule.

There was a verdict of guilty, and the defendant alleged exceptions.

E. J. Sherman, attorney-general, for Commonwealth. *J. W. Cocoran* and *H. Parker*, for defendant.

FIELD, J. The defendant's license was subject to the conditions that "he shall not keep a public bar," and that "no sale of spirituous or

intoxicating liquors shall be made between the hours of eleven at night and six in the morning; nor during the Lord's day, except," etc. Pub. Stats., chap. 100, § 9, cl. 2 and 5; Stat. 1885, chap. 90, § 1.

The government's witness testified that the sale he testified to in the lower court was the same sale he testified to in the superior court; but the defendant's evidence tended to show that no sale was made after eleven o'clock. Whether the sale was made before or after eleven o'clock at night, it was the same sale in both courts, and it was equally an offense, whether in making this sale the defendant violated one or two of the conditions of his license. The defendant was charged with selling on the 5th day of July, 1886, intoxicating liquors "without any authority therefor." The form of the complaint was sufficient, because, if the defendant sold the liquor over a public bar, or after eleven o'clock at night, his license did not give him any authority to make such a sale. *Com. v. Davis*, 121 Mass. 352; *Com. v. Rogers*, 135 id. 536; *Com. v. Everson*, 140 id. 292; *Com. v. Salmon*, 136 id. 431.

The presiding justice was not required to rule upon the government's evidence, if the defendant intended to introduce other evidence, and no exception lies to the refusal to rule that the evidence of the government was insufficient, if other evidence was afterward offered by the defendant. But the court also ruled that there was evidence introduced by the government, upon which the jury could find the defendant guilty.

The admission by the defendant that he was proprietor of the place, and had a license of the first class "to do business thereat," and the testimony that the defendant kept the place, were evidence for the jury that sales made in it were made by him, or by his authority. *Com. v. Leighton*, 140 Mass. 305; *Com. v. Mead*, id. 300.

Exceptions overruled.

LINDSEY v. PARKER.

October 23, 1886.

COSTS — ATTACHMENT BOND — COUNSEL FEES.

An indemnity bond, in the usual form, given on an attachment to save harmless the plaintiff "of and from all suits, damages and costs whatsoever which he might be liable or obliged by law to pay to any person or persons by reason of said attachment," includes counsel fees reasonably incurred in the defense of a suit occasioned by the attachment.*

Action of contract to recover upon an indemnity bond, given by the defendant Parker as principal, and William Tinker, Norman Strickland and E. L. Day as sureties. The condition of the bond was to save the plaintiff harmless of and from all suits, damages and costs which he might be liable, or obliged by law to pay, by reason of an attachment made by the plaintiff upon a writ in favor of the defendant Parker against one Frederick A. Willis. At the trial in the superior court, without a jury, it was agreed that the plaintiff was a deputy sheriff for Hampshire county; that said plaintiff was sued in tort by one Cannon, in the superior court for said county, for the alleged con-

* See *Raymond v. Green*, 12 Neb. 215; S. C., 41 Am. Rep. 763; *Bolling v. Tate*, 65 Ala. 417; S. C., 39 Am. Rep. 5, 13, note.

version of the property attached on the writ. *Maria H. Parker v. Frederick H. Willis*, referred to in the bond declared on, that judgment against said Lindsey was recovered in said suit, by agreement, June 25, 1884, for \$75 damages, and \$40.42 costs of suit; that execution issued on said judgment August 14, 1884, and on said execution Lindsey had to pay, and did pay, the sum of \$115.42, and twenty-five cents more for the execution, and that said Lindsey, in defending said suit, paid, as a reasonable expense for counsel fees therein, the sum of \$56. It was not claimed that said judgment, by agreement, was collusive and fraudulent, either as affecting the parties to it, or others collaterally affected by it, and it was not claimed that Lindsey could have successfully defended against said suit. The plaintiff introduced in evidence a letter from Norman Strickland, attorney for the defendant Parker, addressed to G. Kress, the attorney for the plaintiff, by which he authorized the latter to settle the suit of *Cannon v. Lindsey*, as well as he could, in the interest of the defendants. It was admitted that Strickland was not a member of the bar, and no special authority to him from Mrs. Parker was shown. The defendants asked the court to rule that the plaintiff cannot recover against the defendants, or either of them; that the evidence did not show any relation of Strickland to the case.

The court refused so to rule, and found for the plaintiff for the penal sum of the bond. The court awarded execution for the breach of the bond in the sum of \$188.66, being the sum paid on said execution and the sum of \$56 paid as counsel fees in defending the suit of *Cannon v. Lindsey*, and interest on the combined sums from the date of the writ, and at the request of the parties reported the case for the consideration of this court.

G. Kress, for plaintiff. *J. C. Hammond*, for defendants.

FIELD, J. The only exceptions argued are, first, that it does not appear by any competent evidence that Norman Strickland was authorized by Mrs. Parker to agree to a settlement of the suit of *Cannon v. Lindsey*; and second, that the sum paid by Lindsey as counsel fees in said suit cannot be included in the amount for which execution is to issue. It appears by the report that it was not claimed that the judgment entered in the suit by agreement "was collusive or fraudulent, either as affecting the parties to it or others collaterally affected by it, and it was not claimed that Lindsey could have successfully defended against said suit." This, we think, is in effect an admission that there was no defense to the suit, and such an admission rendered the evidence objected to immaterial. There is no suggestion in the report that the settlement was not reasonable and proper. The bond is in the common form to indemnify and save harmless the plaintiff "of and from all suits, damages and costs whatsoever whereunto he . . . may be liable or obliged by law to pay to any person or persons by reason of said attachment."

The objection to including counsel fees in the sum for which execution is to issue is put solely upon the ground that they are not included in the damages and costs, from which the defendants are to save the

plaintiff harmless. The principles on which reasonable counsel fees are excluded or included in the damages to be recovered, when there is no express contract of indemnity, were considered in *Westfield v. Mayo*, 122 Mass. 100; S. C., 23 Am. Rep. 292, and the effect of an agreement of indemnity general in its terms was considered in *Howard v. Lovegrove*, L. R., 6 Exch. 43. See *Smith v. Compton*, 3 Barn. & Ad. 189. It has been said that "the law measures the expenses incurred in the management of a suit by the taxable costs." *Reggio v. Braggiotti*, 7 Cush. 166, 170. See *Henry v. Davis*, 123 Mass. 345, 346. But that these expenses exceed the taxable costs is now notoriously true. It was the plaintiff's duty to ascertain and determine whether there was a defense to the suit, and to defend it if there was a defense, and to employ counsel for that purpose, unless Mrs. Parker took upon herself the defense of the suit, and as the words of the bond are "all costs whatsoever," to which the plaintiff "may be liable" as well as the costs which he may "be obliged by law to pay to any person or persons," we think that they may be construed to include counsel fees reasonably incurred in the defense of a suit occasioned by the attachment.

The judgment is affirmed, and execution is to issue for the sum awarded by the superior court, with interest from the date of the award. See *New Haven and Northampton Co. v. Hayden*, 117 Mass. 433.

So ordered.

CONNECTICUT SUPREME COURT OF ERRORS.

McFARLAND v. SIKES.

April 2, 1886.

NEGOTIABLE INSTRUMENT — DELIVERY ON CONDITION — PAROL EVIDENCE.

A note may be delivered upon condition, and the annexing of a condition to the delivery thereof is not an oral contradiction of the written instrument.

In an action by the payee of a note, parol evidence is admissible to show that at the time of its delivery, it was agreed that it should be returned to the maker if demanded. (See note, p. 15.)

Action on a note. Plaintiff had a verdict. The opinion states the case.

C. H. Briscoe, J. P. Andrews and D. Marcy, for appellant. *J. L. Hunter and B. H. Bill*, for appellee.

PARK, Ch. J. This is a suit upon a note of \$300. On the trial in the court below, the defendant offered evidence to prove, and claimed to have proved, that previously to the execution and delivery of the note the plaintiff, who was a grand juror of the town of Ellington, where the defendant resided, and was acting as the attorney of one Mary Quinn, accused the defendant of having made an assault upon the person of the said Mary, and threatened him with a criminal prosecu-

tion unless he settled with her for the injury; that the defendant thereupon admitted that he had done wrong in the matter and offered \$100 to settle it; that the plaintiff demanded \$300, which the defendant was unwilling to pay; that the defendant was without counsel and asked to be allowed till the following Tuesday to consider the matter, and offered to give his note for \$300 to be held by the plaintiff till then, and if he did not then appear, to be held by the plaintiff as a settlement for the injury to the said Mary, but if he should appear, to be returned to him to be canceled; that thereupon the plaintiff wrote the note in suit, which the defendant executed and delivered to the plaintiff to be held by him upon the conditions stated; and that the defendant at the same time declared that he should appear and demand a return of the note. The defendant also offered evidence that on the following Tuesday he appeared before the parties and demanded the return of the note, but that the plaintiff refused to surrender it.

With reference to this evidence the defendant requested the court to charge the jury "that if the note was delivered to the plaintiff with the understanding between him and the defendant that it was to be delivered up to the latter on his demand on the Tuesday following, and the defendant demanded its return on that day, the plaintiff cannot recover, and the verdict must be for the defendant." The court did not so charge the jury, but charged substantially, that if they should find all the facts claimed by the defendant to be proved they did not constitute a defense to the action.

We think the court erred in refusing to charge as requested, and in charging as it did. The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract.

A written contract must be in force as a binding obligation, to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise and by parol evidence.

Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them.

In the case of *Benton v. Martin*, 52 N. Y. 570, the court say: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexation of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instru-

ment may be limited by the conditions with which the delivery is made."

In the case of *Schindler v. Muhlheiser*, 45 Conn. 153, the head-note is as follows: "The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. *Held*, in a suit on the note, that parol evidence was admissible, on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant that the land was afterward to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid."

The defense in that case was really that the note had never been delivered as a note, binding upon the defendant. The delivery was merely formal, and was so understood by the parties. See, also, *Adams v. Gray*, 8 Conn. 11; *Collins v. Tillou*, 26 id. 368; *Clarke v. Tappin*, 32 id. 56; *Post v. Gilbert*, 44 id. 9; *Hubbard v. Ensign*, 46 id. 585.

We think the court erred in refusing to charge the jury as requested by the defendant.

The view we have taken of that question renders it unnecessary to consider the other questions made in the case.

There is error in the judgment appealed from, and it is reversed and a new trial ordered.

All concur.

NOTE.—See *Reynolds Ev.*, § 69 *et seq.*; 20 Eng. Rep. 595; *Jones Constr. Com. Cont.*, § 160 *et seq.*; *Willse v. Whitaker*, 22 Hun, 242, was an action brought against the maker and accommodation indorsers of a promissory note dated January 28, 1879, and payable one day after date; the indorsers were allowed, against plaintiff's objection and exception, to prove that they indorsed the note under a verbal agreement with the plaintiff, to whom the note was to be delivered, that they should have until the first of the following June to pay it. *Held*, that the evidence was directly inconsistent with, and affected the terms of the note, and the court erred in admitting it. The court said: "It is familiar doctrine that an accommodation party may show, except as against a *bona fide* holder for value, that a note had been diverted from the use for which it was made. That does not affect the terms of the note; but shows that it was never a valid instrument. Such is the case of *Prentiss v. Graves*, 33 Barb. 621, cited by defendants, and such are many others which might be cited. So, in the case of *Bookstaver v. Jayne*, 60 N. Y. 146, the indorser did not attempt to disprove the terms of the note. But he set up the breach of another affirmative agreement, viz.: to discontinue a certain action against the maker; and this was held to be a defense. *Grier-son v. Mason*, 60 N. Y. 394, holds only that evidence could be given, showing that a certain writing was not a contract between the parties. *Benton v. Martin*, 52 N. Y. 570, was a case of the same general character. The parol evidence was not received to alter the meaning of the draft, which on its face bore the conditions on which it was delivered. The conditions had reference to other matters than the contract expressed in the draft itself. The case of *Seymour v. Cowing*, 1 Keyes, 535, was where it was proved by parol that certain writings in form notes were in fact memoranda. That parol evidence avoided the writings. It did not change their effect. The alleged oral agreement was not a distinct and separate agreement collateral to the indorsement. But if made, it was an oral agreement varying the terms of the written contract of indorsement, and it should not have been received in evidence."

In 1869, J. and C., sons of plaintiff, procured policies of insurance upon their lives; the policy upon C.'s life was made payable to plaintiff. These policies remained in the possession of G., who paid the premiums thereon until May 23, 1872, holding them as collateral security for an indebtedness of J. and C.; on that day plaintiff executed to G. an assignment of the policy in which she was interested, absolute in form, for the express consideration of \$1, "and for other valuable considerations." At the same time in connection with her sons she executed another instrument, by the terms of which they jointly and severally assigned all their rights and interests in the

policies to G., in consideration of his crediting C., \$353.72, paying a mortgage of \$110.46 on property conveyed to him by J., by deed containing covenants that they were free of incumbrance, and indorsing \$35.82 on note given by C. G. gave the credits and paid the mortgage specified, and defendant, his assignee, collected the policy on the life of J. Plaintiff claiming that the assignment was in fact given simply as collateral security for an indebtedness of \$500, after the tender of that amount, and demand of the moneys collected, brought this action to recover the same. *Held*, that in the absence of any claim of fraud or mutual mistake as to the contents of the assignment, plaintiff was concluded thereby, and oral evidence was incompetent to show that it was executed as collateral security merely. *Marsh v. McNair*, 99 N. Y. 174. The court said: "This instrument is more than an assignment. It contains what both parties agreed to do. It shows that the assignment was made for the purposes mentioned, and precisely what G. was to do in consideration thereof. He became bound to do precisely what was specified for him to do, and he could have been sued by the assignors for damages if he had failed to perform. Hence the instrument is not a mere assignment or transfer of the policy; it is a contract in writing within the rule which prohibits parol evidence to explain, vary, or contradict such contracts. It is believed that no case can be found where parol evidence has been received for the purpose of showing that such an instrument was given merely as collateral security, and not for the precise purpose mentioned in it. Without commenting upon the authorities, the following are ample to show that the evidence was not competent. 1 Greenl. Ev. 275; *McCrea v. Purmort*, 16 Wend. 461; *Kellogg v. Richards*, 14 id. 116; *Goodyear v. Ogden*, 4 Hill, 104; *Graves v. Friend*, 5 Sandf. 568; *Coon v. Knapp*, 8 N. Y. 402; *Cocks v. Barker*, 49 id. 107; *Hinckley v. New York Cent. R. R. Co.*, 56 id. 429; *VanBokkelen v. Taylor*, 62 id. 105; *Shaw v. Ins. Co.*, 69 id. 288; *Cram v. Union Bank*, 1 Abb. Dec. 461; *Wilson v. Deen*, 74 N. Y. 530; *Eighmie v. Taylor*, 98 id. 288. If the plaintiff could show that this agreement, by the mutual mistake of parties, did not express their real intention, she could have it reformed; if she could show that she was induced to execute it by the fraud of G., she might have it annulled. But, in the absence of an allegation, and of proof and finding, that there was either fraud or mutual mistake, the instrument must have force and effect according to its terms, and cannot be varied, explained or contradicted by parol evidence."

In an action brought to recover damages for a breach of a contract alleged to have been made by the defendants to sell lumber to the plaintiff, the referee found that the agreement was made in writing by letters passing between the parties, by the terms of which the plaintiff was to pay for the amount of lumber delivered each month on or before the twentieth day of the following month. Upon the trial, the referee received oral testimony tending to show that before the letters were written, it was agreed that the defendants should make inquiries at the commercial agencies as to the plaintiff's pecuniary responsibility, and that the sale and delivery of the lumber should be contingent upon a satisfactory report from the agencies; that such report was unsatisfactory, and that the defendants for that reason refused to fulfill the contract. *Held*, that this oral evidence was inadmissible for the reason that it contradicted specific provisions of the written agreement. *Reynolds v. Robinson*, 37 Hun, 561. The court said: "The general rule is that parol evidence cannot be received or used to contradict or vary the terms of a written instrument, and that when an agreement is reduced to writing it is taken to express the ultimate sense of the parties to it, and, therefore, in the absence of fraud, parol evidence is not admissible to alter or modify the terms or legal effect of a written contract as between the parties entering into it. But there are exceptions to this rule which permit parol evidence of engagements collateral to, or independent of, the provisions expressed in the written agreement and not within its terms, although made at the same time and affecting the rights of the parties in relation to the subject-matter of the written contract. In such case it is deemed only partially reduced to writing, and the collateral undertaking exists in parol. *Chapin v. Dobson*, 78 N. Y. 74; *Van Brunt v. Day*, 81 id. 251; *Juillard v. Chaffee*, 92 id. 529; *Lewis v. Seabury*, 74 id. 409; *Shughart v. Moore*, 78 Penn. St. 469; *Welz v. Rhodeus*, 87 Ind. 1; 44 Am. Rep. 747; *Lindley v. Lacey*, 17 C. B. (N. S.) 578. The written agreement in this case contains a stipulation for a specific credit, and the parol evidence upon which the conclusion of the referee rested was to the effect that such provision was dependent upon the condition that a report derived from the commercial agencies was or should be satisfactory to the defendants in respect to the financial character of the plaintiff. That was in no sense a collateral or independent agreement, but tended directly to impair the force of a provision introduced into the written contract, and to prove that, instead of being an absolute undertaking, as its terms imported, it was a qualified or conditional one,

and that by reason of a reserved right the fact existed which defeated it. That proposition is no violation of the well-established rule, and in its application generally salutary one, which preserves the force and effect of written contracts against the uncertain consequences of parol evidence upon their plain provisions. *Payne v. Ladue*, 1 Hill. 116; *Bank of Albion v. Smith*, 27 Barb. 489; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Hill v. S. & B. R. R. Co.*, 73 id. 351; *Wilson v. Dean*, 74 id. 581. It may be that the defendants intended that the condition referred to should be carried through and characterize their correspondence, and thus qualify the acceptance of the plaintiff's proposition, but if they designed to preserve the qualification they should have done so by the terms of their acceptance of his order; the letter contains nothing from which it may be implied. The distinction to be observed between the rule and the exception, and the circumstances which may furnish the opportunity to apply the latter, are well stated in *Exhime v. Taylor*, 96 N. Y. 294."

In *Stiles v. Vandewater* (Sup. Ct. N. J.), 5 East. Rep'r, 777, it was held that parol evidence, that a note payable in three months was given upon an agreement that it should be renewed when it became due, is incompetent within the rule that oral testimony cannot be received to vary the terms of a contract in writing.

It was orally agreed by A. and B. that A. should furnish B. with certain machinery at a specified price, and that B. should accept and pay for the same in a specified manner, and that A. should guarantee that the machine should do B.'s work satisfactorily. The agreement was reduced to writing and signed, not including the guaranty. Held, that parol evidence was competent to add the guaranty. *Chapin v. Dobson*, 78 N. Y. 74; S. C., 84 Am. Rep. 512.

Parol evidence of an agreement to extend the time of payment of a mortgage may be given without violating the rule prohibiting parol evidence to explain, vary or contradict written instruments, it appearing that it was an independent agreement, and did not tend to contradict the mortgage. *Kane v. Cortesy*, 100 N. Y. 132; S. C., 2 East. Rep'r, 331.

In *Van Brunt v. Day*, 81 N. Y. 251; S. C., 8 Abb. N. C. 336, defendant executed to plaintiff an assignment under seal, of a bond and mortgage, which contained a guaranty of payment of the amount secured in case of the failure of the mortgagors to pay. In an action to foreclose the mortgage, defendant was sought to be charged with any deficiency. He alleged and offered to prove that, at the time of the execution of the assignment, plaintiff, in consideration of being permitted to retain \$300 out of the purchase-money, and of the assignment to him of a policy of insurance upon a building on the premises, agreed, by parol, to keep the building insured until the mortgage became due; that she did not do this, and that the building was destroyed by fire. The evidence was objected to and excluded. Held error; that the rule excluding parol evidence, varying or modifying written instruments, did not apply, as the agreement sought to be proved was an independent collateral engagement, upon a new consideration, which, if established, would not qualify or change the guaranty, but simply gave a right of action available as a counter-claim. Also held, that the fact that the breach of the parol agreement was not in terms set up as a counter-claim was not available here, as the facts were alleged, and no objection to the proof offered was made upon the ground that the pleading was defective. In speaking of this case, Mr. Abbott says: "This case illustrates both sides of the important distinction — often overlooked — between admitting extrinsic evidence of an oral condition, not in the writing, for the purpose of evading liability on the writing, and admitting evidence of a collateral, oral stipulation, or agreement, for the purpose of establishing a counter liability. Modern decisions allow the latter to an extent beyond what the language of earlier cases would seem to have done. Compare *Johnson v. Oppenheim*, 55 N. Y. 280; affirming 35 Super. Ct. (J. & S.) 440; and *Remington v. Palmer*, 62 N. Y. 31; reversing 1 Hun, 619; 4 Sup. Ct. 696."

As to whether it is competent, in an action upon a bill of exchange against the drawer, for him to show by parol, that although he signed his own name without adding the word "agent," he did in fact sign and deliver it as agent for the drawee, and without intent to become personally liable, and the bill was discounted by the payee with knowledge, *quære?* *Herkimer County Nat. Bank v. Rust*, 97 N. Y. 635.

The rule which excludes parol testimony for the purpose of varying or contradicting a written contract is confined to the parties or their privies to the contract, and does not prevent strangers thereto from introducing such evidence. *Kellogg v. Thompson* (Mass.), 6 East. Rep'r, 80.

A recent author (Dewey, *Contracts for Future Delivery*, pp. 54-7) contends that in a case where the contract is in writing, and the understanding that no delivery is to be made is not expressed, parol evidence is inadmissible to establish that fact. We

do not so understand the rule. The evidence is admissible, not for the purpose of contradicting the agreement in writing, but for the purpose of showing that the intent of the parties was merely to gamble, notwithstanding it may have the effect to vary the terms of the writing. Again it has been held that evidence to establish any defect of this character (illegality) in the alleged contract does not come within the spirit of the letter of the rule excluding parol evidence. *Jones Construction of Contracts*, § 191, citing authorities. See, also, *Kreigh v. Sherman*, 105 Ill. 49.

HOLMAN v. CONTINENTAL LIFE INSURANCE CO.

July 27, 1886.

INSURANCE — NON-FORFEITABLE POLICY.

A non-forfeitable life policy for a term of ten years for \$1,000, was issued to plaintiff and contained a provision that the policy should lapse upon the non-payment of any annual premium and of interest annually in advance on any outstanding premium notes which might be given; but that, after the payment of two annual premiums, in case of default the company would convert the policy into a paid-up one for as many tenth parts of the sum originally insured as there had been annual premiums paid when the default was made, provided application for such conversion was made within one year after the default. In an action to recover the amount due on the policy defendant answered that the plaintiff had paid two annual premiums, a part in cash and the remainder in premium notes which were outstanding; that he had made default in the payment of the next premium and applied to the company for a paid-up policy; that the company thereupon indorsed upon the policy that it was to pay \$200, "subject to the terms and conditions expressed in the policy;" that thereafter plaintiff paid the interest on the outstanding premium notes annually in advance for two years, but no longer. *Held* (1) that the indorsement upon the policy was equivalent to a paid up policy; (2) that the policy as thus indorsed was to be construed as forfeitable upon the non-payment of the interest on the outstanding premium notes.*

Action upon a policy of life insurance. Demurrer. The opinion states the case.

H. B. Freeman, for plaintiff. *T. M. Maltbie*, for defendant.

LOOMIS, J. The complaint in this case seeks to recover the amount due under a so-called "paid-up" policy of insurance on the life of William W. Holman, for the benefit of his wife. The demurrer to the defendant's answer raises the question whether the defense therein set forth is sufficient in law to prevent a recovery by the plaintiff, and this depends entirely upon the contract of the parties. By the terms of the contract as originally made, the defendant was to receive an annual premium of \$108.72 during the continuance of the policy, for the term of ten years, payable, as appears from the margin, partly in cash and partly by note. At the end of the term, or upon the previous death of the insured, the defendant was to pay \$1,000, "deducting therefrom all indebtedness to said company on account of this policy, if any, then existing," subject to sundry express conditions and agreements mentioned in the policy, the third and fourth of which only are involved in this case. These are as follows:

"*Third.* If the said assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same, and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof, or shall not pay, at maturity, any notes or obligations given for the cash

* See *People v. Knickerbocker Life Ins. Co.*, post.

portion of any premium or part thereof,— then, and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured, or any part thereof, except as hereinafter provided.”

“*Fourth.* If, after the receipt by the company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premium when due, then notwithstanding such default, this company will convert this policy into a ‘paid-up’ policy for as many tenth parts of the sum originally insured, as there shall have been complete annual premiums paid when such default shall be made: Provided that this policy shall be transmitted to and received by this company, and application made for such conversion within one year after such default.”

The defendant’s answer, after admitting the issuing of the policy, its terms and demand and refusal to pay, as alleged in the complaint, further alleged that —

“2. On the first day of April, 1874, the plaintiff had paid to the defendant in cash a portion of the two annual premiums, and had given to the defendant premium notes for the remaining portion of said premiums, which notes were then and are now outstanding and unpaid.

“3. Thereafter the plaintiff made default in the payment of premiums, and transmitted said policy to the defendant, and with his wife, Rebecca J. Holmes, applied to the defendant to adjust the insurance under said policy, according to the stipulations thereof, by reducing the amount thereof to \$200; and in said application agreed to pay the defendant, annually, in advance, the interest on all outstanding notes given in part payment of annual premiums.

“4. Thereupon the defendant made the following indorsement upon said policy of insurance: ‘This policy having lapsed after two annual payments is hereby recognized as binding upon the company for two-tenths thereof, or \$200, subject to the terms and conditions expressed in this policy and in the quit-claim to this company, bearing even date with this entry;’ and returned said policy to the plaintiff, who accepted the same.

“5. Thereafter the plaintiff paid the interest on said outstanding premium notes, annually, in advance, until the year 1876, when he ceased to pay the same, and has not since paid the same.

“6. Said policy provided that if the assured should not pay the interest annually, in advance, on any outstanding premium notes given for any portion of the annual premiums on said policy, then said policy should cease and determine, and said company should not be liable for the payment of the sum insured or any part thereof.

“7. By reason of the failure and neglect of the plaintiff to pay the interest annually, in advance, on said outstanding premium notes in the year 1876, and thereafter, said policy of insurance has ceased and determined, and the defendant is not liable for the payment of the sum insured, or any part thereof.”

The plaintiff’s reply was as follows:

“The plaintiff demurs to the answer of the defendant, as the facts

therein stated are insufficient in the law, because the paid-up policy upon which complaint is brought was non-forfeiting by its terms, and contained no provision that the failure to pay interest on the outstanding premium notes should work a forfeiture of said paid-up policy, and the same is nowhere averred in said answer."

The special ground of this demurrer presents the precise question involved in the case, namely, does the paid-up policy contain a provision that the failure to pay interest on the outstanding premium notes shall work a forfeiture of the policy?

This question is different from the one considerably discussed in other jurisdictions, namely, what will entitle the insured to a paid-up policy, and what provisions as to forfeiture should it contain? The parties have settled these questions themselves by giving and accepting the reduced insurance; and if the policy thus accepted contains a provision whereby the failure to pay interest will make it void, then the plaintiff by his pleadings impliedly admits that he has no case, even though he would have been entitled to a different policy under the original contract.

The new contract, whereby the insurance was reduced to \$200, states that the company recognize the policy binding for that sum, "subject to the terms and conditions expressed in this policy and in the quit-claim to this company bearing even date with this entry." This, in effect, is the same thing as a new policy, containing the terms and conditions of the old one as far as applicable. Now among these conditions is the clear stipulation that "if the assured shall not pay the interest annually in advance on any outstanding premium notes, this policy shall cease and determine." In what manner did this provision become eliminated from the paid-up policy?

It cannot be claimed to be inapplicable, because there is a subsisting obligation to pay this interest annually in advance recognized not only in the original policy but in the quit-claim, whereby the plaintiff and his wife, when they applied for the reduced insurance, made a fresh promise and agreement to pay this interest, and this quit-claim is referred to and made part of the new contract, and the promise on the part of the company is made subject to it as a condition.

But a specious argument always urged against this view by counsel for the insured and sometimes sanctioned by courts is founded upon what is called the absurd paradox of forfeiting a non-forfeitable policy. The name "non-forfeiting" has undoubtedly been sometimes used to mislead applicants for insurance, and some of the cases refer to the fact that agents for insurance companies have made declarations and issued circulars to the effect that, after the payment of two annual premiums, the policy would be binding on the company without any further attention on the part of the holder.

But no such fact appears in this case, and upon the admitted facts it is certain that the insured was not misled, for he voluntarily offered to pay and did actually pay interest annually in advance on the paid-up policy until the year 1876. It is manifest that both parties at the time and for several years subsequently construed the contract alike. There was no trap, therefore, into which the plaintiff was unwarily led.

But courts need not be misled by mere appeals to prejudice. The contract is not to be construed by its mere label, but by its written terms, and upon referring to these we see at once that the policy is non-forfeitable only to a very limited extent.

No one has ever claimed that it extends beyond the payment of an annual premium and interest, and even in these respects it is non-forfeitable only at the option of the holder, who must transmit the policy to the company and make application for its conversion into a paid-up policy within one year after default. But a glance at the policy will show that even after the conversion the insured can have no security against forfeiture except by observing the conditions. If, without the consent of the company, he travels outside of the prescribed limits mentioned; if he engages in certain specified hazardous occupations; if he becomes intemperate or is addicted to vice of any kind to the extent of permanent impairment of his health; if he is convicted of felony; if he dies by his own voluntary act or in consequence of a duel, or under the sentence of the law, the paid-up, non-forfeitable policy could not for a moment avail, but would thereby become null and void.

Any argument, therefore, founded merely upon the use of the term "non-forfeitable" is of little weight. We must, as in all other cases, construe the contract by the language used in it. In this case the question is confined to the language of the saving clause, which is the fourth. Does that save the insured from the consequences of a failure to pay interest, the same as it does in the case of failure to pay future annual premiums? The third clause, which it is indispensable to consider in this connection, clearly specifies two distinct defaults, either of which will forfeit the policy; first, failure to pay the annual premiums when due, and, second, failure to pay interest in advance on outstanding premium notes. So far the meaning cannot be mistaken. Now, how does the saving clause which follows affect the question? It only relieves the insured — after the payment of two or more annual premiums — from one of those defaults — "the payment of any subsequent premium when due." Not a word is said about interest. The saving clause, therefore, is not co-extensive in its operation with the preceding forfeiture clause, as it should be to justify the plaintiff's construction. It is not easy to conceive why the parties, having clearly in mind the distinction between the two causes of forfeiture mentioned in the third clause, should in the next, in terms, confine the relief to one only, if they intended to place both on the same ground. To accept the plaintiff's view would be for the court virtually to insert what the parties omitted. If it be suggested that the distinction between interest and premium note was unnecessary, the answer is twofold. In the first place, the parties have made such a distinction, and presumably had it in mind all through, and in the second place, the distinction is well founded, for the interest contract is not a mere incident of the note, but distinct from it; it is payable in advance at the beginning of each year, without reference to the time when the notes become due. And herein is a distinction of some importance between the case at bar and some of the cases from other jurisdictions, where the premium note was payable at a future day with interest without separate contract as to the

latter. In such case the interest, being a mere incident of the note, could not be separately recovered, and there would be some reason for holding that if the note was to be paid only by deducting it from the policy upon its final adjustment, the interest also must follow the same course, for it must follow the note.

But is the distinction which we have assumed that the policy in question makes reasonable and just? The requirement to pay interest annually is indispensable to the success of this system of insurance where credit is given. The annual premium for the risk here was \$108.72. The policy was a participating one, under which the insured was to receive his fair proportion of dividends. The company could not treat this matter as entirely isolated from all other policies. Some stable basis must be found upon which an intelligent estimate could be made of the company's ability to pay losses, expenses and dividends. Such basis can only be found in the assumption that the company will certainly receive the annual premium in money or a fair equivalent in the way of annual interest. The reception of the note payable at a future day cannot possibly be the same thing as payment in money unless interest is paid on the credit annually. The relief from forfeiture provided for in the policy is based upon the equitable idea that the reduced policy represents the proportionate amount of insurance fully paid for upon a cash basis. If the insured wishes to be secure from forfeiture, he may pay the annual premiums in money. If he insists on a credit, he may take a reduced policy, which exempts him from the payment of future annual premiums, but he is still subject to the rigorous condition to pay interest or lose the benefit of his policy.

In support of these views we cite sundry cases from other jurisdictions.

The case of *Knickerbocker Life Ins. Co. v. Dietz*, 52 Md. 16, decided in April, 1879, is very strong for the defendant. The original policy in substance was the same in every respect as the one under consideration. It was dated May 5, 1868, and under it the insured paid premiums in cash and notes up to May 5, 1873, when he surrendered the policy and obtained a new one for five-tenths of the amount originally insured. The second policy stated that it was issued in consideration of the surrender of the previous one, and accepted by the insured upon the express condition and agreement that if the interest should not be paid on or before the day named, the policy should be null and void. The interest was not paid on the 5th of May, 1874, and the policy was canceled by the company. Soon after this the insured tendered the interest due, but the company refused to receive it.

The question arose under a bill in equity, alleging that no interest was required to be paid May fifth; that the clause that made the new policy void on non-payment of interest was inconsistent with the true meaning of the contract; that the stipulation as to forfeiture was in the nature of a penalty, against which a court of equity should relieve, and praying for such construction of the contract and for a decree for the payment of the amount of the policy less the notes and interest. It will be seen that the position of the case before a court of equity was more favorable for the claimant than that of the present case, but the court

held there was no relief. GRASON, J., in delivering the opinion of the court, said: "The theory on which the amount of the premium is fixed, . . . is that, assuming that a man of a given age has a prospect of living a certain number of years, as shown by experience and observation, the premium charged is such a sum as, invested annually at a certain rate of interest and compounded, will, at the expiration of that time, amount to enough to pay the policy and cover the expense of the company. To accomplish this result the premium must be punctually paid and invested, and the interest reinvested at the assumed rate. Otherwise the ability of the company to pay the policy, instead of being a matter of reasonable certainty, becomes a mere matter of chance, the business of life insurance ceases to have any scientific or accurate basis, and a policy of insurance becomes a mere wager on the life of its holder. The prompt payment of interest on premium notes is as necessary to the successful working of an insurance company, as well as to the security of the insured, as are the payment of the premium notes themselves. If one policy-holder can fail to pay his interest, any number of them may do the same, and the ruin of the company would be the inevitable result. The time for the payment of interest on premium notes is of the essence of contracts of insurance."

The case of *Knickerbocker Insurance Co. v. Harlan*, 56 Miss. 512, decided in January, 1879, was an action on a paid-up policy which recited that it was issued in consideration of the surrender of the original policy — the provisions of which were similar to those in the case at bar — and which stipulated that if the interest on the premium note was not paid before a specified day, the policy should be null and void. The company pleaded the forfeiture of the paid-up policy by reason of the non-payment of interest; to which plea the plaintiff demurred, precisely as in the case at bar. The court below sustained the demurrer upon precisely the same arguments as are urged in behalf of the plaintiff in the present case, but the judgment was reversed in the court of appeals mainly upon the ground that, under a proper construction of the new policy, the right to recover the sum assured by it was to be earned only by the prompt payment in future of the interest on the premium note, and that it made no difference that the amount of the note was already due the company on the old policy.

In *Alabama Gold Life Insurance Co. v. Thomas*, 74 Ala. 578, decided in December, 1883, the action was upon a paid-up policy, as contained in indorsement upon the original policy, the terms of which were as follows: "In consideration of the payment on the within policy of four annual premiums, less note for \$169.20, given for balance due on premium loans to November 11, 1872, said policy is entitled at maturity to a paid-up value of four-tenths of the sum insured, subject to deducting note above described, interest upon which is payable annually in advance." It was held that the indorsement was to be construed, together with the original policy, as constituting one contract, and that thereby the parties made a clear agreement that the policy should be void in the event of the failure to pay interest. It was held, as in the Maryland case before cited, that "the payment of interest was of the essence of the contract; that the calculations of insurance actuaries

fixing the rates of insurance are based on the theory of prompt payment, so as to afford opportunity for such reinvestment as to reap the fruits of compound interest upon the company's moneyed capital."

Insurance Co. v. Robinson, 40 Ohio St. 270, was an action based on the refusal of the company to grant an application for paid-up policy pursuant to the provisions of a policy containing provisions identical with the one at bar, so that this case presents the question as to the rights of the parties under a non-forfeiting policy like the one in this case prior to the indorsement made upon it. The default on the part of the insured was simply as to interest on the premium notes. He had paid previously four annual premiums, part in cash and part by note, in the manner provided. GRANGER, Ch. J., in delivering the opinion of the court, said: "The third condition before us is plain. It clearly states that, upon a failure to pay the interest in advance, the policy should be void. The fifth adds that in such case all payments thereon and all dividends and credits accruing therefrom shall be forfeited to the company. But the insured claims that the fourth condition modifies the third. This fourth condition makes no reference to interest, either expressly or by reasonable implication. Having failed to pay the interest due on four notes he in effect was in default for a part of each of four annual premiums, besides the one that became due on March 7, 1876. This interest formed no part of the annual premium due on that day. Its punctual payment was necessary to complete the payment of the premiums due in the four preceding years. . . . We are unwilling to so construe a stipulation worded so plainly, and with such evident care, as to make of no moment a default which the third condition declared of enough importance to destroy the life of the policy."

In *Attorney-General v. North Amer. Life Ins. Co.*, 82 N. Y. 172, decided in September, 1880, the question arose in reviewing the decision of a referee appointed to adjust the claims against an insolvent life insurance company in the hands of a receiver. It appeared that in lieu of certain policies upon which notes had been given for part payment of annual premiums, paid-up policies had been issued containing a provision that in case the interest should not be paid as agreed the policies should become void. Where there was such default in the payment of interest the referee rejected the claims, and the court of appeals unanimously sustained the ruling. EARL, J., in delivering the opinion, in answer to the claim that the condition relied upon by the insurance company was unconscionable, and that a case of forfeiture was presented against which a court of equity should relieve, said, among other things: "It was a contract between the parties that these policies should be carried only so long as interest should be promptly paid upon the notes; and if not paid, that the company should cease to be liable. . . . The provision is not an unusual one. . . . Here was an insurance company doing business throughout the country. Prompt payment of its obligations was deemed important to it. If premiums to such an insurance company are not promptly paid, it may be agreed that the policy may be forfeited. If notes be taken for premiums, payable at a definite time, the policy may

be avoided for non-payment. If notes be taken which are to run to maturity of the policy and then be adjusted, the policy may be avoided for non-payment of the interest. All these cases stand upon the same footing, and a court of equity can, upon principle, no more relieve against a forfeiture in one of them than in either of the others. The case of the claimants may be treated as if the interest represented premiums to be paid during the running of the policies. . . . There is much authority sustaining the decision of the referee. *Anderson v. St. Louis Mut. Life Ins. Co.*, 5 Bigelow, 527; *Martin v. Aetna Life Ins. Co.*, id. 514; *Patch v. Phoenix Mut. Life Ins. Co.*, 44 Vt. 481; *Knickerbocker Life Ins. Co. v. Harlan*, 56 Miss. 512; S. C., 8 Ins. L. J. 349; *Nettleton v. St. Louis Life Ins. Co.*, 6 id. 426; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 742."

Patch v. Phoenix Mut. Life Ins. Co., 44 Vt. 481, decided in 1872, was an action of *assumpsit* upon a paid-up policy issued in exchange for an endowment policy upon which two annual premiums had been paid, partly by two notes. The exchange was made pursuant to a memorandum on the back of the first policy to the effect that the company would purchase any of its policies upon which two annual premiums had been paid and issue a new policy for the equitable value of the policy surrendered, "thus making *all* policies *non-forfeitable*." On the margin of the paid-up policy was this statement: "This policy is conditional on the interest on two notes given in part payment for two premiums paid on No. 10,603, being paid in advance." PIERPONT, Ch. J., in delivering the opinion, among other things, said: "The interest upon the notes, by their terms, is to be paid annually, and it is such interest that the memorandum refers to and requires to be paid in advance. Any other construction would be a manifest violation of the meaning and intent of the parties to this contract. The defendant having taken the notes in the place of the money, it could not reasonably be expected that the defendant would do less than to secure the payment of the interest therein, by making the new policy dependent upon its payment. Treating the memorandum as a part of the policy, and the whole to be considered the same as though it were included in the body of the instrument, the interest upon the notes becomes practically a premium upon the policy, payable annually in advance; and on failure to pay the same, the company ceases to be liable and the policy is forfeited."

Russum v. St. Louis Mut. Life Ins. Co., 1 Mo. App. 228, decided February 28, 1876, was an action on the original policy, conditioned: 1. That default in the payment of future annual premiums should not avoid, but it should be proportionately reduced; 2. That if the insured should fail to pay annually in advance the interest on premium notes, the policy should be void. GANTT, P. J., in delivering the opinion of the court, said: "If the insured had paid the interest on his note on December 2, 1871, he would, we think, have been entitled to recover two-tenths of the sum insured, deducting the unpaid note. Having failed to make that payment the policy is forfeited and the company discharged. We think it impossible to escape this conclusion. . . . It is urged that the two provisions of this policy are inconsistent and

contradictory, and that the one which leads to a forfeiture must be rejected; but the clauses are not inconsistent. . . . All that is needed is for the insured to bring himself within the terms of both. The first is intended to save a forfeiture, which generally would be incurred by the failure to pay the annual premium. To this extent it is a privilege or advantage to the assured. The second proviso insists upon rigorous conditions — in respect of what? Only of so much of any unpaid premium as the assured, instead of paying in cash, takes the indulgence of only paying interest on at six per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy; he can presently pay his note for the premium, and, without more, he has a paid-up, non-forfeitable policy for a fixed portion of the sum contemplated by the instrument when originally issued. If he wishes, instead of this, to take the chances of gain, he must at the same time incur the hazard of loss, and cannot complain if he be held to the terms of the contract he has deliberately made."

Other pertinent cases might be cited, but these will suffice to show that the views of the majority of this court have a very strong support in other jurisdictions; and while we concede that the opposing views of the plaintiff are sustained by some courts entitled to very great respect, we think the weight of judicial authority is the other way.

The first case cited in behalf of the plaintiff, to which we will refer, is *Fithian v. North Western Life Ins. Co.*, 4 Mo. App. 386, decided October 23, 1877, by the same court that decided *Russum v. St. Louis Mut. Fire Ins. Co.*, *supra*, the year previous. It was held that non-payment of interest did not forfeit the policy in that case, and some of the reasoning at first blush seems different from that in the first case; but LEWIS, J., who delivered the opinion, concurred in the previous one, and no allusion whatever is made to the other case. It would seem improbable that it was the intention of the court to overrule the first case or that it was considered inconsistent with the last one, and upon examination of the policy we see good ground for a distinction. The first stipulation was that in case of default the company would pay as many tenths of the original sum as there should have been complete annual premiums paid; then followed the provision: "If said premiums, or the interest upon any note given for premiums, shall not be paid on, etc., . . . then in every such case the company shall not be liable for the payment of the whole sum assured and for such part only as is expressly stipulated above." Here both notes and interest are put on the same ground, showing that no distinction was intended, and the company in terms is made liable as stipulated — that is, for so many tenths of the original sum insured; and there were other provisions in the policy adverted to in the opinion showing that no forfeiture was to arise because of any default in payments, whether of notes or interest. This case it will be seen may, therefore, be widely distinguished from the one at bar, in that the policy in terms secures a proportionate part against forfeiture, while here, as we have seen, it is expressly forfeited for non-payment of interest, with no relief provided.

The same distinction may also be made in regard to the cases of

Hull, Adm'r, v. North Western Life Ins. Co., 39 Wis. 406; *North Western Mut. Life Ins. Co. v. Little*, 56 Ind. 504; *Ohde v. North Western Life Ins. Co.*, 40 Iowa, 357; *Symonds v. Same*, 23 Minn. 491; *North Western Mut. Life Ins. Co. v. Ross, Adm'r*, 63 Ga. 199; and *Same v. Bonner*, 36 Ohio St. 51. In all these cases the policies were the same as in the case cited from 4 Mo. App., *supra*.

Of all the cases, therefore, cited in behalf of the plaintiff, only two remain which are weighty in the opposing scale. The first and the stronger case is that of *Cowles v. Continental Life Ins. Co.* (the present defendant), decided July 31, 1855, by the supreme court of New Hampshire, reported in 1 New England Rep. 247; S. C., 2 East. Rep'r, 741, where the action was *assumpsit* on a paid-up policy identical in its provisions with the one now in suit, and where the defense was the same. It is, therefore, irreconcilably in conflict with the positions we have taken.

In the brief but forcible opinion delivered by Doe, Ch. J., there is no reference to the authorities. The basis upon which the reasoning rests will fully appear from the following quotation: "A significant clause of the contract is a conspicuous marginal advertisement describing the writing as a 'non-forfeitable endowment policy.' The forfeiture clause qualified by the provision for a 'paid-up' policy does not mean that the reduced 'paid-up,' 'non-forfeiture' insurance is annually forfeitable for non-payment. The strict construction for which the defendant contends would leave the insured exposed to a danger from which the reduction and conversion of the policy would be generally understood to relieve him; and it is not to be presumed that the document was ingeniously drawn up for the purpose of fraudulently obtaining money by non-forfeiture pretences. All parts of the contract taken together can be, and should be, reasonably and liberally understood as designed to accomplish the scheme of non-forfeiture for non-payment which men in general would believe the policy invited them to accept."

The other case is *Bruce v. Same*, decided February 26, 1886, by the supreme court of Vermont, and reported in 4 East. Rep'r, 452. This was a bill in chancery to compel the delivery of a paid-up policy and payment of the amount due. The court gave the same construction to the original policy as was given in the New Hampshire case, but certain circulars issued by the company, and the fact found in the case, that the company regarded the premium notes as given for a loan of money, seem to have been influential with the court.

This case, however, recognizes a distinction, already adverted to, and which we think applicable to the case now under consideration. POWERS, J., in giving the opinion, said: "The case at bar is unlike *Patch v. Ins. Co.*, 44 Vt. 481. There the question arose upon the construction of a paid-up policy, issued in the place of a former one surrendered, which contained an express stipulation that certain sums of interest should be paid in advance. The action was *assumpsit* on the paid-up policy, and no question was made whether the paid-up policy was in such form as the insured was entitled to. Such as it was, he accepted it, and the action was upon it in the form it was issued and accepted."

It is manifest that our argument in some particulars has gone beyond the strict requirements of the present case, and has tended in some measure to show that the form of paid-up policy issued to the plaintiff, and accepted by him, was in accordance with the original policy; but, in view of the adverse construction of the same kind of policy by the courts of New Hampshire and Vermont, and the want of unanimity among the members of this court upon this subject, we think it best to leave that part of the discussion an open question for future consideration should the matter again arise, and to restrict the present decision to the precise question stated at the opening of our discussion, whether the paid-up policy involved in this suit contains a provision whereby the failure to pay interest has accomplished the forfeiture of the policy.

We advise that the answer of the defendant to the complaint is sufficient.

CARPENTER and GRANGER, JJ., dissent.

NEW JERSEY SUPREME COURT OF CHANCERY.

THE EXECUTORS OF JAMES C. LORD, DECEASED, AND OTHERS v. THE CARBON IRON MANUFACTURING COMPANY.*

TRESPASS — CONTINUING — DAMAGES — EQUITABLE RELIEF.

For a simple trespass, which is complete when the force, by which it is committed, ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass, in which the person injured must recover his damages once for all.

The jurisdiction of courts of equity in cases of trespass is purely preventive; they may restrain a threatened trespass if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass, but for a completed trespass, which, as a legal wrong, is complete when protection is sought, they can give no redress whatever.

A court of equity cannot award pecuniary damages in redress of a trespass, nor has it authority to impose an easement on the land of a trespasser in redress of the wrong done by the trespass.

As a general rule, the only legal duty which a trespasser incurs by his wrongful act, where his trespass is complete when judicial aid is invoked, is a liability to reimburse the person injured, in money, for the loss which his trespass has caused.

If an upper mine-owner breaks through a barrier, which was left by the lower mine-owner for the purpose of protecting his mine against the water which otherwise would flow from the upper into the lower mine, the trespasser is answerable for the damages, including the cost of restoring the barrier, but the trespass, in such case, imposes no legal duty upon the trespasser to either close the opening, or to prevent the water in his mine from flowing through the opening into the lower mine. The flowage of water from the upper mine into the lower, through an opening thus made, is neither the continuance of a trespass, nor of a nuisance, and gives no distinct ground of action.

* See *Uline v. New York, etc., R. Co.*, 100 N. Y. 98; 4 East. Rep'r, 30.

- If the damages resulting from a trespass are aggravated or increased by the folly, willful obstinacy, or gross carelessness of the injured person, such part of his loss as is directly attributable to his own fault cannot be recovered.

Where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect, and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, shall leave or provide sufficient support for the surface to prevent its subsidence.

Land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally.

For damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress, such losses being regarded as *damnum absque injuria*, but where one of two adjoining mine-owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to go there at different times and in greater quantities than it would go there naturally, he commits a legal wrong.

The owner of mineral land has a right to take away the whole of the minerals in his land, for such is the natural course of uses of such land, and if in the course of such user, water accumulates on his land, either on the surface or underground, and then passes off, by the operation of the laws of nature, into the land of his neighbor, his neighbor has no legal cause of complaint.

On final hearing on bill and answer, and proofs taken in open court.

S. H. Little and Theodore Little, for complainants. *Henry C. Pitney*, for defendants.

VAN FLEET, V. C. The questions in dispute in this case relate to the rights and duties of persons owning adjoining mines in the county of Morris. They have both worked the same vein of ore, but at different levels, and at different times, the defendants' mine being above that of the complainants, and having been first worked in order of time. The main purpose of the complainants' suit is to procure a decree which will protect them against injuries, which they allege they now suffer from the flowing of water from the defendants' mine into theirs, and which will also give them protection against injuries, which they say they will inevitably sustain in the future, if the defendants are allowed to do what they threaten, namely, "reduce the pillars and walls of their mine and let its surface subside." The complainants ask protection it will be observed, against both present and prospective injury.

The facts on which the complainants rest their right to be relieved against present injury may be summarized as follows: "The Carbon Iron Company were the predecessors in title of the defendants; they owned the mine now owned by the defendants, up until June, 1878, when, under a decree of this court, directing the sale of certain mortgaged premises, this mine, with other lands, was conveyed to the defendants. The Carbon Iron Company, while they owned the defendants' mine, worked over the boundary line, and took ore from the complainants' land. The time when this trespass was committed is not fixed with entire certainty. The bill does not allege when it was committed; it simply says, that the Carbon Iron Company, while they were in possession, committed a trespass by working over the line. The answer, however, says, that it was committed somewhere about the year 1872, and the proofs render it tolerably clear that it was committed near that time; certainly prior to 1875. The point where it was committed is about one hundred feet, measured vertically, below the

surface. There is a dispute between the parties as to the true location of the division line, and a large amount of evidence was submitted by each in support of their respective claims, but, without expressing an opinion as to which claim is vindicated by the evidence, I shall, for the purposes of this discussion, treat the line claimed by the complainants as the true one. Adopting their line as the true one, the wrongful act of the Carbon Iron Company, which the complainants seek to make in part, the basis of the relief they ask against the defendants, consisted in making an excavation or hole in the complainants' land, one hundred feet below the surface, for a distance of about forty-seven feet beyond the property line. A second trespass was committed in 1881. The defendants' lessees were the wrong-doers in this instance. This trespass was committed at a point about two hundred feet, vertical measurement, below the surface, and consisted in making an excavation beyond the division line for a distance of about thirty feet.

The two wrongful acts just described, form the sole foundation of the complainants' right to relief against present injury. Neither the defendants, nor those who preceded them in title, nor those who have succeeded to any of their rights, have, by the exercise of force or violence, committed any other wrong against the complainants. It is not claimed that these trespasses, at the time they were committed, did the complainants any immediate irreparable injury, or even serious harm, but it is consequences which have since flowed from them—consequences produced by the complainants' own subsequent acts, which have inflicted the injuries against which they ask protection.

The complainants did not begin to open their mine until the fall of 1880. They then sunk a shaft at a point where they knew it must, if carried down on the vein, strike the excavation which the Carbon Iron Company had previously made in their land, and that an opening between the two mines would thus be made, and that when it was made, the inevitable result would be, if no barrier was erected to bay back the water rising in the defendants' mine, that the water would flow down into their mine. The location of their shaft was judiciously selected. It was placed where it could be constructed with the least expense, and be used to the greatest advantage. Their superintendent, however, says—and he is the person who selected the site for the shaft—that he expected, when he located the shaft, that in sinking it he would break into the excavation made by the Carbon Iron Company, and that he knew if he did, an opportunity would be afforded to the complainants to turn the water rising in their mine above that point, into the defendants' mine; and he also says that he thought if at any subsequent time it should become necessary to protect the complainants' mine against the water rising in the defendants' mine, that he could do it by building a dam across the opening. The first opening between the two mines was made in sinking the shaft, in the manner the complainants' superintendent expected it would be made. And the second was made by the complainants' miners in blasting. A hole was drilled immediately above where the second excavation across the line had been made, and was then charged with powder, and fired. The blast was not successful. Two of the complainants' miners say that they sup-

posed the reason why it was not successful was that the bottom of the drill hole had happened to be near a crevice or fissure in the rock, and that when the powder exploded the force produced, spent itself in this opening. A new bottom was then made for the hole, and it was again charged with powder, and when this second charge exploded, a hole as large as a man's head was made between the two mines. This hole was afterward enlarged by the use of picks, so that an ordinary person could pass through it from one mine to the other. At the time this last opening was made, the complainants' mine had no means of ventilation except through its shaft and the upper opening made into the defendants' mine. One of the miners who assisted in making the second opening says that the complainants' mine needed ventilation, and that after the second opening was made, its ventilation was much better than it was before.

The surface above the mines is low and wet, and they both, consequently, carry a large quantity of water. They are both wet mines. Through the two openings made in the manner just described, all the water rising in the defendants' mine, above the openings, is given a free passage into the complainants' mine, and it is against the injury inflicted by this flowage that the complainants ask protection. They insist that upon the facts above stated they are entitled to an injunction restraining the defendants from permitting the water rising in the defendants' mine from flowing through these openings into theirs. The complainants' right to the relief they ask, it will be perceived, stands distinctly and exclusively on two simple trespasses, neither of which was committed by the defendants.

The material question then would seem to be, has this court any power, for injuries like those from which the complainants are now suffering, and which proceed from causes like those which produce the complainants' injuries, to give redress by the exercise of its prohibitory power? For a simple trespass, which, as a legal wrong, is complete when the force by which it is committed ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass, in which the person injured must recover his damages once for all. The damages recovered in a suit founded on such a cause of action, and the sum recovered must, therefore, necessarily embrace compensation for all the injury, whether it be past, present or future, certain or contingent, known or unknown. Courts of equity, in cases of trespass, exercise a limited and not a general jurisdiction. They may prevent or stop a trespass, but they cannot otherwise redress a wrong of that kind. They may restrain a threatened trespass, if the injury like to ensue will be irreparable, or they may enjoin the continuance, or repetition of a trespass, but for a completed trespass, which is finished and ended when protection is sought, they can give no redress whatever. And the reason is manifest; their jurisdiction being purely preventive, if the wrong is already done when their power is invoked, they cannot prevent the wrong. The doing of that which is already done cannot be prevented. For a past trespass, which, as a legal wrong, is complete when redress is sought, no redress can be given

except compensation in money, by way of damages, and redress in that form cannot be administered by a court of equity. In cases where the damages are not susceptible of exact estimation, and where no standard of measurement exists except such as an experienced judgment will approve, it has been declared by the highest court of this State, that this court cannot admeasure them, but their admeasurement, in all such cases, belongs exclusively to the common-law courts. *Palys v. Jewett*, 5 Stew. 312.

Therefore, if the wrong which forms the ground of this action had been committed on the surface, and had consisted of an excavation made in the complainants' land, and also of the removal of a solid stone wall, erected by the complainants on their own land to prevent the water of a pond, standing on the defendants' land, from overflowing theirs, and the effect of the defendants' wrongful acts, in making the excavation and removing the wall, had been to produce a continuous discharge of the water of the pond over the complainants' land, which would continue, constantly inflicting additional injury, so long as the wall was not restored, and the complainants had failed to apply for protection while the wrong was in progress, but came seeking it after all force and violence had ceased, and after the defendants' trespass, as a legal wrong, was fully completed, though its injurious consequences were still in progress, I consider it entirely clear, on principle, that, under such a condition of facts, this court would be powerless to give the complainants any relief whatever.

It is certain that the trespass could not be restrained, for, as already remarked, it is impossible to restrain or prevent the doing of that which has already been done. It is equally certain that this court has no power to decree the payment of pecuniary damages in satisfaction of such a wrong. And I know of no power in this court, or in any other, which gives it authority, where one person had made an excavation in the land of another, to command the aggressor to go back and fill up the excavation and restore the land to its original condition. Such a decree would, I think, be entirely anomalous, having the support of neither precedent nor principle. And it would produce this incongruous state of affairs, to redress the first trespass the court would command the aggressor to commit a second. Nor do I think that this court has power, in such a case, to compel the wrong doer to erect a wall on his own land to protect the injured party against the consequences of his wrongful acts. The practical effect of such an exercise of power, it will be observed, would be to fasten a perpetual easement on the lands of the aggressor as a remedy for a trespass committed by him on the land of his neighbor. I have never understood that it was possible for any such consequence to flow from a trespass, nor that it was possible for an easement to have its origin in such a source. Acts which are wrongful in their origin may be repeated so frequently and so long as to raise the presumption of a grant, and thus transform what was originally wrongful into a right, but I know of no act which a wrong-doer may do on the land of another which will give the person injured a right of any kind in the land of the wrong-doer.

It would seem, therefore, to be entirely clear, that if the trespasses,

on which the complainants ground their right to relief, had been committed on the surface, this court would have been without the slightest pretense of jurisdiction over the case, and that the only remedy to which the complainants could in that case have had recourse would have been an action at law. But the complainants say that their right, in this respect, is changed by the place where the trespasses were committed and by the character and consequences of the trespasses. The proposition on which they rest their right to a remedy in equity is this: that the defendants, by their trespasses, having placed the two mines in such position or relation to each other, that water, rising in the defendants' mine, must necessarily, by force of the law of gravitation, flow into that of the complainants', they thereby imposed upon themselves, as a consequence of their wrong, a legal duty to prevent the water accumulating in their mine from flowing into the complainants' mine; and that inasmuch as the complainants can only have adequate protection against the injuries which will arise from the violation of this duty, by an injunction commanding the defendants to prevent the water in their mine from flowing into the complainants' mine, their right to relief in equity is clear, for the reason that a court of equity is the only tribunal which can effectually and adequately redress their wrongs. This proposition, it will be observed, goes to the length of declaring, that it is a settled rule of law that a trespass, which is complete in every thing except its damnifying consequences, when suit is brought, will, in a case like the present, raise a duty against the person committing it to do something more, in making redress for it, than to pay pecuniary damages. No such duty, it is clear, exists by force of any general principle, and if it exists at all, it must be as an exception to some general rule. According to the rule which prevails generally, if not universally, in such cases, the only legal duty which a trespasser incurs by his wrongful act, where his act as a legal wrong is complete when judicial aid is involved, is a liability to reimburse the injured person, in money, for all loss, both direct and consequential, which his trespass has caused.

If A. breaks the windows of B.'s house, and a rain-storm should afterward occur before B. could, by the exercise of reasonable diligence, have the windows repaired, and his house should in consequence be seriously injured by the rain, B., in a suit against A., would be entitled to recover all the damages which his house had sustained, as well those resulting from the destruction of the windows as those subsequently caused by the rain. But B. could not leave his windows in the insecure condition in which A.'s wrongful act put them, and then maintain an action against A. for not repairing them. To allow B. to maintain an action against A. for not repairing the windows would involve this absurdity. A. would have no right to enter B.'s close to repair the windows — if he went there, even for that purpose, he would commit a further trespass — and so if B. should be allowed to maintain an action against A. for not repairing the windows, his action would rest on A.'s not doing that which he had no right to do.

The only judicial hint ever given, so far as I am aware, that it was possible for a duty, like that which the complainants charge against the defendants, to spring from a trespass, was thrown out by Chief Baron

POLLOCK, in disposing of a demurrer to a declaration in *Firmstone v. Wheeley*, 2 Dowl. & Lownd. 203. The declaration alleged that the defendant had committed a trespass on the plaintiff's land, by removing a barrier which the plaintiff had left there to protect his mine against water accumulating in the defendant's mine, and that in consequence of the defendant's trespass, the water in his mine, which the barrier, if it had been left undisturbed, would have held back, now flowed into the plaintiff's mine. The declaration then charged that it became the defendant's duty, in consequence of his having unlawfully removed the only barrier between the two mines, to so deal with the water accumulating in his mine as to prevent it from flowing into the mine of the plaintiff. The chief baron, in deciding the question raised by the demurrer, said: "There may, perhaps, be a difference as regards the law between the barrier of a mine and a fence above ground. If a wall is knocked down the owner may maintain an action of trespass; but he cannot, by omitting to rebuild it, hold the defendant always responsible for any consequential damages. But here the plaintiff says that the removal of the barrier is irreparable, and, therefore, the duty alleged in this declaration may well arise." This, it will be seen, is at most a mere intimation that such may be the law. The case does not decide that a trespass will create any such duty and it has never been so understood. Lord DENMAN, in speaking of it in *Clegg v. Deardon*, 12 Ad. & El. (N. S.) 601, said that it had not been determined in that case that any such duty or obligation would flow from a trespass; and in *Smith v. Kenwick*, 7 Man., Grang. & Scott, 564, the court, in reviewing the last remark attributed to the chief baron, said that the case could hardly be treated as a decision. If these criticisms of *Firmstone v. Wheeley*, do not show that no such duty exists, they are certainly sufficient to raise serious doubts respecting its existence. Whether it exists or not is a disputed question of law, and while that remains the case no injunction or other equitable relief can be granted. So long as the defendants' duty is in doubt there must also be doubt respecting the complainants' legal right, for if the defendants are not subject to the duty claimed, the complainants are without legal right, and where, as in this case, a complainant asks protection against injury arising from the violation of a legal right, he is not entitled to what he asks, unless he can show that the right on which his title to relief rests is settled as a matter of law.

There is, however, authority declaring directly that no such duty exists. To this extent, I think, the law pertinent to this branch of the case must be considered settled; that for wrongs, like those of which the complainants complain, there is but a single remedy, and that is an action of trespass; and that the only duty which a wrong-doer incurs by the commission of such wrongs is a liability to answer in damages for the loss his wrongs have caused. These are the doctrines established by *Clegg v. Deardon*, *supra*. The plaintiff's right of action in that case rested on the same duty which the complainants here seek to fasten upon the defendants. The defendant had broken down a barrier which the plaintiff had left on his land to protect his mine against water rising in the defendant's mine. The parties owned adjoining mines, the plaintiff's being the lower of the two. The plaintiff brought an action of

trespass against the defendant, had a recovery, and his damages were subsequently paid. The plaintiff afterward suffered further damages, damages which were not covered by the previous recovery, and to recover such subsequent damages he brought an action on the case against the defendant for wrongfully keeping open and continuing the aperture between the two mines which he had made in breaking down the plaintiff's barrier. The case was submitted, on a special verdict, to the court of queen's bench, for judgment, whether, on the facts above stated, the plaintiff could recover. The court held that he could not. It was said, leaving the aperture open, in consequence of which the water continued to flow from the defendant's mine into the plaintiff's, afforded no distinct ground of action, as for the continuance of a trespass or of a nuisance; the flowing of the water, and the damage thereby caused to the plaintiff, was merely consequential to the making of the aperture, and for that the plaintiff had already received compensation. The pith of Lord DENMAN's argument against the plaintiff's right to recover was expressed as follows: "There is a legal obligation to discontinue a trespass or remove a nuisance, but there is no such obligation upon a trespasser to replace what he has pulled down or discharged upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass, but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor of a nuisance, nor is it a breach of any legal duty." Substantially the same views were expressed by the court in *Smith v. Kenwick*, *supra*.

The law, as established by *Clegg v. Deardon*, was adopted and enforced in *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. The defendants in this case, while working out the coal in their land, broke over the line and took coal belonging to the adjacent owner for a distance of from thirty-six to thirty-nine feet. This trespass was committed in 1861, and the defendants abandoned their mine in 1862. In 1864 the plaintiff acquired title to the land upon which the defendants' trespass had been committed. In 1868, the plaintiff's workmen, while taking out his coal, broke into the excavation made by the defendants, and through the opening thus made, the water which had collected in the defendants' mine was let into the plaintiff's mine, and flooded it. The plaintiff subsequently, and after the right of action for the trespass committed in 1861 had become barred by statute, brought an action to recover the damages which he had sustained by the flooding of his mine. He insisted that the defendants' wrong was in legal substance a continuing nuisance; that while it was true their wrong had its origin in the trespass committed in 1861, yet its injurious consequences did not cease with the trespass, but were continuous, those most remote causing the utter ruin of his mine, and the damnifying consequences of the wrong should, therefore, be treated like the injuries inflicted by other continuing nuisances, and be adjudged to be the proper basis of successive actions. The court refused to adopt this view, but, on the contrary, held, that the case was one of simple trespass and not of

nuisance, and that any bar or extinguishment of the right of action for the trespass, whether it arose from a lapse of time or a prior recovery, absolved the defendants from all liability for the trespass or any of its consequences.

A recent decision of the supreme court of Michigan adopts the doctrine laid down in these two cases, in all its length and breadth. The case referred to is the *National Copper Company v. Minnesota Mining Company*, 56 Mich. The plaintiff and defendant owned adjoining copper mines, each holding their land in fee. The plaintiff, in working out its ore, left a wall of rock, from fifteen to eighteen feet thick, next to the defendant's mine. The defendant left no barrier, but in taking out its ore, worked not only up to the boundary line, but over it, breaking into the plaintiff's mine at two different points, at one of which its trespass extended over on the plaintiff's land about twenty feet. The plaintiff subsequently, in making blasts in its mine, broke into these excavations, and openings were thus made between the two mines, by which the water in the defendant's mine was let into that of the plaintiff. The defendant afterward abandoned its mine, first robbing it by taking out all the ore which had been left for supports. In consequence of the removal of the supports, the surface of the defendant's mine caved in, and depressions were thus made, into which the water produced by rains and melting snow collected, and then sank into the defendant's mine, and from there flowed through these openings into the plaintiff's mine. The plaintiff, after its right of action for the original trespass was barred by statute, brought an action against the defendant. It put its right to maintain its action on two grounds: first, that the defendant's trespass was a continuing wrong; and second, that the defendant having wrongfully removed the barrier which the plaintiff had left for the protection of its mine, and thereby caused the water in the defendant's mine which the barrier would, if it had been left undisturbed, have kept there, to flow into the plaintiff's mine, thereby, as a legal consequence of its wrong, imposed upon itself an obligation either to close the openings, or to prevent the water in its mine from flowing through them into the plaintiff's mine. The plaintiff recovered a judgment for a large sum in the court of original jurisdiction. The case was then removed to the supreme court, and there both grounds taken by the plaintiff were declared fallacious. Chief Justice COOLEY, who pronounced the opinion of the court, said, in discussing the plaintiff's first ground: "The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered for it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with any thing it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises, and leaving houses or other obstructions there to incumber or hinder his occupation. Physical hindrances are a continuance of the

original wrongful force, but the hole is only the consequence of a wrongful force, which ceased to operate the moment the hole was made."

The chief justice then discusses the second ground taken by the plaintiff with more elaboration, and a greater wealth of illustration, than it is discussed in either *Clegg v. Deardon* or *Williams v. Pomeroy Coal Company*, but he rests his repudiation of it at last on the principle established by those cases.

On the important question, whether the remedy given by the common law in cases of this kind, where the damages flowing from a trespass contemporaneous with its commission, or shortly afterward, may be very insignificant in comparison with those which may result from it at a date long subsequent to its commission, is adequate to enable a court of law to do full and complete justice to the person aggrieved, the chief justice speaks as follows: "The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this, which was not then so far probable, that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and, if it had done so, and made the restoration, the damage now complained of could not have happened." It thus appears that complete redress could not have been had in a suit then brought, and, that being the case, the plaintiff is not entitled to recover now for an injury for which an award of the means of prevention was within the right of action which was suffered to become barred. The right which then existed being a right to recover for all the injury that had been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new suit. The wrong which had then been committed was indivisible, and the bar of the statute must be as broad as the remedy was which it extinguishes." These adjudications make it entirely clear that the wrongful acts imputed to the defendants imposed no such duty upon them as that which the complainants seek to fasten upon them; and they also demonstrate that the only remedy to which the complainants could ever have had recourse, for the redress of the wrongs for which they complain, was an action of trespass.

So far the case has been considered as though the defendants had themselves committed the trespasses of which complaint is made, and, also, as though the damages, against which protection is sought, were all caused by the unlawful acts of the defendants, and were, therefore, legally chargeable against them. This, however, is not the fact. The defendants committed neither trespass; nor is it true that all the damages the complainants have since sustained resulted from the trespasses. They were to a large extent self-inflicted. As already remarked, the proofs show that the complainants' shaft was judiciously located, and, also, that in arrying their shaft down, it was impossible to avoid breaking into the upper excavation. But so long as their mine did

not extend below the first excavation, an opening between the two mines at this point could do the complainants no harm, but, on the contrary, would be advantageous. It would provide them with a way by which their mine could be relieved of all the water accumulating in it above this point without pumping it to the surface. Their superintendent says that this was one of the advantages which he had in view in selecting the site for the shaft. The injury which the complainants' mine now suffers from this opening is inflicted at a point far below the opening, and is caused by the flowage of water rising in the defendants' mine, through the opening, into the complainants' mine.

The complainants carried their mine on down below the opening, not only with full knowledge that the opening was there, but also knowing what would be the inevitable effect upon their mine, if they sunk it below the opening, without first erecting a barrier across the opening. The erection of a barrier at this point was one of the things which the complainants' superintendent had in contemplation when he selected the site for the shaft. He says, that he intended, if it became necessary for the protection of the complainants' mine, after an opening had been made, to build a barrier across the opening, and that he thought that this course would be less expensive than to sink the shaft at any other point, or to so alter the course of the shaft as to avoid breaking into the excavation.

In view of these facts there can be no dispute that the injuries against which the complainants seek protection are largely, if not entirely, due to causes which the complainants have themselves created. It is certain that if they had not sunk their mine below the opening, or if, before carrying it below that point, they had erected a sufficient barrier across the opening, none of the injuries of which they now complain could have happened. Their injuries have been caused by what they did and what they omitted to do. And this is true of both sources of injury, of both the upper and lower opening. The complainants had an unquestionable right to sink their mine below the opening, but the fact that they knew that the opening was there, and that if they left the opening in just the condition they found it, they would expose their mine to constant and serious danger, made it their duty to do what they could to protect their mine against injury from this source. A wrong-doer is not liable for such damage as the injured person may easily avoid by his own act. The rule is settled that if the damages resulting from a trespass are aggravated or increased by the folly, willful obstinacy, or gross carelessness of the person injured, such part of his loss as is directly attributable to his own fault cannot be recovered. 1 *Suth. Dam.* 148; *Field Dam.*, § 126; *Loker v. Damon*, 17 *Rich.* 284.

For these reasons I am of opinion that the first measure of relief asked by the complainants must be denied.

The threatened or prospective injury against which the complainants ask protection is that which they fear their mine will sustain in case the surface of the defendants' mine subsides. The complainants allege that the defendants intend to reduce the pillars which were left in their mine, while they were working it for the support of the stratum imme-

diately above them, and that they also intend to take the ore from the walls of their mine; that the pillars and walls are now too weak to furnish sufficient support for the stratum above them, and that if their strength is further impaired by the removal of additional ore, the inevitable effect will be the caving in of the surface of the defendants' mine, and that the cavity thus made will serve as a conduit to pass into the complainants' mine a large quantity of surface water, which, if the surface is left in its natural condition, will flow off over the surface and never reach the complainants' mine. The complainants also allege, that as the Rockaway river flows near the workings of the defendants' mine, there will be great danger in case a subsidence occurs, that the water of the river will be precipitated into the cavity made by the subsidence, and from there into the defendants' mine, and then through the two openings into complainants' mine. The defendants do not deny that they intend to remove, according to the customary methods, all the ore which remains in their mine, and which can be removed with profit; nor do they deny that the removal of the ore may cause the surface of their mine to subside, nor that in case a subsidence takes place, some damage may not be done to the complainants' mine, but they insist that if any damage should result to the complainants' mine from that cause, they cannot be held answerable for it, either here or elsewhere. The defendants do, however, deny that in case the surface of their mine should subside, that the slightest danger will thereby be created, that the water of the Rockaway river may be thrown into the complainants' mine, and the proofs in support of their averment in that regard seem to render it perfectly clear that there is not at present the least reason to fear that the complainants will ever suffer any injury from that cause.

The first question then which this branch of the case would seem to present is this: Have the defendants a right by law to remove all the ore from their mine, regardless of the effect which the removal may have on the mine of the complainants? It is to be assumed, of course, that the work necessary to be done in the removal of the ore is to be done in a skillful and proper manner. The parties to this litigation stand free from all covenant obligations to each other. They each own their own land in fee and have all the property rights in it which an absolute and independent title can give. There can be no doubt that the rule is settled, that where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect, and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, shall leave or provide sufficient support for the surface to prevent its subsidence. And the same implication will arise where grants are made of different strata, one above the other, to different persons. This rule is founded on the familiar maxim, that whoever grants a thing shall be understood to grant also whatever is indispensable to the full beneficial enjoyment of the thing granted. *Harris v. Ryding*, 5 M. & W. 60; *Hilton v. Lord Granville*, 5 Ad. & El. (N. S.) 701; *Mundy v. Duke of Rutland*, 23 Chan. Div. 81. But it is manifest that this rule has no application to this case.

The two general rules which must control the decision of this branch of the case may be stated as follows: First, land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally; and second, for damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress, such losses being regarded as *damnum absque injuria*; but where one of two adjoining mine-owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to go there at different times and in larger quantities than it would go there naturally, he commits a wrong which the law will redress. The second of these rules states the principle to be deduced from two adjudications, which have received the approval of the highest judicial tribunal of Great Britain. They are both cited in *Rylands v. Fletcher*, L. R., 3 H. L. 330, as correct expositions of the law. The first declares that it is the natural right of each of the owners of two adjacent mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from negligent or malicious conduct. *Smith v. Kenrick*, 7 C. B. 515. And the second says, that the occupier of the higher mine has no right to be an active agent in sending water down into the lower mine. The lower mine is subject to no servitude of receiving water conducted by man, from the higher. Each mine owner has all rights of property in his mine, and, among them, the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine to bay back the water of his higher neighbor. The law imposing these regulations for the enjoyment of somewhat conflicting interests does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine, or advantageous to himself. *Bond v. Williamson*, 15 C. B. (N. S.) 376. And here it may not be improper to say, that the value of the minerals in the soil of Great Britain, and the importance of mining as one of the great industries of that country, as well as the frequency with which its courts have been called upon to decide controversies respecting the rights and duties of mine-owners, render it quite certain that questions, like the one under consideration, have received the very best consideration which it was possible to give them, and the decisions of the courts of that country, on such questions, are, therefore, entitled to the very highest respect.

The application of the leading principle, established by the two cases just cited, to the case in hand has been made easy and simple by a judgment pronounced by the house of lords in 1876. That case and the one under consideration are identical in all their material parts, except in that case a subsidence had actually taken place, and some of the injury consequent to the subsidence had been actually sustained, while here

damage is simply apprehended. The following are material facts of that case as given in the opinion of Lord BLACKBURN, who pronounced the judgment of the house of lords. The plaintiff and defendant were the lessees of the minerals under two adjacent parts of the same estate. They both held under the same landlord. The defendant's seam of coal cropped out at the surface and lay at a high inclination, dipping toward the seam in the plaintiff's holding, and entering the plaintiff's seam at a point many fathoms below the surface, so that any water which fell on or percolated into the defendant's holding would, necessarily, by force of gravitation, descend to the plaintiff's holding, unless stopped by the minerals or soil from doing so. The soil above the coal was stiff and impervious to water, so that, while it remained undisturbed the greater part of the rain-fall flowed away over the surface, very little filtering down to the seam, which was in consequence a very dry seam, the impervious strata above, while it remained undisturbed, forming what might be called a roof practically water tight over the coal. The defendant altered this state of affairs. He worked out his coal, carrying away the whole of it, and, as a necessary result, the surface sank. At the upper part where the seam cropped out to the surface, the subsidence was so great, over about five acres, that the surface sank into pits and cracked into open fissures, through which the rain, which fell on these five acres, flowed down into the defendant's workings, and the coal in these workings having been removed, the water in the defendant's mine flowed down toward the plaintiff's holding, and in consequence a considerable quantity of water, which, whilst the roof remained in its original state, a water tight roof, had flowed away over the surface, descended into the plaintiff's mine, and he was in consequence put to additional expense in freeing his mine from water. To recover compensation for the loss thus sustained, the plaintiff brought an action. He was defeated in the courts below and then carried his case to the house of lords.

Lord BLACKBURN, in pronouncing judgment, stated, that it seemed to him the question to be decided was whether the loss the plaintiff had sustained was not *damnum absque injuria*, against which he was bound to protect himself in the best way he could, or whether the defendant while working the upper mine was under any obligation to the plaintiff to preserve or restore the impervious roof, which, whilst it existed, prevented the greater part of the rain-fall from descending to the plaintiff's mine. He then said: "The general rule of law is that the owner of one piece of land has a right to use it, in the natural course of uses, unless in doing so he interferes with some right created either by law or contract; and as a branch of that law, the owner of mineral land has a right to take away the whole of the minerals in his land, for such is the natural course of the uses of mineral land, and that a servitude to prevent such an user must be founded on something more than mere neighborhood." Quoting then from Lord CAIRNS in *Rylands v. Fletcher*, he said, that the occupier of a close may use it for any purpose for which it may, in the ordinary course of the enjoyment of land, be used, and that if in the course of such user water accumulates on his land, either on the surface or underground, and

then by the operation of the laws of all time passes off into the close of the plaintiff, the plaintiff has no legal cause of complaint. He also said: "I may observe that I cannot see any principle on which an obligation to restore the surface to its natural state of water tightness, for the benefit of the owner of the coal on one dip, can be founded, which would not equally give rise to an obligation to make the underground workings as water tight as they were before the coal was removed." *Wilson v. Waddell*, 2 App. Cas. 95; S. C., 28 Eng. Rep. 38. Subsequently the same tribunal declared in *Fletcher v. Smith*, 2 App. Cas. 781; S. C., 19 Eng. Rep. 1, that after the decision in *Wilson v. Waddell*, the court could not be asked to hold that a defendant was liable, as for a wrongful act, for removing the coal from his land, and thereby opening the soil above his mine so as to let through into the plaintiff's mine the rain-water which might fall on the surface of the defendant's mine. And just in this connection, I think it should be noticed that all the injuries which the complainants fear, but have not suffered, had actually been sustained by the plaintiffs in *National Copper Company v. Minnesota Mining Company*, *supra*, and yet the court was compelled to declare in that case, that, as the plaintiffs have lost their right of action for the trespass, they were remediless.

These adjudications are directly in point; they stand upon a principle universally recognized as just, namely, the right of every land owner to have the full, free and perfect enjoyment of his land, for all purposes for which land may rightfully be held and enjoyed; and they demonstrate beyond all question that if this right be accorded to the defendants in this case, the complainants are without the least title to any kind of equitable relief.

The question whether if the defendants remove the one remaining in their mine, and a subsidence shall in consequence take place, and the injuries, which the complainants now fear, shall actually happen, they may then have a right to maintain an action against the defendants under the doctrine laid down in *Backhouse v. Bonomi*, 9 H. L. Cas. 503, and *Dailey Main Colliery Co. v. Mitchell*, L. R., 9 App. Cas. 127 — and which doctrine is stated more clearly and forcibly by Chief Justice COOKBURN in *Lamb v. Walker*, 3 Q. B. Div. 389; S. C., 28 Eng. Rep. 332, than it has ever been stated by any other judge — cannot be considered now, and probably may not be a proper subject for the consideration of this court until it has been considered and determined by the supreme court of this State.

My judgment on the whole case is that the complainants are not entitled to either measure of relief asked, and their bill must, therefore, be dismissed, with costs.

TOFFEY v. ATCHESON.

CONSTITUTIONAL LAW — CHANGING MATTERS OF PROCEDURE.

The first section of the statute of 1880 — P. L. 255 — declaring that no decree for deficiency shall be made in a foreclosure suit, is valid.

Notwithstanding the constitutional provision that the legislature shall not pass any law depriving a party of any remedy for enforcing a contract which existed

when the contract was made, it is competent for the legislature to change the practice of the courts, and any legislation which merely affects the pursuit of remedies for enforcing contracts is not within the constitutional prohibition.

On demurrer.

William P. Douglass, for demurrant. *M. T. Newbold*, for complainant.

VAN FLEET, V. C. This is a foreclosure suit. The complainant, in addition to the ordinary decree condemning the mortgaged premises to sale, asks that a decree be made adjudging that the defendant is liable for any deficiency which may exist, in case the mortgaged premises shall be sold for a sum less than the amount due on her mortgage. Her mortgage was made in 1869. During the same year the mortgagor sold the mortgaged premises to the defendant, and by the deed by which they were conveyed to him, the defendant assumed the payment of the complainant's mortgage, and thereby, as between the mortgagor and himself became the principal debtor, and as such stood bound to discharge the mortgage debt in exoneration of the mortgagor. These facts, according to the former practice of the court, would unquestionably be sufficient to entitle the complainant to the decree she asks. *Klapworth v. Dressler*, 2 Beas. 62; *Crowell v. Currier*, 12 C. E. Gr. 152; S. C. on appeal, id. 650. But a statute was passed in 1880, which declares, that in all proceedings to foreclose mortgages, commenced after it takes effect, no decree for deficiency shall be made. P. L. 255. If this statute is valid, it is clear that no such decree as the complainant asks can be made. The complainant, however, disputes the validity of this statute, her insistent being, that it is void under that provision of our Constitution which declares that the legislature shall not pass any law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made. Const., art. 4, § 7, p. 3.

This objection is not new. It has been made twice before. First in *Newark Saving Institution v. Forman*, 6 Stew. 436, where the chancellor held, that, although the statute prohibits the entry of a decree for deficiency, in a suit to foreclose a mortgage, on a purely legal liability, as for example, against the obligor making the bond accompanying the mortgage, or against a guarantor of the mortgage debt, and thus take away the complainant's equitable remedy, it was nevertheless valid, for it does not deprive the complainant of his legal remedy. The statute leaves that in full vigor, and it was held to be a valid exercise of legislative power, for the legislature, where both a legal and equitable remedy exists for the same cause of action, to abolish the equitable remedy, provided the legal remedy is left in full force, and provided also, that in taking the equitable remedy away the suitor is deprived of no right of recourse, to either person or property for the collection of his debt, which his remedy in equity gives him and his remedy at law does not. And next in *Allen v. Allen*, 7 Stew. 493, where on a precisely similar state of facts with that existing in the case under consideration, Vice-Chancellor Donn held that the statute was valid. The ground on which he put his

judgment was, that the statute simply regulates the remedy, but does not destroy it or take it away. By the uniform course of decision on the question as to how far legislative power is restrained by this provision of the Constitution it has been held that it is entirely competent for the legislature to change the practice of the courts, and that any legislation which merely affects the pursuit of remedies for enforcing existing contracts is not within the prohibition of this provision. *Potts v. New Jersey Arms and Ordnance Co.*, 2 C. E. Gr. 395; *Rader v. Road District*, 7 Vr. 273; *Newark Saving Institution v. Forman, supra*.

All that this statute attempts to do is to prescribe a new rule of practice. By the practice inaugurated by the court in *Klapworth v. Dressler, supra*, it was made competent for a complainant, in a foreclosure suit, where the grantee of his mortgagor had bound himself to pay the mortgage debt, and thus made himself the principal in respect to such debt, and so liable over to the mortgagor for deficiency in case the mortgaged premises were not sold for a sum sufficient to discharge the mortgage debt, to have the question of such person's liability for deficiency decided in that suit before it was known whether there would be a deficiency or not, and also before any right of action for deficiency had accrued. This course of practice, while appearing somewhat incongruous, inasmuch as it put it in the power of a complainant to compel a defendant to litigate the question whether he was liable or not, before the fact on which his liability depended had occurred, was nevertheless highly advantageous to the defendant. It placed him in a position where he could know, before the sale of the mortgaged premises, just what his liability was, and he was thus afforded an opportunity, before the sale of the mortgaged premises, to adopt such measures as might be necessary for his protection. The statute changes this course of practice. It does not take away a mortgagee's right to a decree for deficiency, that remains in full force, but it does declare, that hereafter he shall not have a right to a decree adjudging that a defendant is liable for deficiency until a deficiency actually exists; in other words, that he must wait for his remedy until he has suffered a wrong. The constitutionality of the statute is, in my judgment, free from the slightest doubt.

A further objection is made. The second and third sections of this statute, as amended by an act passed in 1881—P. L. 184—have been declared unconstitutional. *Baldwin v. Flagg*, 14 Vr. 495; *Coddington v. Bispham*, 9 Stew. 574; *Morris v. Carter*, 17 Vr. 260.

The complainant insists that the sections which have been pronounced unconstitutional are so closely connected with the main object of the section under consideration, and form so essential a part of the general legislative scheme, that if a part of the statute falls, the whole must go down. There is nothing in this objection. The section under consideration stands wholly independent of the other two. The two parts of the statute deal with entirely different subject-matters, and stand as distinct as they would if they had been the subject of separate statutes, passed at different times. The chancellor passed upon this objection in *Newark Savings Institution v. Forman, supra*, and held it to be groundless.

This statute, upon which the demurrer in this case is founded, having been held to be valid, the demurrer must be sustained, with costs.

WESTERVELT v. VOORHIS.

LIEN — PRIORITY — MORTGAGE — JUDGMENT.

By the common law the priority of liens, whether by mortgage or judgment, is governed exclusively by the date of their acquisition, the first in order of time standing first in order of rank.

An unregistered mortgage executed by an ancestor, though prior in date to a judgment recovered against his lien in the ancestor's life-time, does not, on the ancestor's death, become void under the twenty-second section of the statute concerning mortgages.

A mortgage and judgment, in order to stand in the relation of being prior and subsequent to each other, must embrace or cover the same land.

On final hearing on bill and answer and facts admitted.

T. C. Simonton, for complainant. *Charles H. Voorhis*, for defendant.

VAN FLEET, V. C. The question to be decided in this case is whether the mortgage, on which the complainant's action is founded, is void or not as against the defendant. The complainant seeks to foreclose a mortgage made to him by Henry H. Voorhis, on the 3d of June, 1883, to secure \$1,000. The mortgage was not recorded at the time of its execution, nor for more than two years afterward. The mortgagor died intestate, January 30, 1885. On his death the mortgaged premises descended to his four children, of whom Charles H. Voorhis was one. The defendant, Ida E. Voorhis, on the 26th of December, 1884, recovered a judgment against Charles H. Voorhis, in the supreme court of this State, for \$14,000; and his interest in the mortgaged premises was subsequently, on the 4th of June, 1885, conveyed to her in execution of a sheriff's sale made under her judgment. The complainant's mortgage was not recorded until the 19th of February, 1885. The defense is that the complainant's mortgage is void as against the judgment under which the defendant claimed title to one-fourth of the mortgaged premises.

By the common law and in the absence of statutory regulation, the priority of liens, whether by mortgage or judgment, is governed exclusively by the date of their acquisition, the first in order of time standing first in order of rank. Unless, therefore, the common-law rights of the parties to this suit have been changed by statute, there can be no doubt that the complainant's mortgage is both valid against and prior to the defendant's judgment. The defendant, however, insists that the complainant's mortgage is rendered a nullity as against her judgment, by the twenty-second section of the statute concerning mortgages. This section, in substance, declares that every mortgage of land shall be void and of no effect against a subsequent judgment creditor, not having a notice thereof, unless such mortgage be recorded as lodged for that purpose, at or before the time of entering such judgment, provided, nevertheless, that such mortgage, as between the parties and their heirs, shall be valid and operative. Rev. 706. The mortgage in question is undoubtedly valid against Charles H. Voorhis, the judgment debtor; it is made so by the express words of the

statute. As heir he could take nothing from his ancestor until his ancestor's debts were paid. So long as the title to lands descended remains in the heir, the debts of the ancestor constitute a lien thereon. Rev. 768, § 77 ; *Haston v. Castner*, 4 Stew. 697.

And as a general rule a judgment creditor can take nothing for the satisfaction of his debt which his debtor cannot himself sell and make a good title as against his creditors. Speaking generally, the limit of his right as a creditor is to sell, by judicial process, only such property for the satisfaction of his debt as his debtor could himself sell. It must be admitted, however, that this statute has changed this rule and has given a judgment creditor in a certain contingency a right to sell property for the satisfaction of his debt, which his debtor could not himself sell, and to sell the same free from the lien of a prior unregistered mortgage executed thereon by his debtor. But in order to possess this right he must be a judgment creditor of the person who executed the prior unregistered mortgage, and not a judgment creditor of some person who may, at some future time after the entry of his judgment, become the owner, by descent, of the mortgaged premises. That this is the meaning of the statute seems to me to be too obvious for debate. There are some things so plain that any attempt by argument to make them more explicit, serves to obscure rather than to elucidate. Prior to the enactment of this statute it was possible for a dishonest man, after having mortgaged his lands for all they were worth, to procure an additional loan on them by falsely representing that they were unincumbered, and thus defraud the last mortgagee. The evil which needed correction consisted in this, that all prior liens, though secret and unknown, were valid and entitled to be paid according to their priority. The remedy which the statute applies is to compel a mortgagee to give notoriety to the fact that he has a lien, by requiring him to record his mortgage, under the penalty of losing his priority as against subsequent lien-holders acquiring liens in ignorance of his. The nullification is effected by the entry of the judgment. If the prior mortgage is not recorded or lodged for that purpose, at or before the time of entering the subsequent judgment, the mortgage becomes void at once on the entry of the judgment. But if, when the judgment is entered, the mortgaged premises are owned by one person and the judgment is entered against another and different person, so that the judgment is not a lien on the mortgaged premises, the mortgage and judgment do not stand in the relation of successive liens, so that one can be prior to the other. The obvious design of the statute is to protect a subsequent incumbrancer against a prior unregistered incumbrance, where both incumbrancers have liens on the same lands, but where two persons have liens against different debtors, and embracing or affecting different tracts of land, their liens stand wholly independent of each other, and neither is prior or subsequent to the other. Legislation, which in such case should declare either void against the other, would be both useless and absurd.

The defense, it is obvious, comes within neither the words, the spirit, nor the policy of the statute, and must, therefore, be pronounced groundless. The complainant is entitled to a decree.

SUPREME COURT OF PENNSYLVANIA.*

WALKER v. FRANCE.

May 3, 1886.

CONTRACT — REFORMATION — PAROL EVIDENCE — EJECTMENT — RECOUPMENT.

A written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it.†

A. sold to B., by articles, a tract of land for the consideration of \$6,000 cash, and one million five hundred thousand feet of hemlock boards, to be manufactured from the timber on the tract, and to be delivered; later A. brought ejectment against B., to enforce the payment of the value of the one million five hundred thousand feet of manufactured lumber; on the trial B. proved that the written contract did not embrace the entire agreement of the parties, and that he had been induced to sign it under the false representation of A. that there was on the property ten million feet of hemlock timber, and that a saw-mill upon the premises had power and was in condition to cut at least two thousand feet of boards on any day of the year, and one thousand feet for every hour when a certain upper mill was not withholding the water. In point of fact there were but three million feet of hemlock timber on the tract; and the mill, owing to dilapidation, and also deficiency of water power, would not perform as warranted. The common pleas proposed a solution of the question of what was due; A., by finding the difference between the value of three million feet of hemlock timber and ten million feet, and as to the mill by finding what was the customary value of the earnings of such a mill, per thousand, after deducting all expenses, and by comparison arriving at the difference of the value of the mill as warranted, and as it was when delivered to B. *Held*, there was no error in the method of solution adopted by the court.

Error to the court of common pleas of Wayne county.

This was an action of ejectment. The facts are set forth in the opinion.

The following is a copy of the eleventh and twelfth specifications of error:

"*Eleventh*. The court erred in that part of their charge wherein they say:

"Next as to the mill and water power, if it was guaranteed to have a certain capacity, had it less capacity than it was guaranteed to have, and if so, how much less? How would the value of the property be affected by this deficiency in the capacity of the mill, if it existed, and what would be the damage to the defendant by reason thereof? We stated, in our answer to one of the plaintiff's points, that we thought perhaps there was some basis in this case upon which the jury might adjust the damages for any deficiency in the capacity of the mill or water power, if there was any such deficiency. That evidence is this. There is evidence in the case to the effect that the value of the mill, and the water privilege used in connection with it, was \$1 per thousand for the lumber it would saw. For instance, if the mill would saw ten thousand feet per day, then, according to that, the value of its use would be \$10. But we think, however, although it was not mentioned by the witnesses, that from that would have to be taken into consideration the wear and tear of the mill, and the expense of maintaining it.

* Reported by OVID F. JOHNSON, of Philadelphia Bar.

† See *McFarland v. Sikes*, ante, p. 13, note.

But a mill which had the capacity to cut ten thousand feet a day would certainly be more valuable than one which had the capacity to cut only five thousand.'

"*Twelfth*. The court erred in that part of their charge wherein they say:

" 'Now, supposing that you should find that there was such a guaranty as is alleged by the defendant, and that there was a deficiency, or breach of that guaranty, how are you to ascertain the value of the hemlock timber standing upon that lot? We have some evidence in the case bearing upon the question of the value of hemlock lumber in the tree, and our recollection is that that evidence runs from twenty-five cents a thousand to \$1.25 or \$1.50 a thousand. From this evidence the jury will have to ascertain, as best they can, the value of hemlock lumber in the tree, standing upon that land, at that time; and, if you find the existence of such a parol guaranty, deduct the value of the deficiency, if any existed, from what would otherwise have been due to Mr. Walker upon this contract. And also the damages arising to Mr. France from the deficiency in the capacity of the mill and water power, if you find such guaranty and deficiency to have existed.' "

Watson & Hawley, E. C. Mumford and H. M. Hannah, for plaintiff in error. It was not alleged nor proven that Walker made these representations knowing them to be false. Indeed the subject-matter of the representations almost positively excludes the idea of willful misrepresentation. *Huber v. Wilson*, 11 Harr. 178; *Coil v. Pittsburgh College*, 4 Wr. 439; *Cox v. Highly*, 100 Penn. St. 252. France neither proved nor tried to prove that the condition or the location of timber on the land in any way affected its value. It could not, therefore, be a matter of defense. "A party who seeks to relieve himself from the obligation of his bond, on the ground of actual fraud or misrepresentation, must establish that there was a false representation of a matter of substance important to his interest and which actually misled him to his hurt." *Fulton v. Hood et al.*, 10 Cas. 365. "In order to render admissible parol evidence to vary the terms of a written agreement on the ground of fraud in its procurement, there must be evidence of fraud other than that which may be derived from the mere difference in the parol and written terms. The mere breach of a verbal agreement, made at the time of signing a written contract, whereby one party promises the other to perform certain stipulations not provided for in the writing, is not such fraud as will let in evidence to control the written agreement." *Thorne, McFarlane & Co. v. Warfflein*, 4 Out. 519. The court should have directed the jury to ascertain what part of the value of the whole at the time of the purchase was represented by the deficiency, whether one-fourth, one-third, one-half, or any other portion which might be shown by the testimony. Then they should have been instructed to deduct from the whole purchase-money a corresponding portion, one-fourth, one-third, one-half, or such other fraction as they might find from the testimony. *Beaupland v. McKean*, 4 Cas. 124; *Morris v. Phelps*, 5 Johns. 49; *Cornell v. Jackson*, 3 Cush. 506; *Mitchell v. Mills*, 17 Ohio, 601; Sedg. Dam. 182-3.

G. G. Waller and *P. P. Smith*, for defendant in error. The court told the jury that they should find the value of hemlock in the tree standing on the land at the time (1876) and to deduct the value of the deficiency from what would otherwise have been due to Walker on the contract, thus ignoring all questions of fraud and allowing compensatory damages only. Certainly under the facts in the case as found by the jury the plaintiff ought not to complain of this instruction. The value of the timber at the place and time of sale was the true measure of damages. *Herdic v. Young*, 5 Sm. 176; *Young v. Lloyd*, 15 id. 199; *Coze v. England*, id. 212. As in common speech the words "guaranty" and "warranty" are used as synonymous terms, the parties to this suit have also used the word "guaranty" as descriptive of the parol contract which in law constitutes an express warranty. Of course we regard it as an express warranty rather than a guaranty, technically so called. If a vendor actually consents to be bound for the truth of his representation, no matter what the form of words used, he becomes a warrantor, and creates the contract of warranty. *McFarland v. Newman*, 9 Watts, 60; *Weimer v. Clement*, 1 Wr. 149; *Warren v. Phil. Coal Co.*, 2 Norr. 437.

GORDON, J. This was an action of ejectment, brought by G. W. Walker, the plaintiff below, against W. B. France, to enforce payment of the balance of purchase-money alleged to be due to him on articles of agreement executed by the said parties on the 20th of April, 1876, by the terms of which Walker, in consideration of the sum of \$6,000, which he acknowledged to have received in hand, and one million five hundred thousand feet of hemlock lumber, to be thereafter delivered, agreed to sell to France some five hundred and sixty-five acres of land, and also certain personal property, as therein set forth and described. France took possession of the premises, but paid nothing beyond the hand-money, except some \$720 which were due to Moss, the owner of the legal title. What the plaintiff sought to recover by his action in the court below was the value of the aforementioned manufactured lumber, estimated to be worth, at the place of delivery, \$12,000. Were we confined to the terms of the written contract, as executed by the parties, the case would be of easy solution, for, though the evidence reveals the fact that France made a very bad bargain, yet, having made it with his eyes open, he would have to abide by it. But he alleged, and, what was more to the purpose, proved, on the trial of the case, to the satisfaction of the jury, that the written contract did not embrace the entire agreement of the parties, and that he was induced to sign it under the false representations of the plaintiff, accompanied with his solemn guaranty that there was on the property ten million feet of hemlock lumber, and that the saw-mill, which formed part of the premises, had power, and was in condition, to cut at least two thousand feet of boards on any day of the entire year, and one thousand feet for every hour of the twenty-four when the upper mill-owner did not withhold the water. Now, as it was admitted that there were not over three millions of hemlock on this tract, and as it was proved that, from dilapidation and want of power, the mill could not perform what it was warranted to do, it is clear that the defendant

could set up this warranty, though in parol, as a defense to the plaintiff's claim. Of these representations and warranty, the testimony was clear, positive and abundant, so that the question turned principally on the credibility of the witnesses, and was one of course, for the jury. So far as the court was concerned, it was limited to a proper and formal submission of the evidence, and instructions as to the proper measure of damages. In these particulars the learned counsel for the plaintiff has failed to convict the court of error. That a written agreement may be modified, explained, reformed, or altogether set aside, by parol evidence of an oral promise, or undertaking, material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion. All those assignments of error, therefore, which involve the court's rulings on the principle here stated, or on the evidence admitted to prove the plaintiff's representations as to the condition of the property and quantity of timber upon it, as well as on the testimony admitted to show that these representations were in fact not true, must be dismissed as having in them nothing which we can sustain. This leaves for our further consideration only the eleventh and twelfth assignments, which embrace the rulings of the court on the question of the damages to which the defendant was entitled by way of recoupment. In considering the proposition raised by these assignments, we are not to forget that the plaintiff's action is an equitable one, and that his right to recover depends upon the fact that he has substantially performed his part of the contract. His vendee cannot be compelled to pay for that which he cannot give him, neither can he dispossess the defendant until he has refunded the purchase-money which he received, and compensates him for his improvements. *Richardson v. Kuhn*, 6 Watts, 299.

In the case in hand, France stands on the defensive only ; he may defeat Walker, but can recover against him nothing but costs. To this end the defendant had but to show that the plaintiff failed to comply with his part of the contract in some material particular. For having paid part of the purchase-money, and being in lawful possession of the premises, the plaintiff, on a partial performance on his part, could neither force his vendee to pay the balance of the purchase-money, nor, as an alternative, compel him to turn out, until by repayment of what he had received and a compensation for improvements, if any such there were, he had restored that vendee to the position in which he found him at the time of the execution of the contract. When the matter in hand is looked at in this light, the plaintiff certainly has no ground of complaint as to the instructions of the court, for it held the defendant to a proof of damages equivalent to the whole balance of the purchase-money. The defendant showed the payment of \$6,000, that there was a warranty of ten millions of hemlock lumber, and that the mill had power to cut not less than two thousand feet of boards on any and every day in the year, whilst the facts proved were that there were not more than three million feet of hemlock lumber on the tract, and that there were some five or six months in the year when

the mill could not be run at all for the want of power. Here, then, was enough of itself to defeat the plaintiff's action; an agreement to convey ten millions of hemlock lumber, and an offer to perform on conveyance of three millions. Surely this will not do; he cannot thus compel the defendant to a performance of the contract when, in so material a particular, he admits his own inability to perform his part of it. But as a mere matter of recoupment we cannot see how the court could have submitted a better rule for the ascertainment of damages. The principal value of the property was in its timber. Undoubtedly, if we have regard to the weight of evidence, the hand-money fully covered the value of the land as the defendant received it, and so the jury must have found, for the question, as the court put it, was whether or not any thing was due the plaintiff, allowing no certified balance to be found for the defendant. Now, the manner proposed for the solution of this question was direct and simple; what was the difference between the value of three million feet of hemlock lumber and ten millions, and this difference found, was it enough to cover the balance of the purchase-money? So with the mill; assuming that its capacity was materially less than that warranted, what was the difference, and how was this difference to be reduced to a money value? It was not so situated that it could be rented as a custom mill; it could not be made to fill the warranty by repair or reconstruction, for the principal defect was the deficiency of its water power. These means of estimation could not, therefore, be resorted to, hence the court and jury had but one method to which they could have recourse, and that was to ascertain, from the evidence, what was the customary value of the earnings of such a mill per thousand, after deducting all expenses, and so, by comparison, arrive at the difference of the value of the mill as warranted, and as it was when delivered to the defendant. This was the method adopted by the court, and as we have discovered none better, we can do no less than give it our approval. The judgment is affirmed.

APPEAL OF JAMES BROWN.

March 8, 1886.

GUARDIAN AND WARD — ALLOWANCE — SURCHARGE — STEP-FATHER — SUPPORT.

A guardian — of children residing in humble circumstances in the country with their mother during her life and after her death with their step-father — under the advice of counsel, but without an order of court for an allowance, paid from pension money for the clothing, maintenance, and education of each of his wards, at the rate of \$1.35 per week. *Held*, under all the circumstances, the guardian should not have been surcharged with the pension-money so paid out.

A step-father is under no obligation to support his step-children after the death of their mother.

In the absence of a contract between a guardian and a step-father of the guardian's ward for the support of the ward, the step-father is not entitled to compensation.

Appeal from the decree of the orphans' court of Crawford county. The facts are stated in the opinion.

W. R. Bole and *A. J. Harper*, for appellant. The first question raised by this record is whether a step-father is legally bound to support

his minor step-children. In *Duffy v. Duffy*, 8 Wr. 402, READ, J., says: "In *Pelly v. Rawlins*, Peake Add. Cases, 226, it was held that if a husband educate a wife's child by a former husband, he cannot recover compensation from such child when it comes of age." This case is cited in Chitty on Contracts by Russell, 6th ed., pp. 48 and 144, and he says in such case no recovery can be had, "unless there be an express promise to repay him," which is also stated as the law in 1 Story on Contracts, § 82 f. In *Williams v. Hutchison*, 5 Barb. 122, which was affirmed by the court of appeals in 3 Comst. 312, it was held that a step-father is not entitled by law to the custody or services of the children of his wife by a former husband, nor is he bound to maintain them, but if he assumes the relation of a parent to such child, receives him into his family, supports and educates him, and there is no express agreement to pay wages to such step-child, the latter cannot maintain an action against the step-father for services rendered while a minor, although the value of the services may exceed the expenses of such education and support and a promise to pay wages will not be implied." There is no case in Pennsylvania holding that a step-father is legally bound to support his step-children. An allowance will not be made to a father for the maintenance of his minor children unless it appears that he is unable to support them. Rhone O. C. Pr. 335; *Harland's Accounts*, 5 Rawle, 323. If a mother is not able to maintain her minor child an allowance may be made for its past and future support. *Pennock's Estate*, 32 Leg. Int. 169; *Strawbridge's Appeal*, 5 Wh. 568. An order for past allowance may be made for past maintenance on the ground that the court may ratify what it would have approved. *Seibert's Appeal*, 7 Harr. 49. All that a court of equity requires of a trustee is common skill, prudence and caution. Especially when a trustee acts under professional advice he will be protected. *Neff's Appeal*, 57 Penn. St. 91.

Humes & Frey, for appellees. *Latz v. Frey*, 2 Harr. 202; *Fahnestock's Appeal*, 8 Out. 46; *Nicholson's Appeal*, 8 Harr. 54.

PAXSON, J. If this decree is affirmed the appellant will have a severe experience as a guardian of minor children. He received in all for his two wards the sum of \$1,339.28, of which \$1,307.28 was pension-money from the United States. All of this money was paid out by the guardian for the maintenance and education of the wards. The court below has surcharged him with the sum of \$1,886.09.

It was not denied that the money had been paid out as above stated; nor that it had been expended under a contract made by the guardian for the support of the children; but it was alleged that the contract and the payments thereunder were improvident. Upon this point the learned judge below says: "The actual contract made by the guardian was a most unreasonable and improvident one, and the sum he agreed to pay for his wards' support was most extravagant, and a wanton waste of his wards' money."

This is strong language. The children appear to have been about eleven and eight years of age when their mother died, and they were left in the sole charge of their step-father. The pension to which they

were entitled was \$12 per month until the elder child reached the age of sixteen, and \$10 per month from that time until the younger child arrived at the age of sixteen, when it ceased. This pension money was applied by the guardian to the support of the children as long as it was received from the government. As near as I can come at it, the payments amounted to about \$1.35 per week for the clothing and maintenance of each child.

This sum does not impress us as being extravagant. Circumstances, however, may make it so. A brief statement of the facts is, therefore, necessary to a proper understanding of the case. A. P. Beard, the father, died in the army on May 6, 1864, leaving a widow and two children, Ida and Jesse, the minors in question, aged seven and four years respectively. James Brown, the appellant, was appointed their guardian, February 21, 1865. The mother of the minors was married to one H. C. Hammond, April 14, 1866, and died September 1, 1868. It was not denied that the death of Mr. Beard left the family in very destitute circumstances. They had a lot of about ten acres of land, three acres of which were tillable, the rest covered with stumps, logs and bushes, and practically without fences.

The improvements were of little value; very small; very poor and very much out of repair. The guardian, acting under the advice of counsel, paid the pension-money over to the mother for their support, as fast as it was received, taking therefor the receipts of the wife and her second husband. When their mother died, the guardian made a similar arrangement with the step-father, and paid the money over to him. In addition, the guardian allowed him to occupy the land and house rent free upon condition of fencing the land and putting the property in repair. The latter appears to have been done. The land in its improved condition, with fences put up and the logs and stumps removed, was worth from \$12 to \$20 per year. The children appear to have had a comfortable home, were suitably clothed, and were sent to school whenever the schools were open. When not at school, they did such chores about the place as children of their age are accustomed to do in country places.

It was urged that the step-father could not charge for their support for two reasons, viz: 1st. He stood *in loco parentis* to the children; and 2d. That they earned their support while with him.

It is conceded that if there had been no contract between the step-father and the guardian, the step-father would not have been entitled to compensation. The law in such a case, under all the authorities, would not imply a contract or a promise to pay. But there was a special contract. Was it so improvident that the guardian must be surcharged with all the money he paid under it, with interest thereon? We think not. The step-father was under no legal obligation to support these children after their mother's death. He could have sent them away and thrown them upon their guardian for support. He testifies that he was unable to support them without the pension-money. The guardian may have thought that in keeping them in a comfortable home, where they would be kindly treated, properly clothed and educated, for the small sum he paid, he was making a good bargain. At any rate he

made it, and made it in good faith, and we are not prepared to say it "was most extravagant and a wanton waste of his wards' money."

We are not unmindful of the testimony in regard to the services of the children. The learned court and auditor differ widely upon this point. The auditor finds: "The children were kept and clothed as farmer's children usually were, and went to school summer and winter, whenever there was school. They did such chores and housework as children of their ages can do. The witnesses give Ida credit for being an exceptionally good girl to work."

The learned judge took a radically different view of it. He says: "The oldest child (the daughter) at least earned her own living. She worked for her step-father as if for her own father, and certainly earned her own board, lodging and clothing. Her education was free. The boy soon began to earn the same board, lodging and clothing for himself."

I have examined the evidence with some care and am inclined to the auditor's view of it. It must not be forgotten that for a considerable portion of the time the cost of clothing and in fact all the necessities of life was exceptionally dear. And we must take the opinions of persons who were not members of the household as to the value of the children's services with some grains of allowance. They might be worth more to some persons than to others. In a household where their services were actually needed, they would be worth more than to a poor family who could dispense with such services. What might be an accommodation to some persons might be a burden to others. I apprehend few families in humble circumstances would be willing to take such children, feed them, clothe them and send them to school whenever the schools were open, for such services as such children would render.

We do not think this guardian has so grossly mismanaged this trust as to incur the severe punishment inflicted upon him by the court below. He has acted according to his best light, under the advice of counsel and in good faith. The fact that an aunt of the children offered to take them from the step-father and support them was not communicated to the guardian. That the latter might have saved some money for the children by binding them out as servants is possible. He did not do so; he preferred to keep them in their home where they would have a better chance to receive some education, and we are not prepared to say that in applying the money to their support, which the government gave for that purpose, he was misappropriating it.

The decree is reversed at the costs of the appellees; the exceptions are sustained; the first report of the auditor is affirmed.

MILLER v. COMMONWEALTH.

May 3, 1886.

JURISDICTION — COMMON PLEAS — ORPHANS' COURT.

An auditor was appointed by the orphans' court to distribute a fund in the hands of A., who was administrator, *de bonis non* of the estate of B. The auditor found there was due from the estate of B to the estate of C., who had been the administrator of the estate of B., the sum of \$206.01. The finding of the auditor

was confirmed by the court and from that action no appeal was taken. In course of timesuit was brought in the common pleas to recover the sum found by the auditor to be due to the estate of C. In that action an attempt was made to prove that the actual indebtedness was on the part of the estate of C. to that of B. Held, that under the circumstances this could not be successfully done.

Error to the court of common pleas of Wyoming county.

The facts are set forth in the opinion of the common pleas *per* ELWELL, P. J. [26th District] of which opinion the following is a copy.

“By the COURT. When Ralph W. Russell, administrator of Jacob DeWitt, deceased, died, and M. W. Dewitt was appointed administrator *de bonis non* of the estate of Jacob Dewitt, all of the assets of the estate in the hands of the first administrator by force of the act of June, 1834, became at once the property of the administrator *de bonis non*.

“They were recoverable by action at law against the administrator of the first administrator if not voluntarily surrendered or assigned, whether such assets consisted of personal property, choses in action, or the proceeds of judicial sales of real estate under an order of the orphans’ court.

“The offer of evidence by the defendant does not allege failure to deliver all the assets of the estate of Jacob Dewitt into the hands of the administrator *de bonis non*.

“On the contrary the facts in evidence clearly showed that this duty had been performed. Jacob Dewitt died in September, 1872. Ralph W. Russell administered upon his estate; he died before July 7, 1873, and M. W. Dewitt was appointed administrator *de bonis non* on the 29th day of July, 1873. In 1874 he settled an account showing assets in his hands to the amount of \$7,662.85, thus showing that the assets had been delivered or passed over to him from the estate of Ralph W. Russell.

“In the absence of any specific allegation to the contrary a clear presumption arises that all the assets were so delivered, including the note of C. S. Russell, mentioned in the offer.

“In December, 1874, an auditor was appointed to distribute the fund admitted to be in hands of M. W. Dewitt to and among persons entitled thereto.

“It was in that proceeding judicially ascertained, and eventually confirmed by a decree or adjudication of the court having jurisdiction of the account, that there was due from the estate of Jacob Dewitt of the assets in the hands of the administrator *de bonis non* the sum of \$206.01. From that adjudication no appeal was taken.

“It is now proposed in this action brought to recover the sum found to be due to the estate of Ralph W. Russell, to prove that the indebtedness is on the part of the estate of Russell to that of Jacob Dewitt.

“As offered, the attempt is to settle in this suit in the common pleas, matters which can be settled only in the orphans’ court, and which, so far as appears, have been already passed upon and adjudicated by that court.

“The decree of the orphans’ court of Bradford county is conclusive of the matters therein determined.

"It is now claimed as a defense against that decree that it has been paid to the estate of Ralph W. Russell, by giving credit to C. S. Russell, his administrator, for the amount of the decree on a note given by him for his own private debt and passed over to the administrator *de bonis non* with the other assets of the estate.

"The offer to this effect was properly overruled at the trial. The assets of an estate known to be such ought not to be applied for the discharge of the administrator's own debts, unless the creditor taking them can first be satisfied of his right to so apply them. *Field v. Schfflien*, 7 Johns. Ch. 150, per Chancellor KENT. The taking of the assets of an estate in satisfaction of or security for a debt of an administrator charges the creditor with a participation in the misapplication. It is a distribution of the trust fund, inconsistent with the object of the trust, which the person dealing with the administrator is bound to notice, where he has knowledge of the nature of the transaction. Such a transfer renders the assets liable in the hands of the assignee.

"This view of the law is sustained by a long line of decisions, cited in note *Sutherland v. Brush*, 11 Am. Dec. 388.

"In *Petrie v. Clark*, 11 S. & R. 386, it was said by GIBSON, J., when the assignee knows at the time he is receiving his debt out of a fund, not the property of the person paying, but which is appropriated to the payment of other debts, that alone is a circumstance of suspicion that ought to put him on inquiry as to the propriety of the transaction. The assets are in the hands of an administrator not for the payment of his own debts. They cannot be levied for his own debts even by his own permission. This seems to be the doctrine of the law as held by the courts generally. It is contended by the counsel for defendant that the case of *Trotter v. Shippen*, 2 Barr, 358, has established as a rule in this State, that if an administrator is solvent the rule is different here. I am not prepared to believe that the decision in that case was intended to go that length. The facts were somewhat peculiar, and the decision was made with reference to them.

"As I understand the case Nixon had the right to receive the interest on a mortgage which he had owned or which stood in his name and was by him marked to the use of an estate of which he was administrator. The owner of the property rented it to tenants who were to pay the interest. It was coal land. Nixon received coal of them without any agreement at first that it should apply on the interest; subsequently he received coal which was agreed to be in payment of interest, and he also agreed to indorse the coal he had before received of the tenants of the owner, on the bond to secure which the mortgage was given. 'The question,' says GIBSON, J., p. 360, 'was whether payment of the interest in coal for the private use of the executor would have been good if made by the owners instead of through the instrumentality of their lessees,' no fraud having been intended, the payment was held good.

"The agreement mentioned in the offer, that the indorsement should be made that were made on the note, if intended as payment of the money due from M. W. Dewitt to the estate of Ralph Russell, was not binding upon the latter estate, whether C. S. Russell was solvent

or not. The offer to prove that the estate of Ralph W. Russell was liable to the estate of Jacob Dewitt to the extent of the balance of the note of C. S. Russell was clearly inadmissible.

"Whether that estate was solvent or insolvent did not appear in the evidence or offer. It was not shown nor does it appear that the account of Ralph W. Russell, administrator of Jacob Dewitt, had been settled in the orphans' court, nor that an account had been settled by C. S. Russell as administrator of Ralph W. Russell. The orphans' court was the proper tribunal before which the accounts have been or should be settled.

"So far as shown by the records in evidence the estate of Dewitt was indebted to that of Russell. I am of opinion that the unsettled matters between the estate cannot be settled in a suit in the common pleas. On the whole I am of opinion that no error was committed in the rejection of the evidence offered by the defendant, nor in the charge to the jury. And now Feb. 6, 1886, rule discharged."

Jas. W. Piatt and Davies & Hall, for plaintiff in error. *B. M. Peck and D'a. Overton*, for defendants in error.

PER CURIAM. The jurisdiction of the orphans' court over this claim in contention and the impropriety of attempting to assert it in the common pleas are correctly stated in the opinion of the learned judge. On discharging the rule to show cause why a new trial should not be granted. On that opinion the judgment is affirmed.

BOROUGH OF SUSQUEHANNA DEPOT v. SIMMONS ET UX.

May 3, 1886.

MUNICIPAL CORPORATION — NEGLIGENCE — CONTRACTOR.

B., a property-owner, obtained the consent of a municipality to his digging a trench and laying water-pipe in one of the public streets to supply his premises with water; he then contracted with C. to do the work for a gross sum; D. fell into the trench dug by C. and was injured. Held, the remedy of D., if any, was against C.

Error to the court of common pleas of Susquehanna county.

This was an action brought against a borough to recover damages for an injury occasioned to a woman by falling into a water-pipe ditch, dug by a contractor who had contracted with a property-owner, for a gross sum, to dig the ditch and lay water-pipe. The verdict was for plaintiff.

The following is a copy of the defendant's seventh point and the answer thereto:

"*Seventh.* The undisputed evidence being that the excavation complained of in this case was made by Jonas Florence, a person in the employ of Dr. E. N. Smith, for the private benefit of Dr. Smith, under a license obtained by said Smith from the corporate authorities, the borough defendant is not liable for the negligent manner in which the work was done, and the verdict must be for the defendant.

"*Answer.* This is affirmed if the jury find that the borough authorities had no knowledge of its dangerous condition."

M. M. Riley, E. L. Blakeslee, R. M. Lannon and M. J. Larrabee,

for plaintiff in error. The doctrine that a municipal corporation is not liable for the negligence of a contractor in its employ, who undertakes to do a specific work, for a gross sum, and who represents the will of the employer only as to the result to be obtained, and not as to the manner in which the work shall be performed, is too well settled in Pennsylvania to admit of argument. *Whart. Neg.*, § 181; 2 *Thompson Neg.*, 740; *Painter v. Pittsburg*, 10 *Wright*, 213; *Reed v. Alleghany*, 79 *Penn. St.* 300; *Allen v. Willard*, 7 *P. F. Smith*, 347; *Hunt v. R. R. Co.*, 1 *id.* 475; *Wray v. Evans*, 30 *id.* 102; *Erie v. Caulkins*, 4 *Norris*, 247. As to excavation made by an individual in a public street for his private benefit under a license from the corporate authorities, *Westchester v. Apple*, 11 *Cas.* 284. To recover from one person for the negligence of another, on the principle of "*respondet superior*" the relation of master and servant must exist between them. *McCollough v. Shoreman*, 9 *Out.* 169.

W. H. & H. C. Jessup and McCollum, Searle & Smith, for defendants in error. As to municipality being obliged to keep highway passable, *Borough v. Warne*, 16 *W. N. C.* 44; *Fritsch v. Alleghany*, 8 *id.* 319; *Born v. Plank Road Co.*, 12 *id.* 283; *Buffalo v. Holloway*, 7 *N. Y.* 493. Negligence is the absence of care according to the circumstances. *Turnpike Co. v. R. R. Co.*, 54 *Penn. St.* 435. "A municipal corporation is liable for damages for injuries for neglect of its officers is not keeping its streets, roads and bridges in repair." *McLaughlin v. City of Corry*, 77 *Penn. St.* 109; *Lower Macungie Township v. Merkhoffer*, 71 *id.* 276; *Norristown v. Moyer*, 67 *id.* 355. "An excavation in a public street or road made for a lawful purpose must be fenced and lighted, and a dangerous bridge must be closed up." *Humphreys v. Armstrong County*, 56 *Penn. St.* 210; *Storrs v. City of Utica*, 17 *N. Y. Ct. of App.* 104. We think the case of *City of Allegheny v. Campbell*, 11 *Out.* 535, rules this case. In the case of *Simmons v. Smith*, 7 *Out.* 32, it was held that the borough of Susquehanna Depot had the right to grant authority to Dr. Smith to dig the ditch. The jury have found that it was left in an unsafe and dangerous condition; and so left with the knowledge of the borough authorities. What the rights of this borough may be as against Dr. Smith it is not now necessary to consider. As in the *City of Allegheny v. Campbell*, 11 *Out.* 535, the duty was upon the city, so in our case the duty was upon the borough to keep the streets in safe condition for public travel; and having omitted to perform this duty must respond in damages to Mrs. Simmons.

GORDON, J. The question before us is, who is responsible for the injury which befell Sarah Ann Simmons, in consequence of her fall into the ditch dug in Willow street of the borough of Susquehanna Depot, by Jonas Florence? In the case of *Smith v. Simmons*, 7 *Out.* 33, we held that the only person responsible for this accident was this Jonas Florence who made the aforesaid excavation. The license authorizing it was for a purpose proper and lawful, hence the blame must attach to the person who misused or abused that license, and not to the borough. In the case cited it was determined that an action for the damages thus sustained would not lie against Dr. Smith, the licensee of

the borough, because, in the exercise of a lawful right, he had contracted with Florence to execute the entire job, and as, after the conclusion of such a contract, he had no supervision or control over the manner in which the work should be executed, so he was not responsible for the contractor's negligence. Now, why the borough should be liable we cannot well understand. It is true the municipality has charge over its streets and must keep them in proper repair; it is bound to see that there are no obstructions therein, and is responsible for accidents that may happen from the neglect of the duties thus imposed upon it by law. But to this general rule there are exceptions that are universally recognized. For the purpose of constructing sewers, or laying water or gas-pipes, the municipality may dig up and obstruct its own streets without committing a nuisance, though those highways may be thereby altogether obstructed, business impeded and the citizens injured. In like manner all that is here mentioned may be done by an independent corporation over which the borough or city, as the case may be, has no control. It is, therefore, to no purpose to cite authorities which illustrate only the general rule and have no bearing whatever upon the well-recognized exceptions. It is settled that the defendant had the right to grant the license to dig the ditch complained of; in this it did nothing unlawful. How, then, is it responsible for the negligent act of Florence? It certainly cannot be contended that its responsibility would be greater in a case such as this, than if Florence had been acting under a contract with the borough instead of Dr. Smith. Yet under such a contract it would not have been liable. His employment was independent of the control and direction of the person with whom he had contracted. He was in the lawful possession of the street in which the water-pipes were to be laid, and, as was said in *City of Erie v. Caulkins*, 4 Norr. 247, the borough could not fill up the trench which he dug, or erect barriers which he might not tear down if they obstructed his work. The authorities supporting the principle here stated are many, and when we refer to *Painter v. Mayor*, 10 Wr. 213; *Hunt v. Penn. R. R. Co.*, 1 P. F. S. 475; *Allen v. Willard*, id. 374, and *Reid v. City*, 29 id. 300, we have by no means exhausted the list. The counsel for the defendants in error lay much stress upon the case of *City of Allegheny v. Campbell*, 11 Out. 535, and profess to think that it rules the contention in hand. It does nothing of the kind, and it is wide of the point in controversy. In that case the plaintiff occupied the place of lessee of the defendant, inasmuch as he paid the city wharfage for the use of the landing, and the city was bound to keep it in proper repair. In this the position of the parties was that of landlord and tenant under a lease containing a covenant on part of the former to keep the premises in repair, in which case the landlord would, of course, be liable to the tenant for damages resulting from a breach of such covenant. The like remarks fit the case of *Pittsburgh v. Grier*, 10 Harr. 54. So, a like reasoning may be applied to distinguish the case in hand from that of *Born v. Plankroad Co.*, 12 W. N. C. 283, for there the corporation collected tolls for the use of its road, hence, it was rigidly held to such an oversight of its way as to guard travelers from obstructions of every kind, whether occasioned by its own act or that of a stranger.

If, as was said in *Smith v. Simmons*, the excavation had been *per se* a nuisance, the case would be different, for in that event the public authorities would have been bound to abate it as soon as they had knowledge of the obstruction, but not being a nuisance but lawful, the borough cannot be held for an accident happening thereby, and Florence alone must be regarded as responsible for the injury resulting to the plaintiff from his neglect.

He, doubtless, would have been pursued in the first instance but for his alleged insolvency; nevertheless, it does not follow that for this reason the borough must foot the bill, otherwise it must become the guarantor of the solvency of every contractor who may work on its streets. We conclude, then, in view of the evidence as we have it before us, that the court should have answered the defendant's seventh point in the affirmative without qualification, and thus have peremptorily directed the jury to find a verdict for the defendant. We discover no error in the various rulings of the court with reference to the admission and rejection of evidence, nor are we prepared to say that there is any thing wrong in the court's instruction on the question of damages, but for the error above mentioned we must reverse the case.

The judgment is reversed and a new venire ordered.

A like judgment of reversal, with order for a new venire will be entered in the case of *Borough of Susquehanna Depot v. Simmons*.

SMITH v. CARROLL ET AL.

May 8, 1886.

STATUTE OF FRAUDS — VERBAL PROMISE OF EXECUTOR TO PAY LEGACY.

The mere verbal promise of an executor to pay a legacy confers no right of action against him individually.

Error to the court of common pleas of Susquehanna county.

This was an action of *assumpsit*, brought before a justice of the peace, February 26, 1884, to recover a legacy upon the verbal promise of an executor.

Suit was brought against the executor, in his individual capacity. Judgment was taken by default and appealed to the common pleas.

The case was ruled out and tried before arbitrators, and after an appeal from their decision was referred under the Bradford county act of 1869, extended to Susquehanna-county by the act of 1870.

The referee awarded in favor of plaintiff.

The exceptions to the rulings and findings of the referee form the assignments in error.

Safford & O'Donnell, W. H. & H. C. Jessup, for plaintiff in error. It was held in *Wilson v. Long*, 12 S. & R. 58, that no contract, express or implied, arises between the executor and a legatee of the testator. Since the act of April 26, 1855, which is so plain and explicit, there is no case which holds an executor liable to pay the debts of the testator to a legatee or other person, upon his mere verbal promise; but on the contrary, whenever the question has arisen, this court has affirmed the application of the statute to such cases. *Sidle v. Anderson*, 45 Penn. St. 464; *Burt v. Herron*. 66 id. 404.

O'Neill & Post and *E. L. Blakeslee*, for defendants in error. As to statute of frauds, *Barkley's Estate*, 10 B. 387; *Armstrong's Appeal*, 13 S. 312; *Krucht's Appeal*, 21 id. 344; *Cryder's Appeal*, 1 J. 79; *Scott Intestate Law*, 326; *Hamilton v. Porter*, 13 S. 332; *Malone v. Keenor*, 8 Wr. 109; *Cowan v. Gendor*, 5 Phila. 15.

GREEN, J. We think the radical difficulty in this case is that it is an action against one who is an executor to hold him personally liable upon a verbal promise to pay a legacy. Since our act of 26th April, 1855 — *Purd.* 724, pl. 4 — the decisions appear to be uniform that such a promise confers no right of action against the executor individually. Thus we said in *Sidle v. Anderson*, 9 Wr. on p. 463: "If there was a promise by the administrator to be personally liable, it had no other consideration than that implied in the allegation of an existing *devastavit*. There was no express promise to pay on any such ground, and the case of *Wilson v. Long*, 12 S. & R. 59, very clearly determines that no implied contract to pay arises out of a *devastavit*. This would be decisive of the case on grounds independent of the statute. But suppose the promise rested on this ground expressly. It would be a promise by the administrator to answer 'the damage out of his own estate' for 'the debt of another,' and this would certainly be within the statute, and not binding for want of a writing to that effect." It is clear, therefore, that upon the theory of *devastavit*, there could be no liability upon an implied promise, and an express promise would create no personal liability without a writing. In the following cases it was held that the existence of assets, when coupled with a verbal promise only, was not sufficient to impose an individual liability. In *Oakeson's Appeal*, 9 P. F. S. on p. 101, SHARSWOOD said: "The cases appear to hold that on a promise by an executor or administrator to pay a legacy or distributive share in consideration of assets, the consideration and promise must be co-extensive. *Rann v. Hughes*, 7 T. R. 350, note; *Butt v. Humphrey*, 22 Conn. 317. However that may be, it is clear that the executor cannot be made liable *de bonis propriis* on an oral promise on the mere consideration of assets. That would be "to charge him upon a promise to answer damages out of his own estate, and, therefore, within the act of April 26, 1855. Pamph. L. 308. It has been accordingly held in *Hay v. Green*, 12 Cush. 282, that a verbal promise by an administrator to pay a distributive share in the estate of a decedent was within the statute of frauds, though there were assets; and, in *Philpot v. Briant*, 7 Bing. 717, a promise by the executor of an acceptor of a bill of exchange to pay out of his own estate in consideration of forbearance is held to be void if not in writing."

In *Burt v. Herron*, 16 P. F. S. on p. 404, we said: "To charge the executors upon their own promise, with proof of assets, the action must have been against them personally, and their promise in writing by the act of April 26, 1855."

Whether, therefore, there were assets in the hands of the defendant in this case or not, his verbal promise to pay the plaintiff her legacy imposed no personal liability upon him, and no right of action was thereby conferred. This objection as it touches the jurisdiction is fatal

at any stage of the case. *Black's Executors v. Black's Executors*, 10 Cas. 354; *Musselman's Appeal*, 101 Penn. St. 169.

The argument that the legacy is demonstrative and the defendant a trustee who appropriated it to his own use, is of no avail. The testator simply directed that his personal estate should be disposed of in legacies to his daughters, and he directed that his son Owen should pay, not to the daughters, but to his estate, \$500, to enable the executors to pay the legacies. But he had previously directed his executors to pay his debts and funeral expenses, and all the personal estate, including the money paid by Owen, was not sufficient for that purpose. Doubtless the testator supposed that the money to be paid by Owen, together with the other personal estate, would enable the executor to pay both the debts and the legacies, but in this he was mistaken, and that is the plaintiff's misfortune. The legacies were not charged upon Owen's land, nor was he directed to pay the money to the daughters. Even the executor was not so directed. The money was to be paid to him simply to enable him to pay the legacies. The superior duty, however, of paying the debts must first be performed, and the personal fund, no matter how constituted, must first be applied to that purpose in the absence of specific directions to the contrary.

These considerations render unnecessary any examination of the other assignments of error.

Judgment reversed.

STARK v. SHUPP

May 3, 1886.

TAX SALE — EJECTMENT — ONUS PROBANDI.

A plaintiff in an action of ejectment, claiming title by virtue of a tax sale, made by a county treasurer, under the forty-first section of the act of April 29, 1844, in order to establish his right to the possession, must show the treasurer's authority to make the sale, and to this end it ought to appear that all material conditions and pre-requisites were complied with: as that a tax had been duly assessed upon the property by the proper officers; that it had not been paid; and that sufficient personal property could not be found on the premises, out of which it could be collected. Of the latter, the return of the collector is *prima facie* evidence, but the only proper proof of the former, are the duplicates and assessments found in the commissioners' office.

Land can only be sold at a treasurer's sale for its own tax properly assessed upon it, and not for a tax on personal property.

A tract of land was sold for a tax assessment, levied jointly upon it and personal property. *Held*, the sale was void.

This was an action of ejectment, by one claiming title under a treasurer's sale for taxes. The verdict was for defendant.

Harding & Frear, for plaintiff in error. *Wm. M. Platt & Sons*, *John M. Garman* and *Terry & Streeter*, for defendants in error.

GORDON, J. This was an action of ejectment brought by the plaintiff, George W. Stark, for the recovery of a certain piece of land, situated in the township of Lemon, county of Wyoming. He claimed title by virtue of a tax sale, made by the treasurer of the said county under the forty-first section of the act of the 29th of April, 1844. In order to establish his right to the possession claimed, under the act above stated, it

behooved the plaintiff to show the treasurer's authority to make the sale, and to this end it ought to have appeared that all material conditions and prerequisites had been complied with; as that a tax had been duly assessed upon the property by the proper officers; that such tax had not been paid, and that sufficient personal property could not be found on the premises out of which it could have been collected. Of the latter the return of the collector is *prima facie* evidence, but the only proper proof of the former are the duplicates and assessments found in the commissioners' office. It was in this that the plaintiff failed. It is true, that the assessment-book, and the duplicate issued by the commissioners to the collector of Lemon township would have been entirely sufficient for the purpose for which they were offered had it appeared from them, or either of them, that the taxes for which the land was sold had been properly assessed against it. *Fager v. Campbell*, 5 Watts, 287. But it is certain, that land, whether seated or unseated, can be sold for no other taxes than those assessed upon it. Now, one of the objections to the assessment offered in evidence was, that it thereby appeared that the valuation included, not only the land in controversy, but also personal property, and that the assessment of \$4.93 was not levied upon either separately but upon both jointly. This being the fact, the duplicate was properly excluded, for a levy of this kind would not sustain the treasurer's sale, hence its admission would have been to no purpose. We repeat, the land could be sold only for its own tax, properly assessed upon it, and not for a tax on personal property.

As the tract in controversy was sold for this joint tax, it is clear that the sale was void. Under the act of 1844, the collector has no power to return such a tax, neither has the treasurer power to collect it by a sale of land. The plaintiff, as we have already said, was bound, in order to sustain his case, to show the warrant under which the treasurer acted in the disposition of the land in controversy, and that warrant must have its foundation in some act of assembly, otherwise that officer had no jurisdiction whatever, and his deed was good for nothing.

As, however, the plaintiff has failed to call our attention to any statute which warrants a sale of land for a tax assessed jointly on real and personal property, we must hold that the court did right in directing a verdict for the defendants. The judgment is affirmed.

APPEAL OF ROBERT SCOTT.

May 3, 1886.

ORPHANS' COURT — LACHES — BILL OF REVIEW.

Where interested parties who reside abroad have notice of an adjudication in the orphans' court, and are urged to look after their interests either in person or by counsel, and neglect so to do, their *laches* destroys their right to relief.

An account in the orphans' court settled and confirmed can only be reviewed as a matter of right, for error of law apparent upon the face of the record, or for a matter which has arisen after the decree. It may be reviewed as a matter of grace for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made.

Appeal from the decree of the orphans' court of Philadelphia county.

This was a petition to the orphans' court for a review of an account and adjudication, the prayer for which petition was granted and decreed.

Joseph N. Dougherty and *David A. Gourick*, for appellants. In *Hartman's Appeal*, 12 Casey, 70, STRONG, J., said: "A petition of review must aver errors of law appearing in the body of the decree sought to be reviewed or new matter which hath arisen since the decree, or that new proof has been discovered which could not possibly have been used at the time when the decree was made." "As a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made. Story Eq., § 404; *Riddle's Estate*, 7 Harr. 431; *Russell's Administrator's Appeal*, 10 Casey, 258; *Hartman's Appeal*, 12 id. 70." Per MERCUR, J., in *Milligan's Appeal*, 1 Norr. 389. "A decree settling an account decides every item of it, and fixes the balance. The office of a bill of review in such a case is to surcharge and falsify; and in order to be entertained at all, it must specify erroneous items affecting the final result." *Yeager's Appeal*, 10 Casey, 173; *Russell's Appeal*, id. 258; *Cramp's Appeal*, 31 Smith, 90. The petitioners had full previous notice of the filing of the account and of the audit. *Cremers's Estate*, 7 W. N. C. 544. In *Wetherill's Estate*, 8 id. 238, the court said, *inter alia*, in dismissing the petition for a bill of review: "A review, therefore, is not a matter of right, and if granted, it must be under the general powers which the court possesses, irrespective of the act of assembly. But in applications of this kind, whether for review strictly, after final decree, or for rehearing only, the rule is well settled that 'if there be any laches or negligence on the part of him who seeks it, it destroys the title to relief.' Story Eq. Pl., §§ 414, 421; *Wiser v. Blachly*, 2 Johns. Ch. 488; *Young v. Keighly*, 16 Ves. 348." *Wistar's Estate*, 39 Leg. Int. 265.

Henry S. Cuttall, for "appellees. In *McConnell's Appeal*, 1 Out. 31, Mr. Justice PAXSON says, in commenting upon the finding of an auditing judge in the court below: "We are not disposed to disturb the finding of fact. There was considerable conflict of testimony, but a verdict for such reason would not be set aside. The report of an auditor of the finding of an auditing judge is entitled to equal weight." "When disputed facts are submitted to the orphans' court, without an issue being asked for, the matter is within the exclusive jurisdiction of the orphans' court, and their finding is as binding as the verdict of a jury." *Gibson's Appeal*, 25 Penn. St. 191. The granting of a petition for review being a matter wholly within the discretion of the orphans' court, the exercise of that discretion will not be reviewed unless the record shows palpable and gross abuse. *Milne's Appeal*, 3 Out. 489; *Young's Appeal*, id. 74; *George's Appeal*, 2 Jones, 260; *Neeld's Appeal*, 20 P. F. Smith, 113; *Bowers' Appeal*, 3 Norr. 314. The granting of a review is preliminary to a hearing respecting the alleged error, and no appeal lies from it. *Bishop's Appeal*, 2 Casey, 470; *Jones' Appeal*, 11 W. N. C. 554.

PAXSON, J. The first assignment alleges that the court below erred

in granting the petition for a bill of review, and the second that the court erred in decreeing that the adjudication of June 13, 1884, be opened.

It was conceded that the petition for a review laid no ground demanding relief as a matter of right. It was granted in the equitable discretion of the court. It is not denied that the appellees had ample notice of the adjudication of June 13, 1884, and might, had they desired, have attended in person or been represented by counsel. The excuse that they resided in Ireland and could not conveniently attend is of little weight, as it was entirely competent for them to have been represented by an agent or attorney. There may be some reason for granting indulgence to a party living abroad and who was in point of fact ignorant of the proceedings, but there is none where the parties had notice of what was going on, and were moreover urged to look after their interests either in person or by counsel. Any laches or negligence destroys the title to relief. *Cremer's Estate*, 7 W. N. C. 544.

It was conceded that the petitioners were not entitled to a review as a matter of right. Were they entitled to it as a matter of grace? The rule was thus stated in *Milligan's Appeal*, 82 Penn. St. at page 395; "It is well settled that an account thus settled and confirmed can only be reviewed as a matter of *right* for error of law apparent on the face of the record, or for a new matter which has arisen since the decree. As a matter of *grace* a review may be granted for new proof, discovered after the decree, which proof could not possibly have been used at the time when the decree was made," citing *Story Eq.*, § 404; *Riddle's Estate*, 7 Harr. 431; *Russell's Adm'r's Appeal*, 10 Casey, 258; *Hartman's Appeal*, 12 id. 70.

The petition in this case does not come within the rule thus stated. It does not point out any error of law appearing on the face of the decree, nor show that any new matter has arisen, or even that any new proofs have come to light since the decree. The principal ground of complaint is that the accountant was allowed a credit for the partial loss of a mortgage, which he had transferred from his account as executor to that of his account as a trustee. His claim for this allowance was made at the adjudication in 1883, and was then passed upon by the court. Whether the credit should have been allowed had all the facts been before the court then, which were before it upon the review, we are not called upon to say. It is enough that it was passed upon then in a regular and orderly way, and the petitioners having failed to make their objections then, are precluded from doing so now. All the facts which they have since brought forward were known, or might have been known to them. There is no allegation of after-discovered evidence which they could not have produced at the original adjudication. There is only the allegation that they did not attend to their business, because it was inconvenient to do so. This is not sufficient. They cannot have a solemn adjudication opened and the public time consumed for such a reason. Something is due to the finality of judicial proceedings.

The decree is reversed at the costs of the appellee, and it is ordered that the adjudication of June 13, 1884, be confirmed.

COMMONWEALTH v. WEIDERHOLD.

May 8, 1886.

CRIMINAL LAW — ARSON — INDICTMENT — COUNT IN — FELONIOUSLY

A. was tried for an attempt to burn a stable, parcel of and belonging to a dwelling-house; there were two counts in the indictment, the first properly charging the offense under the one hundred and thirty-seventh section of the *Penal Code* as having been committed *feloniously*; the second differing from the first only in this, that the word *feloniously* was not used. The jury acquitted A. upon the first count, but convicted him upon the second. A motion was made for a new trial and in arrest of judgment. The new trial the court declared it needless to grant, and the motion in arrest of judgment it made absolute. *Held*, there was no error in so doing.

Error to the court of oyer and terminer of Schuylkill county.

Weiderhold was tried for an attempt to burn a stable, parcel of and belonging to a dwelling-house. There were two counts in the indictment, one charging the offense as having been "feloniously" attempted, and the other charging it in the same language but omitting the word "feloniously." The jury returned a verdict of not guilty as to the count containing the word "feloniously" but guilty as to the other count. Weiderhold was then committed to prison. A motion was made for a new trial and an arrest of judgment. The motion for a new trial was overruled, but the court arrested judgment, for the reason that the count upon which conviction was had was not one that could work such a result under the one hundred and thirty-seventh section of the *Penal Code*, as it failed to charge the offense as having been committed *feloniously*, nor could it work such a result under the one hundred and thirty-eighth section of the *Code*, as it had not been found thereunder.

R. H. Koch, solicitor of borough of Pottsville, *Wm. Wilhelm*, deputy district attorney, and *J. H. James*, district attorney, for Commonwealth. The indictment lays the offense as done as follows, to-wit: "Did unlawfully, willfully and maliciously attempt to set fire to, with intent to burn, a certain barn or stable that is parcel and belongs to a dwelling-house, etc., etc." This is in accordance with the law laid down in the *Criminal Procedure* with reference to indictments. The above clause sets out all that is essential, as the law on the subject of drafting indictments is as follows: "Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of the assembly prohibiting the crime, and prescribing the punishment, if any such there be, or, if at common law, so plainly that the nature of the offense charged may be easily understood by the jury." *Criminal Procedure Act of 1860*, § II, N. B. P. D., vol. I, page 475, § 12. "Where a statute made it an offense to present a false affidavit to the commissioner of pensions, with intent to defraud the United States, then declared the person committing it to be guilty of felony, punishable by fine and imprisonment, the supreme court held an indictment not ill for omitting the word 'feloniously.'" "It would be otherwise, said *NELSON, J.*, if the felonious intent was descriptive of the offense and not simply of the punishment." 1 *Bishop*, Third Ed. Evidence, Pleading, Practice, § 535; *United States v. Staats*, 8 How. 41, 45, 46. The highest judicial authority in the land has said

that as long as the act does not use the word "felonious" as descriptive of the offense, but simply applies to the punishment, the word "feloniously" does not need to be used; and that the law generally is that felonies are tried in the oyer and terminer and misdemeanors in the quarter sessions, unless specially designated otherwise by statute as in larcenies. *Commonwealth v. Alexander McConnell*, 2 Pittsb. 215, 216. As to the question, whether there was a proper joinder of count, for felonies triable in the oyer and terminer, with misdemeanors, and whether the verdict was correct upon the indictment—the defendant not demurring but pleading to the same—the Commonwealth directs attention to 13 W. N. C. 200, *Staeger v. The Commonwealth*. As neither of the crimes alleged to have been committed in this indictment, by the person indicted, are enumerated amongst those of which the oyer and terminer have exclusive jurisdiction, it is plain that the "court of quarter sessions have jurisdiction to try the indictment and pronounce upon the prisoner." *Holmes v. Commonwealth*, 1 Casey, 221, 224. A case that is to all purposes like this one, as to the law, is *Fulmer v. Commonwealth*, 1 Out. 503. The case of *Holmes v. Commonwealth* is there referred to and approved by Judge TRUNKEY. The court particularly passes upon the questions in hand, in the case of *Commonwealth v. Alexander McConnell*, 2 Pittsb. 210.

James B. Reilly and W. J. Whitehouse, for defendant in error. As to the distinction between the offenses covered by the one hundred and thirty-seventh and one hundred and thirty-eighth sections of the Penal Code, see *Hill v. Commonwealth*, 98 Penn. St. 192. "In all cases of felonies at common law, and some also by statute, the felonious intent is deemed an essential ingredient constituting the offense, and hence the indictment will be defective, even after verdict, unless the intent is averred. This rule has been adhered to with great strictness, and properly so, where this intent is a material element of the crime."

United States v. Staats, 8 How. 44. Arson has always been a felony at common law, and is still so under our statute, which extends the acts that shall rank as arson and constitute felony—and it has been always uniformly held that the word "feloniously" was an essential requisite in an indictment for arson. 2 Whart. Crim. Law, § 1673. These terms are not mere technicalities, they have come to be regarded in the law as having substantial and important meaning. "The word 'felonious' is essential to all indictments for felony, whether at common law or statutory." 1 Whart. Crim. Law, § 399; and *Mears v. Commonwealth*, 2 Grant, 387.

PER CURIAM. The learned judge committed no error in arresting the judgment sought to be entered on the second count of the indictment. The defendant was acquitted on the only valid count in the indictment under the one hundred and thirty-seventh section of the Penal Code. That count correctly charged the act to be a felony. The other count cannot be sustained under section 138, as it was not framed under that section. It avers a fact not provided for in that section; but in conflict therewith. As it does not charge the act to have been done feloniously, it cannot be sustained under section 137.

Judgment affirmed.

APPEAL OF WALKER.

May 8, 1886.

INJUNCTION — LEVY — WIFE'S SEPARATE ESTATE FOR HUSBAND'S DEBT.

A court of equity will not restrain by injunction a creditor from levying on land in which he avers that his debtor has an interest, but a sale of the wife's land by the husband's creditor may be enjoined where the title of the wife is clear.

Appeal from the decree of the court of common pleas of Schuylkill county.

About January, 1874, Schollenberger purchased and paid for certain real estate, and directed the deeds to be made to Whitney, who executed a declaration of trust acknowledging that Schollenberger had paid the purchase-money, and that he, Whitney, held the property for the purpose of laying out and selling town lots, and after reimbursing Schollenberger the purchase-money with interest, Whitney and Schollenberger were to divide the profits. This was to continue till April 1, 1877, but was extended in April, 1877, till April 1, 1880.

On September 10, 1878, Whitney died insolvent, having devised all his estate—including the legal title to the trust estate—to his wife, Hannah Whitney.

Schollenberger's equitable interest became vested in Walker, in trust for certain creditors of Schollenberger. Walker then filed his petition in the orphans' court to compel Mrs. Whitney to transfer the trust estate. The orphans' court decided they had no jurisdiction, and the supreme court affirmed their decision in *Walker's Appeal*. Walker then filed his bill in equity against Mrs. Whitney for the conveyance of the trust estate.

The case was pending for over a year, and the master finally reported that Mrs. Whitney should make the conveyance asked for, and on April 6, 1885, the court made a final decree that Mrs. Whitney should make the conveyance, which decree remained unappealed from. Mrs. Elizabeth Heilner obtained a judgment against Whitney's estate for a debt of Whitney, issued execution and levied on the trust estate which had been conveyed to Walker, in pursuance of the decree. The property was advertised for sale on July 3, 1885. Walker then filed his bill in equity setting forth the facts and the decree, and alleging that a sale would cast a cloud on the title, and asked the court to restrain. The court granted a preliminary injunction, but on July 10, 1885, dissolved the injunction.

On September 7, 1885, defendants filed a demurrer to plaintiff's bill. The court sustained the demurrer and dismissed the bill on September 14, 1885. From this decree an appeal was taken.

John W. Ryon and Thomas H. & L. B. Walker, for appellant. "It cannot be doubted that, under certain circumstances, the power of a court of equity to restrain an execution creditor from proceeding to sell may be properly invoked; but as was said in *Winch's Appeal*, 11 P. F. S. 244, "it is only where the creditor is clearly and undeniably proceeding, against right and justice, to abuse the process of the law to the injury of another, that equity intervenes to stay his hand." *Taylor's*

Appeal, 12 Norr. 23. The circumstances of the present case are: *First*. The written declaration of trust by Whitney, that he held as trustee, which bound him and those claiming under him. "The declarations of a person while in the possession of the premises against his title are always admissible, not only against him, but against those who claim under him." *Gibblehouse v. Strong*, 3 Rawle, 437; *Weidman v. Kohr*, 4 S. & R. 174; *McIldonny v. Williams*, 4 C. 492. *Second*. The suit to enforce the trust and obtain the conveyance resulted in a decree of the court sustaining the trust, and commanding the conveyance. *Third*. The bill in equity to restrain the sheriff's sale set forth the ownership of the property and the decree of the court, and the defendants, instead of answering and alleging an interest in Whitney, demurred, and the court sustained the demurrer, and dismissed the bill, thus admitting the title and ownership of the appellant for the purposes of this case. It is contended the court erred in dismissing the bill under the pleadings. The bill avers the ownership to be in Schollenberger's assignee, by decree of the court of common pleas of Schuylkill county directing a deed for the land to be made by Mrs. Whitney to L. B. Walker, assignee, and that such deed was made. And the reply of the respondents does not deny this ownership by plea, answer, or demurrer, and, therefore, under the pleading, it is such a case where the creditor is clearly and undeniably proceeding against right and justice to abuse the process of the law to an injury of another. *Hunter's Appeal*, 4 Wr. 194; *Lyon's Appeal*, 11 Sm. 15; *Winch's Appeal*, id. 244; *Taylor's Appeal*, 8 W. N. C. 192; 12 Norr. 21. But this case differs from all others in the books in this respect: that the same controversy and claim has been already adjudicated upon and settled by a court of competent jurisdiction, and Mrs. Heilner was privy to the decree. If Mrs. Heilner is a stranger she is not affected by the decree, but if she is a privy, she is bound by it, for "all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceeding." 1 Greenl. Ev., § 523; *Peterson v. Lothrop*, 10 Casey, 223; *Giltinan v. Strong*, 14 P. F. S. 242; *Otterson v. Middleton*, 6 Out. 78; *Strayer v. Johnson*, 43 Leg. Int. 67. Is Mrs. Heilner a privy to the decree against Whitney's estate? She is a creditor who obtained a judgment against Whitney's estate after his death. She could only be successful in an action of ejectment through Whitney's title. Her claim is not adverse to Whitney's title, but under that title. Her claim has already been adjudicated upon; for Mrs. Whitney as executrix of the decedent is regarded as a trustee for creditors. *Hess' Estate*, 19 P. F. S. 272. And Mrs. Whitney's appearance in her representative character is the appearance of all Whitney's creditors. Story Eq. Pl., §§ 140, 141, 142, 150, 226; *Newland v. Campion*, 1 Ves. Jr. 105; *Peacock v. Monk*, id. 127.

A. W. Schalck, for appellees. In *Patterson v. Marts*, 8 Watts, 379, it is said: A contract to entitle itself to the assistance of a chancellor must have come from an immaculate source. *Freedly v. Barnhart*, 1 P. F. S. 281; *Pierson v. Neil*, 13 id. 426; *Brady's Appeal*, 16 id. 280; *Bleakley's Appeal*, id. 187; *Weise's Appeal*, 22 id. 354. A material change of circumstances, affecting the rights, interests and obligations

of the parties, or lapse of time, or other change of circumstances may, and often do, induce a chancellor to refuse a decree of specific performance. *Patterson v. Martz*, 8 Watts, 374; *Callen v. Ferguson*, 5 Casey, 247, 251; *DuBois v. Baum*, 10 Wr. 537; *Müller v. Hanlan*, 1 P. F. S. 265, 269; *Russel v. Baughman*, 13 Norr. 400, 404. A secret contract forbids the debtor's disposing his stock to the prejudice of the complainant, but in violation thereof the debtor made an assignment for the benefit of creditors. The court refused to interfere, because the rights of creditors had attached, which were not to be defeated by such secret contract. *Tower v. Barrington*, Brightly Rep. 253, 261. No act of the parties after the death of the debtor can vary the rights of creditors. *Turner v. Hauser*, 1 Watts, 423. Death casts a man's estate into an unchangeable mould. The law then fixes its conditions, and prescribes its management, and its distribution. His real estate becomes assets for the payment of his debts. *Nice's Appeal*, 4 P. F. S. 200. The moment the debtor died his creditors of all classes became lien creditors under the act of assembly which provides that the debts of a decedent shall be a lien upon his real estate for five years after his death. *Fowler's Appeal*, 6 Norr. 453; *Nice's Appeal*, 4 S. 200, *in re Judge Hegin's Estate*. It is a fundamental rule of law in Pennsylvania that a man's creditors have an unquestioned right to levy upon and sell whatever right, title or interests, actual or supposed, the debtor may have in lands. Whether the creditor be in error or not in supposing that his debtor has an interest in the land is a question the courts will not determine in advance, and, indeed, have no power or authority to do so. *Hunter's Appeal*, 4 Wr. 194; *Winch's Appeal*, 11 P. F. S. 426. Where the title of the wife is disputed the creditor has a right to proceed against the property to test her title, and it is error for the court to assume jurisdiction and to enjoin against the creditor's execution, and thus to withdraw contested facts from the jury. To do this is to deny the undoubted right of a creditor to sell whatever interest he believes his debtor has in the property. The jurisdiction given to a court of equity for the prevention or restraint of the commission of acts contrary to law and prejudicial to the rights of individuals was never intended to be used to obstruct the collection of debts. S. P., *Dyer v. Bank*, 9 Phila. 159; *Schuster v. Bennett*, id. 208; *Simpson v. Bates*, 10 id. 66; *Reeser v. Johnson*, 26 S. 313; *Taylor's Appeal*, 12 Norr. 21; *Weiser's Appeal*, 8 W. N. C. 354, *per curiam*. A creditor, who has obtained a judgment has a clear legal right to levy on and sell his debtor's interest in any land. A court of equity cannot enjoin on the ground that the debtor has no right, title or interest. The question can only be settled in ejectment by the sheriff's vendee. The case of a married woman's property is the only exception, and that rests upon the construction of a statute. *Weiser's Appeal*, 9 W. N. C. 509. Nothing is better settled than that a court of equity has no jurisdiction to restrain, by injunction, a creditor from levying upon land in which he avers that his debtor has an interest.

PER CURIAM. It is well settled, as a general rule, that a court of equity will not restrain, by injunction, a creditor from levying on land

in which he avers that his debtor has an interest. It is true under the act of 1850, which declares that the property of a married woman shall not be subject to levy and execution for the debts and liabilities of her husband, a sale of the wife's land by the husband's creditor may be enjoined, where the title of the wife is clear, inasmuch as a sale would be in violation of a clear and express statutory prohibition. *Reeser v. Johnson*, 76 Penn. St. 313.

We discover nothing in the facts of this case, nor in the decree between other parties which is invoked, to take the case out of the general rule, which denies to a court of equity the right to restrain a creditor from selling land on execution, in which he thinks the defendant has an interest.

Decree affirmed and appeal dismissed at the costs of the appellant.

APPEAL OF THE CITY OF PHILADELPHIA, TRUSTEE, UNDER THE WILL OF STEPHEN GIRARD.

May 10, 1886.

WILL — CONVERSION.

A testator directed in his will: "I desire all my other estate, real, personal or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages." *Held*, that this worked a conversion of the real estate.

Appeal from the decree of the orphans' court of Philadelphia county.

On March 17, 1877, the orphans' court appointed Krail guardian of the estate of John M. Eisler *et al.*, minors. Security was ordered in the sum of \$3,000, and Silber became security for the faithful performance by Krail of his duties as guardian.

Krail entered upon his duties as guardian, and collected moneys belonging to the minors. He died insolvent about November, 1882, never having filed an account. His widow and administratrix filed the account of the deceased guardian, which was audited by the orphans' court, and a balance of \$421.10 found to be due the minor, John M. Eisler, which was awarded to the city of Philadelphia, trustee, etc. (his guardian). Upon the settlement of the estate of the deceased guardian a claim was made for the amount due the minor, but only a *pro rata* dividend of \$54.43 was awarded, leaving a balance due of \$366.67.

Silber, the surety, died November 8, 1877, leaving a will, by which he directed his real estate, No. 1238 North Second street, and No. 2217 North Fourth street, to remain unsold during the widowhood of his wife. All his other real estate he desired to be sold as soon after his decease as practicable, and the proceeds invested, and the income paid to his wife, so long as she remained his widow, and he authorized and empowered his wife, the sole executrix, to sell his real estate, except the two properties mentioned, at public or private sale, etc. In pursuance of this power and direction, the executrix sold real estate on Kensington avenue, and filed her account of the proceeds. Upon the audit of the account a claim was made for \$366.67, the balance due the minor's estate by his deceased guardian. The claim

was allowed, and the entire balance appearing on the account, \$248.14, less the orphans' court costs, was awarded to the city of Philadelphia. The court *in banc*, however, upon exceptions filed, disallowed the claim, because Silber had been dead more than five years, and the lien against his real estate was lost, and it awarded the balance on the account to the widow of Silber. From that decree an appeal was taken.

Francis E. Brewster and *F. Carroll Brewster*, for appellant. The objection made to the payment of the claim was, that as the testator had been dead more than five years the lien of the claim against his real estate was lost, and payment could not be enforced against the fund in the hands of the accountant, which consisted of the proceeds of the sale of part of testator's real estate. It is submitted that the direction to sell all the real estate unexcepted constituted beyond all question an equitable conversion into personalty on the death of the testator. *Alison v. Wilson*, 13 S. & R. 330; *Morrow v. Brenizer*, 2 Rawle, 185; *Burr v. Sim*, 1 Whart. 252; *Silverthorn v. McKinster*, 12 Penn. St. 67; *Parkinson's Appeal*, 32 id. 455; *Wilson v. Shoenberger*, 34 id. 121; *McClure's Appeal*, 72 id. 414; *Evans' Appeal*, 63 id. 183; *Land's Appeal*, 85 id. 339; *Roland v. Miller*, 11 W. N. C. 431. In *Eby's Appeal*, 84 Penn. St. 241, it was held that land directed to be converted into money is regarded as money. An intent to create from the blended realty and personalty a fund in money for purposes of distribution is equivalent to an express direction to sell. *Lardner's Estate*, 39 Leg. Int. 440. The learned auditing judge did not deem it necessary to consider this question of conversion, for as the executrix actually sold the land under the power contained in the will and brought the proceeds before the orphans' court for distribution, he held that the claim of the city as guardian, though no longer a lien on the land itself in the hands of a purchaser, was a valid claim against the proceeds of the land. In reversing this finding the court *in banc* clearly erred. Where land is actually sold under a power in the will for the payment of testator's debts, there is a conversion out and out. *Wharton v. Shaw*, 3 W. & S. 124; *Willing v. Peters*, 7 Penn. St. 287. An actual sale under a power effects an equitable conversion into personalty. *Scheidt's Estate*, 1 Leg. Chron. 25.

Joseph L. Tull, for appellee. As to conversion, *Lehman's Appeal*, 9 Out. 141; *Page's Estate*, 25 S. 87; *Elwin v. Elwin*, 8 Ves. 547; *Swift's Appeal*, 6 Norr. 502.

PAXSON, J. We are of opinion that the will of Jacob F. Silber worked a conversion of his real estate. By the fourth item of said will the testator said: "I desire all my other estate, real, personal or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages," etc. We regard this as a direction to sell. The words "I desire" are the equivalent of the words "I will" that my real estate shall be sold, etc., while the added words "as soon after my decease as practicable" left no discretion to his executors excepting as to the matter of time. It does not authorize them to postpone a sale altogether. Besides, he makes no other disposition of the real estate.

The auditing judge did not discuss the question of equitable conversion for the reason that the sale by the executors worked an actual conversion, and the money having been brought into court was to be distributed as money and was liable for the testator's debts, of which the claim of the appellant was one. In this one item he was clearly right, and that it was error in the learned court to sustain the exceptions to his adjudication.

Decree reversed at the costs of the appellees, and the adjudication is confirmed.

JENNINGS v. McCOMB.

May 10, 1886.

LANDLORD AND TENANT — LEASE — AGENT — ESTATE AT WILL — COVENANT — EVIDENCE.

A. owned a lot of ground with a building erected upon it; B., by a written instrument dated March 10, 1875, in which he styled himself agent without naming his principals, and which he signed as agent of A., affixing a seal to her name, leased the premises to C. for three years from April 1, 1875; B. had no written authority to execute the lease, nor did A. accept or ratify it in writing. *Held*, that C. had an estate at will only.

Held, that as no certain term had been vested in C., the consideration for his covenant to pay rent had failed, but that he was liable in *assumpsit* for the rental value of the premises, and that the written instrument was admissible in evidence on the question of value.

Error to the court of common pleas, No. 3, of Philadelphia county.

This was an action of case to recover the rental value of premises; the verdict was for plaintiff.

A. *Thompson*, for plaintiff in error. *Assumpsit* will not lie on a sealed instrument. *Irwin v. Shultz*, 46 Penn. St. 74, 76; *Shaeffer v. Geisenberg*, 47 id. 500. Debt or covenant is the proper action when under seal. *McManus v. Cassidy*, 66 Penn. St. 260. The doctrine seems to be universal that where the cause of action arises upon a specialty or sealed writing, the action must be covenant or debt as the case may be. *Id.* *Narr.* in *assumpsit* will not support a sealed contract. *Penn. National v. Conly*, Leg., April 14, '82. A plaintiff may sustain covenant on a sealed instrument, although it be so defectively executed on his part that only *assumpsit* can be maintained against him. *Poor Directors v. McFadden*, 1 Grant, 2, 30. Though a contract under seal be so defectively executed that it could not be enforced, yet if it be performed the dependent covenant cannot be repudiated. *School Directors v. McBride*, 10 Harr. 215. If the plaintiff below had amended his *narr.*, or sought so to do, we would have been entitled even then to an appropriate change of pleas under the amended acts and the decisions thereon, but even this legal right was refused to us.

George Northrop, for defendants in error. The reason why the plaintiffs declared in *assumpsit* was because their agent, Henry C. Brolasky, drew up a lease for the premises, calling himself "agent" simply, and then signed it, under seal, as the "agent" of the plaintiffs, without any authority under seal. If the lease made by the said

Brolasky, as agent, had not been signed and sealed by him in the name of a principal, suit could have been brought in his name. *Hold v. Martin*, 51 Penn. St. 499; *Bedford v. Kelly*, 61 id. 493; *Seyfert v. Bean*, 83 id. 453. A suit on the lease could not be brought either in the name of the principals or the agent. *Frontin v. Small*, 2 Id. Raym. 1418; Chit. Cont. 230; 1 Chit. Pl. 6; *Berkeley v. Hardy*, 5 Barn. & Cress. 355. See, also, *Bellas v. Hays*, 5 Serg. & Rawle, 439; *Grove v. Hodges*, 55 Penn. St. 515; *Baum v. Dubois*, 43 id. 265. Though an action of covenant cannot be maintained in this case, an action of *assumpsit* may, disregarding the seal as a mere excess. *Grove v. Hodges*, 55 Penn. St., bottom of p. 517; *Jones v. Horner*, 60 id. 218, 219; *Schmertz v. Schreeve*, 62 id. 460; 1 Am. Lead. Cas. 596, 611; 1 Chit. Pl. 104; *Swisshelm v. Swissvale Laundry Co.*, 95 Penn. St. 370. A contract under seal may be given in evidence under *non assumpsit*. *Cooper v. Rankin*, 5 Binn. 615, 617. A sealed instrument may be given in evidence in *assumpsit* to show the amount due. *Charles v. Scott*, 1 Serg. & Rawle, 297; *Mehaffey v. Share*, 2 P. & W. 378; *Carrier v. Dilworth*, 59 Penn. St. 410.

A motion made by the defendant for a nonsuit was denied. Defendant then asked to file the following additional pleas: 1. *Non demisit*; 2. *Nil debet*; 3. Covenants performed *absque hoc*; 4. Eviction; 5. Accord and satisfaction. 1. *Non demisit* is a proper plea in debt, not in *assumpsit*. 2 Stephens Nisi Prius, 1225; 1 Chit. Pl. 482. 2. *Nil debet* may be a good plea in debt, but not in *assumpsit*. 1 Chit. Pl. 482; *Davis v. Shoemaker*, 1 Rawle, 141; *Bauer v. Roth*, 4 id. 92. 3. *Covenants performed absque hoc*. This is clearly not a good plea in *assumpsit*. Beside, issue cannot be taken on a general averment of performance, and there was no notice of special matter. 2 Steph. Nisi Prius, 1164; 1 Chit. Pl. 487; Steph. Pl. 334. 4. *Eviction* is also the proper plea in *debt*. 3 Chit. Pl. 993; 1 Saund. 204, note 2. *Accord and satisfaction*. This was an unnecessary plea as whatever could have been offered thereunder could have been given in evidence under the plea of *non assumpsit*.

TRUNKEY, J. The plaintiffs aver in their declaration that on March 10, 1875, they agreed with the defendant that he should have and occupy the building No. 702 Sansom street, for the term of three years from April 1, 1875, and in consideration thereof the defendant agreed to pay to the plaintiffs, monthly on the first day of each month in advance, the annual rent of \$1,000 for the first year, \$1,200 for the second year, and \$1,000 for the third year. This action is to recover the rent for the last ten months ending on April 1, 1878.

At the trial the plaintiffs called Brolasky who testified that he was employed by the plaintiffs, and made a lease in writing of the premises to the defendant. The written lease as to the date of the contract, the term, the rent and payment thereof, accords with the averments in the declaration. In the lease Brolasky styled himself agent, without naming his principals, and signed as agent for Mrs. McComb, affixing a seal to her name. The defendant signed and sealed the lease.

There is no evidence that Brolasky had authority in writing to execute a lease. Nor did the plaintiffs accept or ratify the lease in writing.

An oral lease for a term of three years is valid only when it commences from the time it is made; the statute of frauds declares that all parol leases exceeding the term of three years from the making thereof shall have the force and effect of estates at will only. *Whiting & Co. v. Pittsburgh Opera House*, 88 Penn. St. 100; *Stoer v. Cadwallader*, 2 Pennyp. 117. Therefore, the tenant under the lease made on March 10, 1875, for the term of three years from April 1, 1875, held only an estate at will. No certain term was vested in him.

In many cases when a deed contains covenants on both sides, the covenants on one side being in consideration of the covenants on the other side, the party executing the deed may be bound, although the other party has not executed it. A covenantor in an ordinary indenture, who is a party to it, though he did not seal it, may sue the covenantor who executed the deed, and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantor. *Leake Cont.* 141; *Whart. Cont.* 688. A contract under seal may be so defectively executed by one party that it could not be enforced against him, yet if it be performed, upon breach by the other party of his covenant he is liable in covenant. *School Directors v. McBride*, 22 Penn. St. 215. A plaintiff may sustain covenant on a sealed instrument, although it be so defectively executed on his part that only *assumpsit* can be maintained against him. 1 *Grant*, 230.

Generally, when a party who has not put his name to a written contract accepts it when signed and sealed by the other, it binds him the same as if he had executed it. The principle that contracts must be mutual, must bind both parties or neither, does not mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one, when only *assumpsit* can be maintained against the other. *Grove v. Hodges*, 55 Penn. St. 504.

But when the covenants made by the party first executing the deed are dependent on covenants to be executed by the other party, then the first cannot be enforced until the performance of the correlative covenants, or until that performance is undertaken by the execution of the deed by the other party. Thus, with respect to leases by indenture such covenants as to repair and pay rent during the term are not obligatory if the lessor does not execute the deed, because the interest has not been created to which such covenants are annexed, and during which only they operate; the foundation of the covenant failing, the covenant fails also. Unless there be a term, a covenant to repair or pay rent is void. If no lease, there is no covenant. *Pitman v. Woodbury*, 3 Exch. 11. A defendant, for a certain sum to be paid to the commissioners of an inland navigation company, stipulated for the enjoyment of the tolls for a year. The commissioners did not execute the deed as directed by acts of parliament; but the defendant signed and sealed the deed. The payment of the rent, as it was called, was to be made in consideration of a legal right to enjoy the incorporeal hereditament for a year, which right would have vested had the commissioners executed the deed as directed by law. In reality the defendant had occupied and enjoyed the tolls under a license terminable at any moment, but he had been permitted to enjoy them for the year. Therefore, he

never having had the interest for which he covenanted or contracted to make the payment, namely, a certain estate or right in the tolls for one year, the consideration for the covenant wholly failed. It was held that covenant would not lie; and that the defendant's liability must be enforced in a different action. *Swartman v. Ambler*, 8 Exch. 72.

So, in this case, as no certain term was vested in the defendant, the consideration for his covenant failed. He is liable in *assumpsit* for the rental value of the premises he occupied. The writing was admissible on the question of value—it was not offered in evidence as the foundation of the action. The only objection to it as evidence was that it is sealed. At present there is no occasion to consider whether the case would be different had the lease been for a term not exceeding three years from the making thereof.

Judgment affirmed.

TOWNSHIP OF WEST MAHANOEY v. WATSON.

May 10, 1886.

DAMAGES—PROXIMATE AND REMOTE—QUESTION FOR COURT.

In an action for damages, the question of proximate and remote cause is for the jury, but when the facts are not disputed the court may determine it.

Two horses and a sleigh, belonging to A., were being driven along a public road by a servant of A., the sleigh being dragged upon a pile of ashes was overturned, the horses ran off, and the following day were found five miles distant from the place of accident, upon a railway track, dead. A. brought suit against the township for damages, alleging the proximate cause of the accident to be the negligent maintenance of the highway. On the trial A. did not show that the flight of the horses was continuous from the time of the overturning of the sleigh till their death. On behalf of the township a point as follows was submitted:

"It being an admitted fact in this case, that the horses were killed, not on the township road, but on the Lehigh Valley railroad by a moving locomotive—not owned or controlled by the township—which ran upon and killed them, the negligence of the township, if any, was not the proximate, but the remote cause of the killing of the horses, and the plaintiff cannot recover their value in this action."

Held, the point should have been affirmed without qualification.

Error to the court of common pleas of Schuylkill county. The facts are set forth in the opinion and head-note.

James F. Minogue, Samuel H. Kaercher, Mason Weidman, for plaintiff in error. We rely upon the case of *Hoag & Alger v. R. R. Co.*, 4 Norr. 293, where we have a more recent utterance of this court on this very question fairly raised and squarely answered. The question is, was this moving locomotive owned and controlled by a stranger, which beyond question was the direct cause of the killing of these horses and of Watson's loss, an intervening cause within the meaning of the decisions? or was all of this the natural result of the township's negligence? *R. R. Co. v. Kerr*, 62 Penn. St. 364. The questions raised here were thoroughly discussed in the following recent cases, viz.: *Kerr v. R. R. Co.*, 62 Penn. St. 353; *Hoag v. Tate S. & M. S. R. Co.*, 85 id. 293.

James B. Reilly and M. M. D'Velle, for defendant in error. As

to the correctness of the ruling of the court below in leaving it to the jury to determine whether such negligence was the proximate or remote cause, we submit that it is so clearly established by the decisions of this court that we may content ourselves with a simple reference to them, viz.: *Penn. R. R. Co. v. Hope*, 30 Smith, 373; *Hey v. Philadelphia*, 31 id. 44; *Raydure v. Knight*, 2 W. N. C. 713; *Scott v. Hunker*, 10 Wr. 192; *Penn. & New York C. & Rd. Co. v. Lacey*, 8 Norr. 458.

PAXSON, J. This was an action brought by the plaintiff below against the township of West Mahanoy to recover damages for the loss of his horses and injury to his sleigh, caused, as the jury have found, by the negligence of the township in not keeping the public highway in a safe condition for travel. The undisputed facts are that on January 16, 1884, two horses and a sleigh owned by the plaintiff, in charge of his men, were being driven along a public road in said township, when, by reason of a pile of ashes which had been deposited in the highway, the sleigh was overturned and injured; the horses ran off and were found next day upon the track of the Lehigh Valley railroad, from five to six miles distant from where the accident occurred, and about a mile from any public highway. Both horses were dead when found, having evidently come in contact with a moving locomotive and were thus killed.

The negligence of the township, having been found by the jury, was conceded upon the argument at bar. Hence no question was made as to the damages resulting from the injury to the sleigh and harness, but as to the horses it was contended that the negligence of the township was not the proximate but the remote cause of their being killed, and that for this reason the plaintiff could not recover. This question was distinctly raised by the defendant's fifth point, which was as follows:

"It being an admitted fact in this case that the horses were killed, not on the township road, but on the Lehigh Valley railroad by a moving locomotive — not owned or controlled by the township — which ran upon and killed them, the negligence of the township, if any, was not the proximate, but the remote cause of the killing of the horses, and the plaintiff cannot recover their value in this action."

The court answered it as follows:

"We submit to you the question whether the negligence of the defendant was the proximate cause of the killing of the plaintiff's horses, or whether it was the remote cause. If it were the proximate cause the defendant must answer for the injury; if it were the remote cause, the defendant is not liable for such killing."

No objection was made below or here to this point upon the ground that it assumes the facts. We understand the facts to be conceded.

While it is undoubtedly true as a general proposition that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it. It is sufficient to refer to *Hoag v. Railroad Co.*, 85 Penn. St. 298. In that case this court followed *Railroad Co. v. Kerr*, 62 id. 353, and *Railroad Co. v. Hope*, 80 id. 373, laid down the rule as to proximate cause as follows: "In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence

of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act."

Tested by this rule, the negligence and the injury certainly appear a long distance apart. Assuming that the running away of the horses was the natural and probable consequence of the overturning of the sleigh, we have to further assume that their continuing their flight for several miles, and finally getting upon a railroad track and being then killed, was also a natural and probable consequence of such overturn. If the township is responsible for all possible consequences of its negligence, then we could have no doubt upon this point. Such, however, is not the rule. Assuming, however, that the township would be liable in case the horses were killed in the course of their first flight, that is to say, that becoming frightened by the overturning of the sleigh, they ran on until they reached the railroad track; turned up said track, dashed against a passing locomotive, and were then killed before they had recovered from their original terror; the plaintiff's difficulty is that he has not proven these facts, if they exist. We are asked to assume them, thus piling presumption upon presumption.

The case is entirely barren of evidence as to what became of the horses after they commenced to run until they were found dead upon the track of the railroad. The accident occurred in the evening; the horses were not found until the next morning, and then at a point, as before stated, from five to six miles from the place where they started. There is no proof that it was a continuous flight, and that they had not recovered from their terror when killed. We were asked to assume these facts. It is certainly not a presumption of law, and as a presumption of fact, it is too violent to base a verdict upon. A horse when badly frightened runs at the top of his speed and soon exhausts himself, and with such exhaustion his terror naturally diminishes. It is possible, but not probable, not sufficiently so at least for us to assume it, that a horse could continue to run over five miles without practically recovering from his fright.

No one will contend that if these horses had so recovered, had wandered upon the railroad track as any other stray horses would do, and were then killed by a passing locomotive, that the township would be liable. The negligence in such case would not have been the proximate cause.

In any view of this case, admitting the facts we are asked to assume to have been proven, the strain is sufficiently severe to connect the killing of the horses with the act of negligence. We will not add to the strain by assuming facts which have not been proven, and which are in themselves doubtful, if not improbable.

The defendant's fifth point should have been affirmed without qualification.

The judgment is reversed and a *venire facias de novo* awarded.

GRIFFITHS v. SEARS, ASSIGNEE, TO USE, ETC.

May 10, 1886.

STOCK GAMBLING—MARGIN—SET-OFF—DECLARATION OF—ASSIGNEE—ESTOPPEL.

The consideration of a bond given by way of margin, to secure a settlement of differences in a stock gambling transaction is void, and such bond cannot be enforced.

In order that a declaration of no set-off may operate as an estoppel, it must be made to one who acts upon it, who has reason to rely upon it, and who is thereby induced to alter his condition upon the faith of it. The protection which the declaration of set-off affords is not confined to the immediate assignee to whom or for whose security it was made, but any subsequent assignee claiming under him may avail himself of it.

The assignee of a bond, if he would have the declaration of no set-off of the obligor operate in his favor as an estoppel, must show that he or some prior assignee was a *bona fide* purchaser for value upon the faith of it.

The valuable consideration for the assignment must have been actually paid before notice of an adverse prior right; where part of the price only has been paid before notice, the purchaser is entitled to the protection of a *bona fide* purchaser *pro tanto*.

Error to the court of common pleas, No. 3 of Philadelphia county.

Griffiths bought and continued to buy stock on a margin through Newhall, a broker. In order to protect Newhall, Griffiths with his mother and sister gave him a bond and mortgage; later Newhall arranged to assign the bond and mortgage to Sears, and Griffiths delivered to Newhall a written certificate that the obligors had no defense thereto, whereupon the assignment was made; the bond was entered in the name of Sears; later the mortgaged premises were sold upon a *vend. ex.*, and purchased by Newhall, to whom Sears re-assigned the judgment; later Newhall agreed to assign the judgment to Records for \$1,000, but \$100, however, was paid; later a rule was granted to show cause why the judgment should not be opened. On the following day Records, in consideration of \$1,400—to be paid, assigned the judgment to Perot, who drew his check for \$1,400—to the order of Browne, who was the attorney of Records. Browne received notice of the rule, and held the check till the rule was discharged, when it was presented and the money paid. An appeal was taken to the supreme court, and the decree of the common pleas was reversed and the judgment opened. The record was returned, and after plea pleaded and tried, the jury found a verdict for plaintiff.

James Watts Mercur, for plaintiff in error. Transactions in stocks by way of margin and settlement of differences and payment of the gain or loss without any intention to deliver are mere wagers, which the law will not enforce. *Bruas' Appeal*, 55 Penn. St. 294; *Smith v. Bouvier*, 70 id. 325; *Flareira v. Gabell*, 89 id. 88; *Worth v. Phillips*, id. 250; *Gheen, Morgan & Co. v. Johnson*, 90 id. 38; *Ruchizry v. De Haven*, 97 id. 202; *Dickson, Executor, v. Thomas*, id. 278; *Griffiths' Appeal*, 16 W. N. C. 249. The only question in this case is whether Newhall's assignees stand in a different position, or have any greater equities than himself. This being a gambling contract it is void *ab initio*. Gambling contracts are void, and every contract, note, bill, bond, judgment, mortgage, or other security whatever, given for

security or satisfaction of the same, shall be utterly void and of no effect. Act of 22d of April, 1794, Purd. 728, § 8. Such note is void even in the hands of an innocent holder for value. *Unger v. Boas*, 13 Penn. St. 601. The declaration of no set-off from Griffiths to Sears does not preclude Griffiths from setting up a defense as against Records or Perot. In order that a declaration of no set-off may operate as an estoppel it must be made to him who acts upon it, who has reason to rely upon it, and who is thereby induced to alter his condition upon the faith of it. *Weaver v. Lynch*, 25 Penn. St. 449; *Robertson v. Hay*, 91 id. 242; affirmed in *Griffiths' Appeal*, 16 W. N. C. 249. Both Records and Perot were unwilling to buy the judgment with the declaration without a guaranty, and Mr. Perot testified: "I do not know that I would have purchased the judgment, with the old declaration of no set-off, without the guaranty." The equitable principle of *bona fide* purchaser does not apply to the assignee of a judgment. At any rate, in this case, at the time the rule to open judgment was entered, Records had merely agreed to purchase the judgment, and had paid but \$100 on account of the sale, and had a guaranty from Newhall, the owner, that the sum of \$1,976 was due and payable, and that the defendants had no set-off to the same. He paid the balance with a full knowledge of the defense. When Perot bought, October 28, 1885, it was after the rule to open judgment had been entered, and after the counsel of Records had been notified of the rule. This was notice to him, Perot, of the nature of the transaction and the step taken to defeat the judgment. After his check had been drawn he could even then have stopped payment thereof had he desired, for he was notified by Mr. Browne that the rule had been entered, and that he was holding the check. On October 27, 1884, the defendant, E. E. Griffiths, took a rule to open judgment, and he be let into a defense as to Harry F. Newhall. This rule was discharged by the common pleas, but, upon an appeal to the supreme court, the decree or order of the common pleas was reversed and the rule made absolute. In other words, the judgment was opened, and the defendant allowed to defend against Harry F. Newhall. This being one continuous proceeding, how is it possible to substitute other plaintiffs and give to them greater equities than Newhall had. Having been substituted, they assume the same position Newhall had, and if he could not recover, certainly they could not.

William H. Browne, for defendant in error. A declaration of no set-off made known to an innocent purchaser before the sale to him of a judgment estops all defense to such judgment, as to facts existing at the date of such declaration. Undoubtedly the debtor may be estopped as against the assignee, by the declaration that he has no set-off or defense to the debt assigned. In the face of such a declaration, he cannot set up his defense against an assignee who takes on the faith of it. *Ashton's Appeal*, 23 Smith, 153; *Weaver v. Lynch*, 1 Casey, 449; *McMillen v. Rudy*, 16 S. & R. 18; *Hutchinson v. Gill*, 10 Norr. 253. One having a good defense against his bond, though ignorant of the same, promises to pay it, in confidence whereof another obtains an assignment, the obligor is concluded thereby. *Carnes v. Field*, 2 Yeates,

451; *Elliott v. Callen*, 1 P. & W. 24; *Buchanan v. Wertz*, 5 Watts, 151. It matters not whether the representation proceeded from ignorance, carelessness or design. *Edgar v. Kline*, 6 Barr, 327. A defendant cannot give in evidence his own fraud in defense against his own act, whether it be an absolute deed, or a mortgage, or a confession of judgment. *Gill v. Henry*, 14 Norr. 388; *Sherb v. Endies*, 3 W. & S. 255; *Evans v. Dravo*, 12 Harr. 62; *Hendrickson v. Evans*, 1 Casey, 441. Where a loss must fall on one of two innocent persons, it shall be borne by him whose act occasioned it. *Robinson v. Justice*, 2 P. & W. 19. Any subsequent assignee of a judgment may avail himself of a declaration of no set-off made to any prior assignee. "The benefit of this declaration is not confined to the immediate assignee, to whom or for whose security it was made, but any subsequent assignee claiming under him may avail himself of it." *Burns v. Ashton*, 4 Brewst. 451; *Ashton's Appeal*, 23 Smith, 153. A declaration of no set-off to a mortgage is in effect that the mortgagee shall negotiate the mortgage. It is an acknowledgment that he has received full consideration. *Hendrickson v. Gill*, 10 Norr. 253. The law will take cognizance of the rights of equitable plaintiffs, and permit their substitution at any stage of the legal proceedings. Before notice of the rule to open judgment had been given to any of the parties in interest, two distinct sales of the judgment had been made for valuable considerations to *bona fide* purchasers. The interest of Newhall had been divested, and it is a singular theory to advance, that as to the parties, the record on the court docket, made four and a half years ago, should remain unchanged by the substitution of the last purchaser, as an equitable plaintiff. The mere fact, that on October 27, 1884, when Griffiths took the rule to open judgment, and be led into a defense, the docket disclosed no transfer or assignment to either Records or Perot, would surely not preclude them from making known their rights when the judgment was assailed. Record notice of conveyances and assignments is only of value in its bearing upon the rights of parties not privy to the original transaction. Immediately after the rule to open judgment was discharged by the court below, and nearly two weeks before the first appeal was taken to the supreme court, the substitution of Perot's name, as the equitable plaintiff, was made on the court record. The supreme court subsequently sent the case back to the court below, in order that a jury might pass upon the facts. Records and Perot then for the first time testified in the case, and the jury gave their verdict against Griffiths on testimony which was never before the appellate court.

CLARK, J. The eighth section of the act of 22d April, 1794—3 Sm. 181—has no application to this case. The bond in suit was not given for security or satisfaction of moneys lost "in cock-fighting, bullet-playing or horse-racing, or at or upon any game of address, game of hazard, play or game whatsoever," within the purview or meaning of that act; if it had, it would, in the language of that act, have been "utterly void and of none effect." *Unger v. Boas*, 1 Harr. 601. It was given, by way of margin, to secure a settlement of differences in a stock gambling transaction between Newhall and Griffiths; the con-

sideration, therefore, was void — *Elliot, for use, v. Callan*, 1 P. & W. 24 — and, unless Griffiths is precluded from setting up the truth in defense, the law will not lend its aid to enforce the contract. *Griffiths' Appeal*, 16 W. N. C. 249.

The bond in this case was dated 8th May, 1880, and was accompanied by a mortgage. Newhall having arranged to assign these securities to one John V. Sears, Griffiths, on the 8th June, 1880, delivered to Newhall a formal certificate, in writing, declaring that the defendants had no defense whatever thereto; that the assignment to Sears was made with their full knowledge and consent, and that the whole principal sum of \$2,000, with the interest, was then due and unpaid. The assignment to Sears was consummated in September, 1881; it is conceded, however, that Sears was not a purchaser for value; he was the mere nominal holder of the securities for the benefit of Newhall, and never had any title to or interest therein. The bond having been entered in Sears' name, the mortgaged premises were sold upon a *venditioni exponas* issued thereon, and were purchased by Newhall, to whom Sears afterward reassigned the judgment. The contest now is upon the balance of the judgment entered on the bond.

On the 8th October, 1884, Newhall agreed, in consideration of \$1,000, payable in thirty days, to sell and assign the judgment to E. J. Records; \$100 only of the consideration was paid in hand, and, on the 27th October following, a rule was granted to show cause why the judgment should not be opened. On the 28th October, 1884, Records, in consideration of \$1,400 to be paid to him, assigned the judgment to T. Morris Perot. Mr. Perot drew his check for \$1,400 to the order of W. H. Browne, Mr. Records' attorney; Browne received notice of the rule, and held the check until the rule to show cause was discharged by the common pleas, when he presented the check and paid over the money. An appeal was taken to the supreme court, however, where the decree of the common pleas was reversed, and the judgment opened.

Mr. Records testifies that, at the time of his purchase, on the 8th October, 1884, he had no knowledge whatever of the nature of the transactions between Newhall and Griffiths; that the declaration of no set-off, exhibited to him by Newhall, was the inducement to his purchase, and that, on the 28th of October, 1884, when he sold to Perot, he had no knowledge of the rule taken on the 27th. Mr. Perot testifies, also, that at the time of the transfer to him he was informed that the declaration of no set-off existed; that he had no knowledge either of the original consideration of the bond, or of the entry of the rule, that he gave his check to Mr. Browne for the \$1,400 on the 28th of October, 1884, and that a few days after that he was first informed of the rule.

It is contended, on part of the defendant in error, that Records was a *bona fide* purchaser of the judgment for value, and that as such he is protected by the declaration of no set-off, which was exhibited to him at the time of his purchase. As we said in *Griffiths' Appeal*, 16 W. N. C. 249, in order that a declaration of no set-off may operate as an estoppel, it must be made to him who acts upon it, who has reason to

rely upon it, and who is thereby induced to alter his condition upon the faith of it. By this it was not meant, of course, that the declaration must be renewed at each successive assignment; the protection which it affords is not confined to the immediate assignee to whom or for whose security it was made; any subsequent assignee claiming under him may avail himself of it. *Ashton's Appeal*, 23 P. F. S. 153. Such declarations operate in favor of all those whose conduct it may fairly be supposed they were intended to influence; but strangers casually hearing of them cannot, by acting upon them, preclude the party from showing the truth.

The certificate which Griffiths gave, although made in contemplation of an assignment to Sears, was in the most general terms, and as in the case of *Hutchinson v. Gill*, 10 Norr. 253, was, in effect, an agreement that the mortgage might be negotiated. The purpose of the certificate was to make the mortgage an available means of raising money by the sale of it, and Sears was the medium through which that was to be effected. There is no suggestion of fraud in obtaining the certificate, or that the certificate was given any greater effect than was intended by the parties.

But, in order that the declaration of an obligor may operate as an estoppel, in favor of an assignee of his bond, the latter must show that he or some prior assignee was a *bona fide* purchaser for value upon the faith of it. *Weaver v. Lynch* 25 Penn. St. 449; *Ashton's Appeal*, 73 id. 153. An assignee of a bond, with notice of the illegality of the contract which forms the consideration, will not be protected by a declaration of no set-off. *Duquesne Bank's Appeal*, 74 Penn. St. 426.

"The ground of this equity," as this court said in *Edgar v. Kline*, 6 Barr, 327, "is the loss which must fall upon an innocent party; and it is incumbent upon him who would have advantage of it to show that he paid or gave value for the chose in action he seeks to recover, for without that no loss to him can happen. Where this has not been done, he — the assignee — is a bare donee with no other rights than those which appertained to the original holder of the security assigned, and, of course, open to every defense which might have been made available against him."

But not only must there be in fact a valuable consideration for the assignments, but that consideration must have been actually paid before notice of the adverse and prior right; where part of the price only has been paid before notice, the purchaser is entitled only to the position and protection of a *bona fide* purchaser *pro tanto*. *Pomeroy Eq.*, § 751. Therefore, a purchase of a trust estate, without notice of the trust, was held to be protected only to the extent of his payments made before notice. *Beck v. Uhrich*, 1 Harr. 636. So in *Juvenal v. Jackson*, 2 id. 519, where an assignee of a ground rent received notice from the purchaser of the land subject to the ground rent, of an equitable defense to the payment of the rent, after he had made partial payments to the vendor, but before payment of the whole purchase-money, the assignee was held to be affected by the notice, and this court said, if he had paid the whole purchase-money when notice was received, he would have been protected for the whole; if he had paid part only, he

would have been protected for so much, and if he had paid nothing, he would be protected for nothing. The principle is one of general application, and governed alike in the transfer of property and in the assignment of choses in action.

Nor is it sufficient that the consideration has been secured by contract, bond, or mortgage, equity will protect the purchaser against the payment of it; he may thoroughly protect himself, although he has accepted the deed or assignment, and given his bonds and must, therefore, be considered a volunteer so far as he has not paid the purchase-money. *Union Canal Company v. Young*, 1 Wh. 431; *Rodgers v. Hall*, 4 Watts, 362; *Hoffman v. Strohecker*, 9 id. 183; *Wilson v. Houser*, 2 Jones, 116.

It is admitted that Records only paid \$100 in hand, and that before payment of the balance, he had full notice of the proceedings to open the judgment, upon the express ground that the consideration of the bond was illegal and void. Excepting as to the \$100, therefore, he must be treated as a volunteer; he is not entitled to the protection of a *bona fide* purchaser as to the residue. What may appear as to the \$100, in another trial, we do not know, we speak of the case as it is now presented.

The rule to open the judgment was entered in the common pleas as we have said on the 27th October, 1884; on that day, therefore, notice was spread upon the record of the judgment itself, which was the subject of the sale; not only so, but a written notice of the fact was given to the attorney of record for Mr. Newhall, then the actual owner of the judgment.

How does the case stand as to Mr. Perot? The purchaser of a judgment is ordinarily charged with the inspection of the record of that judgment, and is, therefore, in general, affected with notice of any rights which it plainly discloses. Therefore it has been repeatedly held, if an assignee of a judgment fail to have his assignment noted upon the record, he will be postponed to a subsequent assignee for value, without notice; but if the first assignment be noted, the subsequent assignee will be affected with notice of the fact. *Fisher v. Knox*, 1 Harr. 622; *Campbell's Appeal*, 5 Casey, 401. For says Chief Justice GIBSON in the case first cited: "Though no law required such an assignment to be docketed, the practice to mark the judgment to the use of the assignee is universal, and it ought to have been pursued here; for no prudent purchaser of a judgment invests his money in it before the record has been inspected. From what else could he derive information? He has nothing for it but the honor of the assignor; and any one who leaves it in the power of another to deceive, may be said to collude with him beforehand."

If Mr. Perot had searched the record of this judgment, on the 28th October, 1884, he would have found full notice of the defendant's alleged defense, as set forth in the petition, then on file and noted on the record. If it be said that the certificate of no set-off dispensed with this duty, it may be replied that Perot did not even see the certificate; he seems to have relied wholly upon the word and warranty of Records; indeed it does not appear that the certificate was the inducement to his purchase.

But even if there was no duty on the part of Perot to inspect the record of the judgment, under the special circumstances of this case we are of opinion that the delivery of the check cannot be considered actual payment of the consideration. The application to open, as we have said, was made and noted upon the record on the 27th October, 1884, and on the next day he gave his check to Browne. He was afterward informed by Browne that a defense had been taken against payment of the judgment, on the express ground of the illegality of the consideration. He took no steps to stop payment of the check, he made no request that the check be returned; instead of that, he agreed that Browne might hold the check until the rule was discharged, and that it might then be presented for payment. Browne did exactly as he agreed; the rule was discharged and the check was presented and paid. The check might have been, but in fact was not negotiated. He might have stopped the payment, or had the negotiation of it enjoined, but he did neither; it was presented and paid with his approval.

Under the admitted facts of the case, neither Records nor Perot, excepting as to the \$100, paid in hand, can in the law be regarded as purchasers for value without notice.

The judgment is, therefore, reversed, and a *venire facias de novo* awarded.

CHILDS v. NAPHEYS.

May 10, 1886.

PHILADELPHIA — BUILDING INSPECTORS — SUPREME COURT — COMMON PLEAS — JURISDICTION — INJUNCTION — BREACH OF THE PEACE.

The common pleas of Philadelphia has no power to review upon the merits the action of the building inspectors taken under the act of May 20, 1857 — P. L. 590 — entitled "An act in relation to party walls;" its jurisdiction extends no further than to enforce the decision of the inspectors.

The supreme court has no power to reverse a decision of the building inspectors rendered under the act of 1857, unless, perhaps, for a shown irregularity in condemning a wall.

The decision of the building inspectors under the act of 1857 is a finality, and if one building is, in the taking down of a condemned wall, interfered with, the common pleas may extend its equity power, and restrain such interference by injunction, or should the interference amount to a breach of the peace, the quarter sessions may bind the offending party over.

Certiorari to the court of common pleas, No. 4, of Philadelphia county.

Napheys having bought a lot of ground running south from Spruce street through to Cypress street, in the city of Philadelphia, was building thereon a large lard refinery. In obedience to law he applied to the building inspectors to regulate the walls between his ground and that of Childs, and they decided that the wall of Childs, which adjoined that of Napheys' ground on the east, was insufficient for the purposes of the new building about to be erected, and they thereupon condemned it.

Childs was the occupant — not owner — of a wheelwright and blacksmith shop, No. 309 Cypress street, extending in depth northward part way to Spruce street. It was the western wall of his shop which was condemned.

After Napheys had made his excavations and gotten his wall partly erected, it became necessary for him to remove the condemned wall, but on attempting to do so, he was forbidden by Childs, to touch it.

Application by petition was made to the court of common pleas for relief. The court fixed a day for hearing the matter; of which time notice was sent to Childs the next morning, and on the following morning a copy of the petition was sent to him.

At the hearing both parties were represented by counsel. The petition was formally presented and the answer read. Proofs were submitted, the building inspectors' notice of condemnation, the official plans of the district surveyor, etc., etc.

The court was about to make the order when it was shown by Childs' counsel that the building inspectors had made a clerical error in their notice of condemnation, by putting in the number of Childs' residence, No. 320 Cypress street, instead of No. 309, which was his shop, the wall on which we then intended to condemn.

The hearing was, therefore, postponed in order to give time to serve an amended notice of condemnation; and leave was given to file an amended petition, and to allow time for an appeal by Childs to the board of surveyors. On that same day the corrected notice of condemnation was served on Childs. On the appointed day the parties and counsel were again in court. The amended petition was presented. The next day Childs' counsel admitted that the notice of condemnation had been served five days before, and that he had taken no appeal. Whereupon a decree was made.

The proceeding was based on the first section of the act of 20th May, 1857 — P. L. 590, Purd. 1307, pl. 27 — which reads as follows:

“§ 1. That it shall be the duty of the inspectors of buildings of the city of Philadelphia, upon the application of any person or persons about to erect on his or their lot or lots of ground any new building or buildings, according to the provisions of the act of the first day of May, Anno Domini one thousand eight hundred and fifty-five, entitled ‘An act to provide for the regulation and inspection of buildings,’ to examine all such party or division walls upon or adjoining said lot of ground, and which shall have been erected prior thereto, and if deemed and adjudged by them to be insufficient and unfit for the purpose of such new building about to be erected, such party or division walls shall be removed and taken down by the last builder; the cost and expense of which removal, together with the cost and expense of the new wall or walls to be erected in lieu thereof, shall be borne and paid exclusively by him: Provided, however, that an appeal from the decision of the building inspectors may be had to the board of surveyors, in conformity with the provisions of an act entitled ‘An act to provide for the better regulation of buildings in the city of Philadelphia,’ approved May seventh, Anno Domini one thousand eight hundred and fifty-five; and in settlement of their accounts the said inspectors shall file in the court of common pleas of said city on the first day of June annually hereafter, a full statement of their receipts and expenditures, which account shall be audited by said court, and on their order, the

balance, if any found to be in the hands of said inspectors, shall be by them paid into the city treasury for the use of the said city; and all acts or parts of acts inconsistent with or contrary to the provisions of this act, be and the same are hereby repealed."

J. Howard Morrison and *Henry B. Freeman*, for appellant. The petition, answer and decree are in the nature of an ejectment bill. The petition is shown by the answer to be an attempt to obtain possession of a wall, built entirely upon respondent's land, by calling it a party wall, and then by rebuilding obtain possession of land space which is in dispute as to ownership. The principle is well settled that a court of equity has no jurisdiction to determine a mere question of legal title. *Penn. Coal Co. v. Snowden*, 42 Penn. St. 438; *Bently v. Kenyon*, 2 Luz. Obs. 316. A court of equity has no jurisdiction of a question of disputed boundary where the parties hold legal estates. *Norris' Appeal*, 64 Penn. St. 275; *Kennedy's Appeal*, 32 Sm. 163; *Messimer's Appeal*, 92 Penn. St. 168; *Long's Appeal*, id. 171; *Barclay's Appeal*, 93 id. 50. A similar case to the one here, was that of *Tilmes v. Marsh*, 17 P. F. S. 507, which decides that ejectment is the proper remedy to recover possession of the soil subject to either a private or public easement, and that an equitable remedy by bill will not lie. The court below erred in finding that the wall is a party wall. A party wall is defined by Bouvier to be "a wall erected on the line between two adjoining estates belonging to different persons for the use of both estates." Here the answer denied every fact which is essential to the existence of a party wall. 1. That it was built equally on land of each owner and that any part is situate on the petitioner's land. 2. That the petitioner had any property whatever in the wall or the land on which it stood. The undenied facts of the answer show, this, and go further and show that the petitioner was fully notified and informed of such fact by his grantor, previous to the sale of the premises to him. The fact that the building inspector condemned the wall as a party wall can have no weight in deciding that it is such. *Lyster v. Bitner*, 7 Phila. 348, and cases cited. The court below erred in entering the decree as of September 24, 1883, because the time for taking an appeal to the court of common pleas as allowed by law had not elapsed. It will be seen, upon looking at the various acts of assembly, that they are dependent upon one another, and taken together form a system which requires and embraces the provisions of all to make it stand. By the act of 1782 an appeal from the then regulators — whose duties are now exercised by the building inspectors — was given to the court of common pleas. This provision has never been expressly repealed, and as no enactment inconsistent with this right of appeal has ever been passed, it certainly has not been by implication. If two statutes can stand together there is no repeal by implication. *Erie v. Bootz*, 22 P. F. S. 196; *Barber's Appeal*, 5 Norr. 392; *Sifred v. Commonwealth*, 15 W. N. C. 373; *Homen v. Commonwealth*, id. 337. Where two methods of procedure are given by different acts the first is not repealed by implication. *Erie v. Bootz*, *supra*; *Barber's Appeal*, *supra*; *Sifred v. Commonwealth*, *supra*. In this case the procedure by the petitioner is under the act of May 7, 1855, under

which an appeal certainly lies to the common pleas court. The question then arises, does the provision—in the act of May 20, 1857—giving an appeal to the board of surveyors according to the act of May 7, 1855—there being no act of that date giving any appeal to such a tribunal in existence—repeal the third section of the act of April 15, 1782? We certainly do not think that such is the case, for even allowing that the appeal to the board of surveyors is sufficiently given, yet the right to appeal to the common pleas is not inconsistent with it, and under the cases cited above should not be held to be repealed by implication. If, therefore, the right of appeal to the common pleas still exists, the court were entirely wrong in not dismissing the bill.

J. C. Stillwell and *E. Coppée Mitchell*, for appellee. The whole proceeding is summary in its character, and framed so as to avoid the great inconvenience of stopping a building in favorable seasons, after contracts are made, materials provided, workmen hired, etc., etc. It would be a monstrous injustice to say that a builder could be hung up by an appeal all summer, until the supreme court could be called on to pass upon questions of sufficiency of the thickness of walls, etc., etc. Such proceedings are not the subjects of appeal. *Evans v. Sayre*, 11 Harr. 34.

PAXSON, J. The wall of the plaintiff in error was condemned as insufficient by the building inspectors, under the act of 20th of May, 1857—P. L. 590—entitled “An act in relation to party walls.” Said act is as follows: “That it shall be the duty of the inspectors of buildings of the city of Philadelphia, upon the application of any person or persons, about to erect on his or their lots or lot of ground any new building or buildings, according to the provisions of the act of the 1st of May, A. D. 1855, entitled ‘An act to provide for the regulation and inspection of buildings, to examine all such party or division walls upon or adjoining said lot of ground, and which shall have been erected prior thereto, and if deemed and adjudged by them to be insufficient and unfit for the purpose of such new building about to be erected, such party or division walls shall be removed and taken down by the last builder, the cost and expense of which removal, together with the cost and expense of the new wall or walls to be erected in lieu thereof, shall be borne and paid exclusively by him. Provided, however, that an appeal from the decision of the building inspectors may be had to the board of surveyors, in conformity with the provisions of an act entitled ‘An act to provide for the better regulation of buildings in the city of Philadelphia,’ approved May 7th, A. D. 1855,” etc.

In *Evans v. Jayne*, 23 Penn. St. 34, it was said by this court that “there can be no available objection to the principle upon which our law as to party walls is based. The law as to partition fences involves the same principle. . . . The principle is no invasion of the absolute right of property, for that absolutely involves a relative, in that it implies the right of each adjoiner, as against the other, to insist on a separation by a boundary more substantial than a mathematical line. This imaginary line is common, and so ought the real one to be, and it is only in the character of this that the difficulty lies which requires legislation. When it is constructed, the regulation

of its enjoyment and repair is as plain as that belonging to any other property held in common. And there is nothing more severe in submitting the question of the sufficiency of walls in the city to the city surveyor, than there is submitting the sufficiency of fences in the country to fence viewers. The principle is the same, and if the interests involved in the one case are greater than in the other, it is only because of the nature of city property, that it requires more expensive partition walls or fences than are required in the country. The provisions of the law are substantially the same in both cases."

This language was applied to the act of 5th of April, 1849 — P. L. 411 — but it is equally applicable to act of 1857, above quoted. The act of 1849 is not given in Purdon, for the reason, probably, that the editor regards it as superseded or supplied by the act of 1857. Both acts were clearly intended to give a summary remedy for settling disputes in regard to party walls. That some such remedy is essential in large cities is self-evident. If the erection of buildings is to be delayed pending ordinary common-law or equity proceedings, such delays would be ruinous and intolerable. The act of 1857 refers the whole matter to the building inspectors, with an appeal to the board of surveyors, as provided by the act of 1855. It is manifest that this reference to the act of 1855 is a mistake, however, as that act does not relate to the taking down of party walls, and there is no provision in it for an appeal to the board of surveyors. Moreover, the title to the act of 1855 does not correspond with the statement of it in the act of 1857. The act of 11th of April, 1856 — P. L. 320 — has a title in exact accord with the description thereof in the act of 1857, the fourth section of which authorizes the building inspectors to examine and condemn all walls alleged to be dangerous, and provides for an appeal within three days to the board of surveys. It is probable the reference to the act of 1855 in the act of 1857 was a blunder of the draftsman, or a mistake in transcribing, in substituting the act of 1855 for that of 1856. If not, then no appeal is given by the act of 1857, and the reference to the act of 1855 is a nullity.

The wall in question was condemned by the building inspectors upon notice to the plaintiff. He refused to take down the wall, or to allow the defendant to do so, whereupon the latter applied to the court of common pleas by petition setting out the facts and praying for an order upon the plaintiff in error to take down said wall, or permit the petitioner to do so. An answer was put in by George K. Childs, plaintiff in error, and, after a hearing, the order prayed for was made.

A number of assignments of error have been filed to this action of the court below, the most material of which are, first, that no affidavit of facts had first been filed by the building inspectors setting forth the said violation particularly, and second, there was no proof of the allegations of fact in the petition which were denied in the answer.

It seems to have been assumed in support of the second objection, that it was the duty of the court below to have referred the case to a master, to have found the facts as in the case of a bill in equity. This view entirely ignores the whole scope and spirit of the act of 1857, which was intended, as before stated, to give a summary remedy.

Under that act, the decision of the building inspectors was final and conclusive, saving only an appeal to the board of surveyors which must be taken within three days. The act gives no appeal to the court of common pleas, and that court has no jurisdiction to review the case upon the merits. If it has jurisdiction at all, it is only to enforce the decision of the building inspectors, as was done in this case. Aside from this, the case is here upon a *certiorari*, which brings up nothing but the record. The testimony upon which this court below acted is not here, and we must presume, so far as disputed questions of facts are concerned, that they were decided upon evidence satisfactory to the court. It might have been done by oral testimony at bar.

In regard to the absence of an affidavit, it is to be observed that the act of 1857 does not, as the act of 1849 did, contain a provision requiring the court of common pleas to enforce the order or decision of the building inspectors. Such a proceeding is not essential under the act of 1857, and I can see no necessity for going into that court for such a purpose. The decision of the building inspectors is a finality, and the act declares that "the wall shall be taken down by the last builder," and if the latter is interfered with in doing so, it is simply an unlawful interference which any court of common pleas may, by virtue of its equitable powers, restrain in a summary way by an order or an injunction, or if such interference amounts to a breach of the peace, the court of quarter sessions would have the power to bind the offending parties over to keep the peace.

The tenth section of the act of 7th May, 1855—P. L. 468—has no application. That section provides certain penalties for erecting buildings contrary to the building laws, and authorizes the court of common pleas upon petition, verified by the oath or affirmation of a building inspector, to restrain such unlawful erection by an injunction. It has no reference to the question of the condemnation of party walls.

The further point was made that the appeal given by the act of 24th February, 1721—1 Sm. L. 124—and the act of 15th April, 1782—2 id. 48—has not been taken away by the subsequent legislation.

It is a sufficient answer to this to repeat what was said by this court in *Evans v. Jayne*, *supra*, in speaking of the act of 1849: "This proceeding was under the act of 5th April, 1849, and the process there provided is complete in itself without any appeal, and we cannot imply that any was intended, and herein too it resembles the fence laws."

If, however, we concede that the proceedings below were irregular for want of an affidavit, it would not help the plaintiff in error. It was admitted upon the argument, that the wall has been taken down and rebuilt. The court below merely enforced the decision of the building inspectors. There is and was no appeal from the latter to that court. There might, perhaps, have been an appeal to the board of surveys, but there was none. It would do no good to reverse the court below for simply enforcing the order of the building inspectors, unless we could at the same time reverse the decision of the building inspectors. This we have no power to do, unless perhaps for an irregularity in condemning the wall, and this has not been shown.

The proceedings are affirmed.

MECKEL'S APPEAL.

May 10, 1886.

BILL OF REVIEW — ORPHANS' COURT.

A bill of review in the orphans' court is a matter of right. Where a proper case is set forth in the petition for a review, and the facts are verified by affidavit, it is the duty of the court under the act of October 13, 1840, to grant a rehearing, unless the case falls within the *proviso* of the statute.

Appeal from the orphans' court of Luzerne county.

August Stiebens, a native of Prussia, without relatives, family or friends in America, was a day laborer, residing at Plymouth. He worked in the mines. In September, 1879, he obtained lodging at the hotel of Mrs. Charles, sleeping in the attic, buying for himself and eating in his room, the bulk of his food. In April, 1881, he left Mrs. Charles' house and lodged elsewhere, until his death, April 2, 1883. After his death it was discovered that he had left hoarded and hidden the sum of \$800. It was supposed that he had died without kindred. Mrs. Charles presented a claim of \$296.25 for board and lodging of decedent during the entire period, one year and seven months of his sojourn at her house. During the two years which elapsed before his death, she made no effort, by demand, suit, attachment of wages or otherwise, to collect the amount she claimed. The orphans' court in auditing the account filed by the administrator of Stiebens, allowed the claim of Mrs. Charles.

After the audit was closed, the widow and heirs of Stiebens, who were residents of Prussia, and who had not an opportunity to be heard at the audit, requested the court to reopen the hearing and to accord to them such opportunity.

The request was refused, and the original finding was confirmed, and a decree was entered accordingly.

H. A. Fuller and *Gustav Hahn*, for appellant. Reverse the situation and suppose Stiebens to be a claimant under like circumstances against the estate of Mrs. Charles, for wages earned in her employ as a servant. This court would promptly defeat such a claim by a presumption of payment. *McConnell's Appeal*, 1 Out. 31. "The presumption rests upon the known fact that in England, as a general rule, servants' wages are paid at stated periods, and upon the further fact that a servant rarely leaves the service of an employer and remains away for months, or for years, without a settlement of some sort or at least a demand for payment. It is a presumption which the law raises from a known course of dealing," per *PAXSON, J.* Precisely the same principle, the same presumption exists here. In *Estate of Sarah J. Larkins*, 42 Leg. Int. 446, a claim was presented for "fourteen weeks' nursing at twelve dollars per week, and for one hundred and thirty-eight weeks' washing at fifty cents per week," and rejected because, said *PENROSE, J.*, "the case falls precisely within the principle of *McConnell's Appeal*." See, too, *Greenl. Ev.*, § 38; *Whart. Ev.*, § 1362; *Dunwoody's Estate*, 39 Leg. Int. 416. "Claims which on their face have been accruing for years, but which are delayed in their presentation as legal demands until after the death of the alleged debtor, come before the court discredited by the claimants' own acts and every fair intendment will be made against them." *Pecken's Estate*, 14 W. N. C. 407.

T. R. Martin, for appellee. There is not a whit of difference in determining the action and vigilance of creditors, where the debtor is known to be insolvent and where he is a miser and gives out the impression that he is insolvent, though he be in comfortable circumstances. What should be the duty of a person in asserting his rights and claims in a case of solvency, and what the law demands of him, he is absolved from where he has probable reason for believing his debtor insolvent. All the evidence in the case at bar, pro and con, rebut the presumption of payment, by showing what the habits of Stiebens were, which convinced all, who had any acquaintance with him, that he was impetuous. *Whart. Ev.*, § 1364. The complaints which the appellant makes against the finding of the court on the audit relate entirely to matters of fact. And this court has said, that matters of fact settled and decided by the orphans' court will not be re-examined in the supreme court, unless in a very flagrant case. *Akes' Appeal*, 9 Harr. 320; *Thomas v. Thomas*, id. 315. "The report of an auditor on the finding of an auditing judge is entitled to equal weight." — Justice PAXSON. *McConnell's Appeal*, 1 Out. 407.

GORDON, J. It was said in *Kinter's Appeal*, 12 P. F. S. 318, that the first section of the act of the 13th of October, 1840, was designed to make a bill of review in the orphans' court a matter of right, and at the same time prescribe a limitation of time to the exercise of the power. All this, however, is obvious enough from the reading of the act itself, and where a proper case is set forth on the face of the petition, and the facts therein stated are verified by affidavit, it is the duty of the court to grant a rehearing, unless the case falls within the proviso appended to the said act. As no exception to the regularity of the proceedings appears to have been taken in the court below, we cannot see why a review was not granted. There is certainly a very good reason why the widow and heirs should have an opportunity of contesting the account. They are foreigners and knew not of the settlement of that account. Besides this, the item which gave rise to the application for a rehearing, the bill of the appellee, seems to us of so doubtful a character as to require a scrutiny far more accurate and searching than it has yet received. It is idle for the counsel of Mrs. Charles to allege that she was entertaining Stiebens as an object of charity from whom she could expect no compensation, for, from the evidence, it is obvious that he was a steady, industrious and economical man, able and willing to pay for what he got, and that she should allow so large a bill to accumulate without even a demand for settlement has a very suspicious look. That he did work for her, and that to an amount sufficient, if the evidence is believed, to pay for his boarding, such as it was, can hardly be doubted. Moreover, she brought suit for this very bill, and chose to drop it after it reached the common pleas on an appeal, thinking, perhaps, that it would pass the scrutiny of the orphans' court more easily than that of a jury. However this may be, and we are not to be understood as passing judgment on her claim, the transaction has such a doubtful and trumped-up appearance that, even were the review not of right, we would feel ourselves constrained to order it.

Ordered, that the decree of the orphans' court be reversed at the costs of the appellee, that the confirmation of the account of the administrator of the estate of August Stiebens be opened, so far as the bill of the appellee against the said decedent is concerned, and that the said orphans' court proceed to rehear the same.

APPEAL OF JOHN KILLPATRICK AS NEXT FRIEND.

May 10, 1886.

GUARDIAN AND WARD — IMPROVEMENTS — NEW ERECTIONS — ORDER OF COURT — APPROVAL BY COURT — SURCHARGE.

A guardian judiciously and in good faith but without a previous order of court, erected upon premises of his ward's a shed to protect the barn-yard from winds; he also erected an ice-house. The shed was necessary and the ice-house was a great convenience. After the guardian had filed his account exceptions were filed thereto and an effort was made to surcharge him with the amounts expended by him for the improvements mentioned; the orphan's court approved of the expenditures. *Held*, that this subsequent approval by the court relieved the guardian of liability.

Appeal from the decree of the orphans' court of Erie county.

This was an effort to surcharge a guardian with the costs of improvements made to real estate.

E. P. Gould and *S. L. Gilson*, for appellant. *Davenport & Griffith*, for appellee.

PER CURIAM. There is no merit in this appeal. No collusion is shown between the guardian and other persons. Although the repairs and advances were made without previous order of court, yet they were afterward ratified and approved by the court as necessary and proper. The guardian took the risk of being surcharged for making these payments without being so authorized, yet subsequent approval thereof by the court relieves him from liability. There is no error in the decree. *Patterson's Appeal*, 104 Penn. St. 369.

Decree affirmed and appeal dismissed at the costs of the appellant.

APPEAL OF EDWARD J. FOX ET UX.

May 10, 1886.

TAX — REVENUE LAW — ACT JUNE 30, 1885 — CONSTITUTION — CORPORATIONS — ASSESSMENT — RETURN — PUNISHMENT — PENALTY — APPEAL — SUPREME COURT.

The act of 30th of June, 1885, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the 7th of June, 1879," does not extend the tax on moneys at interest, mortgages, etc., to corporations; it is not, however, for this reason unconstitutional.

As the first section of the act of 1885 was not intended to apply to corporations, the proviso exempting building associations from the operation of the statute is harmless.

The exception in the first section of the act of 1885 of "notes or bills for work or labor done," is a violation of the ninth article of the Constitution, and is void; therefore, such securities are subject to assessment and return under the act, the same as others in the hands of individuals.

The Commonwealth, having the right to tax moneys at interest, has the right to require tax payers to make known the extent of their property of that description, as well as the further right to punish a failure to make return, etc. This power can only be denied when it clearly conflicts with some constitutional pro-

vision, and if it is a matter of doubt, such doubt must be resolved in favor of the act granting it.

Were it not for the fact that, under the act of 1885, an appeal is allowed to the action of the commissioners, in adding the penalty of fifty per centum, it would be a question whether the act would not be in conflict with the fundamental principle that no man can be condemned in his person or property without a hearing.

The supreme court will not declare a revenue law of the Commonwealth unconstitutional, except in a clear case.

Appeal from the decree of the court of common pleas of Northampton county. The facts are set forth in the opinion.

James W. Wilson and Edward J. Fox, Jr., for appellants. We contend that the act of June 30, 1885, is in conflict with the Constitution of 1874 in several particulars: 1. It is in conflict with sections 1 and 2 of article 9, which are as follows: "§ 1. All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity. § 2. All laws exempting property from taxation, other than the property above enumerated, shall be void." The act of 1885 conflicts with these provisions: 1. Because it exempts building and loan associations from taxation under its provisions. 2. Because it exempts all manufacturing corporations from taxation under the revenue laws of the Commonwealth, except companies engaged in manufacturing gas and liquors. 3. Because it provides only for the taxation of the mortgages and other personal property of individual citizens, thereby exempting corporations of all kinds. The provisions of the Constitution are violated when the legislature taxes property in the hands of one class of persons and omits to tax property in the hands of other classes. A law may exempt persons from taxation, by omitting to provide for their taxation as completely as by an express provision exempting them. The Constitution says: "All taxes shall be uniform on the same class of subjects." Does it need an argument to this court to convince them that a subject of taxation may not be taxed on the hands of one set of men and not on the hands of another set? But the principle of section 2 of article 9 is violated by doing the very thing which that section says the legislature shall not do, that is, exempt other property than that specified in section 1. *Township of Londonderry v. Berger*, 2 Pears. 230. Sections 1 and 2 of article 9 being entirely new provisions in the Constitution of 1874, there have been few adjudications by the courts under it, and we, therefore, quote but few decisions upon this subject. *Lehigh Iron Co. v. Lower Macungie Township*, 31 Sm. 482; *Watson v. Chester & Del. River R. R. Co.*, 2 Norr. 254; *Indiana Co. v. Agricultural Society*, 4 id. 357. The legislature fulfilled its duty immediately after the Constitution of 1874 was adopted by passage of the act of May 14, 1874 — *Purd. Dig.* 1596, § 90 — exempting the property described in section 1 of article 9. *Commonwealth v. Penn. Coal Co.*, 2 Pears. 402, Dauphin county C. P.; affirmed by the supreme

court Feb. 12, 1876. Now, the act of June 30, 1885, does not tax all mortgages, but only the mortgages held by individual citizens. It is, therefore, not uniform, for it suffers to escape taxation mortgages to the value of many millions held by building associations, insurance companies, trust companies, manufacturing and other corporations. It may be said that we have erroneously assumed that only the mortgages, etc., of individual citizens are to be taxed. To this we answer that the act does not in any part of it provide for the taxation of the mortgages or money of corporations; nor is there any provision requiring any officer of any corporation to make a return, or inflicting any penalty for the neglect or refusal of any officer to do so. This question has been adjudicated by this court, and under the decision made in *School Directors v. Carlisle Bk.*, 8 Watts, 291, it is plain that corporations are not taxable under this act. *Saving Fund v. Yard*, 9 B. 361; *Sharpless v. Mayor*, 9 Harr. 168; *Chadwick v. Maginnis*, 13 Norr. 121. The title does not disclose the purpose of the twentieth section to abolish all taxes under all laws upon manufacturing corporations. *Dorsey's Appeal*, 22 Smith, 195. To the same effect is *Beckett v. City of Allegheny*, 4 Norr. 196. And also *Rogers v. The Manufacturers' Imp. Co.*, 43 Leg. Int. 66. Section 9 of the act of 1885 is unconstitutional. It is as follows: "Upon the refusal or failure of any taxable person to make a return, as required by this act, it shall be the duty of the assessor to make a return for such taxable person, estimating the amount from the best information at his command, to which estimated return the proper county commissioners or boards of revision shall add fifty per centum, and the aggregate amount so obtained shall be the basis of taxation." The provisions of this act make two bases of taxation. The citizen who makes a return is to be taxed upon his actual property. The citizen who does not make a return is to be taxed upon property which he does not own. The Constitution says that "all taxes shall be uniform upon the same class of subjects." The provisions of this section 9 undoubtedly violate the constitutional provisions, because the citizens of the State will not be taxed uniformly upon the same class of subjects, but unequally. If two citizens have each the same amount of personal estate, all invested in mortgages, each having \$10,000, one making a return, and the other failing to return, one will be taxed on \$10,000, and the other on \$15,000. One will pay, at three mills, \$30 tax, and the other \$45. Surely this is not uniformity. The legislature may provide a means for ascertaining the amount of a taxable person's property, if he fails to make a return. It may authorize, as this section does, the assessor to make a return for such taxable, and the tax payer must take the risk that the assessor may return a much higher amount than he owns. But when it is returned as the amount of the property of such citizen subject to taxation the legislature cannot provide that it shall be increased fifty per cent beyond its actual value. We doubt whether, under the Constitution, the legislature may do this, even when it provides that the citizen shall be subject to such a penalty for a failure to return. But this section does not provide that the additional fifty per cent shall be inflicted as a penalty; and it is, therefore, plainly taxing citizens unequally and not uniformly.

Geo. F. P. Young, Frank Reeder and W. S. Kirkpatrick, for appellees. The rule of interpretation of a State Constitution differs from that of the National Constitution. The latter instrument must have a strict construction, the former a liberal one. Congress can pass no laws but those which the Constitution authorizes either expressly or by clear implication; while the assembly has jurisdiction of all subjects on which its legislation is not prohibited. The powers not granted to the government of the Union are withheld; but the State retains every attribute of sovereignty which is not taken away. *Com. v. Hartman*, 5 Harf. 119; *Sharpless v. Phila.*, 9 id. 160-164; *Weister v. Hade*, 2 Smith, 474. It is very well settled that no statute is unconstitutional merely because it is wrong in policy or principle. It is not enough to prove that it is contrary to a sound public morality or injurious to private rights. Inconsistency with rules of law or principles of equity will not make it void. Nothing will have that effect but a direct collision between its provisions and those of the Federal or State Constitution. *Erie v. N. E. R. R. Co.*, 2 C. 30; *Com. v. Maxwell*, 3 id. 458; *Sharpless v. Phila.*, *supra*. "The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond all doubt that it is so," BLACK, Ch. J., in *Erie v. N. E. R. R. Co.*, *supra*. "To doubt is to be resolved in favor of the constitutionality of the act," SHARSWOOD, Ch. J., in *Commonwealth, ex rel. Wolfe, v. Butler*, 3 Out. 540. A law cannot be declared unconstitutional solely on the ground of unjust and oppressive provisions, or because it is supposed to violate natural, social or political rights, unless such rights are guaranteed by the Constitution. Cooley Const. Lim. (3d ed.) *164. The legislature is absolute whether it operates according to natural justice or not, in any particular case. The protection against unwise or oppressive legislation is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume that right. Cooley Const. Lim. *168. It might be sufficient to say here that guided and controlled by the foregoing principles, the law must be sustained. The new Constitution has really introduced no new principle. It has simply embodied in terse and emphatic language that which essentially qualified and controlled the power of taxation before. Taxation from the very nature of the power in a free government must be equal and uniform, except so far as from the imperfection of human appliances and the complexities of the relations of person and property, equality and uniformity are unattainable. *Grim v. School District*, 7 Smith, 433-439; Cooley Taxation, 127. "Class" is thus defined in Webster: "A group of individuals ranked together as possessing common characteristics." *Durack's Appeal*, 12 Smith, 491; *Kittanning Coal Co. v. Commonwealth*, 29 id. 100; *Kitty Roup's case*, 32 id. 211; *Wheeler v. Philadelphia*, 27 id. 349. It has been over and over again decided that the use of the word "person" in a tax law includes corporations. See *Louisville R. R. Co. v. Com.*, 1 Bush, 250; *Trupp v. Merch. Mut. Fire Ins. Co.*, 12 R. I. 435; *People v. McLean*, 80 N. Y. 255; *Com. v. Butler*, 3 Out. 541. Penalties to secure a return for the purposes of assessment have been recognized and sustained by our courts, notably

in the case of *Drexel & Co. v. Commonwealth*, 10 Wright, 31. In *Butler v. Bailey*, 2 Bay, 244, it was held competent to impose double taxes as a penalty for failure to make due return of property to be taxed. The penalty of an increased assessment or loss of right of appeal for failure to make return seems to have been recognized as valid in the following cases. *Otis v. Ware*, 8 Gray, 509; *Charlestown v. Middlesex*, 101 Mass. 87; *Lincoln v. Worcester*, 8 Cush. 63; *Sharp v. Appar*, 31 N. J. Law, 358; *Newell v. Town of Whittingham*, 3 East. Rep'r, 649; *Biddle v. Oaks*, 59 Cal. 294.

PAXSON, J. This bill was filed by the complainants in the court below against Edward Lerch, Renben Fehner and Tilghman Wolfe, commissioners of Northampton county, and Hiram Edelman, assessor of the sixth ward in the borough of Easton, to restrain the defendants from requiring the plaintiffs to make a return of their personal property for taxation under the act of June 30, 1885.

The bill avers that the complainants are residents of Easton and that Hiram Edelman is the assessor of the sixth ward, in which the plaintiffs reside. That he served a notice upon them requiring them to make a return of their personal property, viz.: mortgages, notes, etc., for taxation in accordance with the act of June 30, 1885; that upon the refusal of the plaintiffs to make such a return, the assessor would estimate the amount of their property and return the same to the county commissioners, who would add fifty per centum thereto and make the aggregate amount the basis of taxation of the personal property of the plaintiffs; that the act of June 30, 1885, is in conflict with sections 1 and 2 of article 9 of the Constitution, and also with section 3 of article 3. The bill then prays for an injunction to restrain the assessor from requiring the plaintiffs to make a return, and from estimating their said property and returning such estimate to the commissioners, and restraining the commissioners from adding fifty per centum to any estimate made by the assessor.

The answer of the defendants admits the statement of facts contained in the bill, but denies that the act of June 30, 1885, is unconstitutional.

The case appears to have been set down for argument in the court below upon bill and answer. The court denied the injunction and dismissed the bill. It was, therefore, a final decree.

The act in question is entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the 7th of June, 1879."

The first section of said act provides "that all mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever — except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes — and all public loan or stocks whatsoever — except those issued by this Commonwealth or the United States — and all moneys loaned or invested in any other State, and all other moneyed capital in the hands of individual citizens of the State, shall be and are hereby taxable for State

purposes, at the rate of mills on the dollar of the value thereof annually; provided, that the same shall, after the passage of this act, be exempt from all taxation except for State purposes; provided the provisions of this act shall not apply to building and loan associations."

The seventh section enacts that "it shall be the duty of every taxable person to make the return prescribed in the preceding section — sixth — of this act, within ten days after being required to do so, with his or her affidavit thereto attached, made and subscribed before the proper assessor that the return is true and correct to the best of his or her knowledge and belief. Any person who shall willfully and corruptly make a false and fraudulent return shall be guilty of willful and corrupt perjury."

And by section ninth it is provided that "upon the refusal or failure of any taxable person to make a return as required by this act, it shall be the duty of the assessor to make a return for such taxable person, estimating the amount from the best information at his command, to which estimated return the proper county commissioners or boards of revision shall add fifty per centum, and the aggregate amount so obtained shall be the basis for taxation; provided, that if such taxable person, on or before the day fixed for appeals from assessments, shall present reasons, under oath, satisfactory to the proper county commissioners or boards of revision excusing the failure to make a return, and shall then make such return as should have been made to the assessor, the proper county commissioners or boards of revision shall substitute the taxable person's return for that returned by the assessor, to have the like effect as if no failure had occurred."

The twentieth section repeals or abolishes all taxes laid upon manufacturing corporations by the revenue laws of the Commonwealth, with a proviso that said repeal shall not apply to corporations engaged in the manufacture of malt, spirituous or vinous liquors, or in the manufacture of gas.

These are all the sections of the act which I think it necessary to give at length or to epitomize. The remaining sections, if discussed at all, will only be referred to incidentally.

It was contended that the act is in conflict with sections 1 and 2 of article 9 of the Constitution. Said sections are as follows:

§ 1. All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity.

§ 2. All laws exempting property from taxation, other than the property above enumerated, shall be void.

It was urged upon the argument that the act of 1885 conflicts with these provisions because:

First. It exempts building and loan associations from taxation under its provisions.

Second. It exempts all manufacturing corporations from taxation

under the revenue laws of the Commonwealth, except companies engaged in the manufacture of gas and liquors.

Third. It provides only for the taxation of mortgages and other personal property of individual citizens, thereby exempting corporations of all kinds.

To which may be added the further objection, not made upon the argument, that the act expressly excepts from its operation "notes or bills for work or labor done."

It is clear from the language of the act that it does exempt building and loan associations from taxation under its provisions; that it does repeal all taxes upon manufacturing corporations with the exceptions therein named; and that it does exempt from taxation "notes or bills for work and labor done." We also are of opinion that mortgages and other moneyed securities held and owned by corporations are not, and were not intended to be, taxed by the act in question. It was contended upon the argument, however, that the phrase, "any person or persons whatsoever," was broad enough to include artificial persons or corporations, and that the subsequent phrase "all other moneyed capital in the hands of individual citizens," strengthened this view, as showing an intention to narrow the generality of the expression when it came to taxing moneyed capital. If we concede the force of this it does not affect the main question, viz., the constitutionality of the act, for the obvious reason that if it is a violation of the Constitution not to extend the tax on mortgages to corporations, it is equally a violation of it to relieve them from the tax on moneyed capital.

We are not without authority as to the meaning of the word "person" when used in statutes. The tax law of March 25, 1831 — P. L. 206 — provided "That all personal estate and property within this Commonwealth hereinafter described, owned or possessed by any person whatever, that is to say, all ground rents, money at interest, bonds, judgments, mortgages, etc., shall be subject to a yearly tax," etc. In the case of *School Directors v. Carlisle Bank*, 8 Watts, 289, this court held that the act did not apply to corporations. It was said by Mr. Justice KENNEDY, in delivering the opinion of the court: "Although it cannot be denied but that the bank being a corporation, and therefore a person in contemplation of law, may be included by the use of the term 'person,' yet in the construction of statutes the terms or language thereof are to be taken and understood according to their usual and ordinary signification, as they are generally understood among mankind, unless it should appear from the context, and other parts of the statute, to have been intended otherwise; and if so, the intention of the legislature, whatever it may be, ought to prevail. Therefore, in the case before us, the term 'person,' being generally understood as denoting a natural person, is to be taken in that sense, unless from the context or other parts of the act, it appears that artificial persons, such as corporations, were also intended to be embraced. Besides, it has generally, if not universally, been the case that the legislature in passing acts, when it was intended that the provisions thereof should extend to corporations as well as to individuals, to designate specifically, so as to leave no room for doubt. Here, however,

nothing of the kind appears; nor is there any thing in any part of the act which goes to show that a bank was intended to be comprehended within the meaning intended by the legislature to be affixed to the term "person."

This case was commented on in *Saving Fund v. Yard*, 9 Penn. St. 359, where it was said: "Although there are some of the *dicta* in that case which I apprehend do not meet the entire approval of the court, yet the exact point ruled — that is, that the word "person" does not usually include incorporations when used in statutes or common parlance, although in its legal import it embraces them, is well and of good authority."

In *Saving Fund v. Yard* the question was whether the personal property of corporations could be taxed under the act of 1846. It was held that it could, for the reason that the language of the act clearly showed such an intention. The said act required that "Every person, every firm and partnership, and the president, secretary, cashier or treasurer of every company or corporate body," to deliver a statement of "all money due by solvent debtors to such person, partnership, firm, company or corporate body, whether on mortgage, judgment," etc.

The act of 1885 resembles the act of 1846 in many respects, and it is at least probable that the draftsman of the later act had the prior act before him when he drew the bill, and it is not without significance that it omits all reference to corporations in the first section. The act of 1885 does not in any part thereof provide by express terms or by necessary implication for the taxing of mortgages in the hands of corporations; nor is there any provision requiring any officer of any corporation to make a return under the first section of the act of 1885, or inflicting any penalty for the neglect or refusal of any officer to do so.

We have not the time to extend this branch of the discussion, nor do I deem it necessary. It has been recently thoroughly examined by two of the learned and able judges of the common pleas of Philadelphia, Judges MITCHELL and THAYER. See *Leg. Int.*, July 18, 1884, and of April 9, 1885. It is true Judge MITCHELL's opinion refers to the act of 1881, but the language of the two acts is substantially identical; his reasoning applies equally well to the act of 1885. They both hold and conclusively show that the language referred to in the two acts does not extend the tax on mortgages, etc., to corporations. I have devoted more space to this branch of the subject than was perhaps necessary for the reason that the main argument of the defendants in error was that the first section of the act of 1885 is broad enough in its terms to extend to corporations. Having, at least, endeavored to show that this point was not well taken, I will now proceed to the further discussion of the case.

Conceding then that the act of 1885 does not extend the tax on moneys at interest, mortgages, etc., to corporations, does it follow that said act conflicts with the section of the Constitution which declares that "all taxes shall be uniform upon the same class of subjects within the limits of the authority levying the same?" If it does, the act must fall, no matter what inconvenience may result to the State. This por-

tion of the Constitution is too important and valuable to be over-ridden by the legislature, or frittered away by judicial construction. It was intended to, and does, sweep away forever the power of the legislature to impose unequal burdens upon the people under the form of taxation. The evils which led to its incorporation into the organic law are well known. The burden of maintaining the State had been, in repeated instances, lifted from the shoulders of favored classes and thrown upon the remainder of the community. This was done by means of favoritism and class legislation. Article 9 of the Constitution was intended to cut up this system by the roots, and we shall have no more of it if the legislative and judicial departments of the government perform their full duty in giving effect to that instrument.

The taxing power of the State is great and searching. Within the limits of the Constitution it is bounded only by the necessities of the State and the will of the people. This must be so or the State might be without the means to sustain itself; to repel aggression from without or to suppress disorder from within. So long as it lays its burdens upon all alike there is hardly a limit to this power. It may take from the people what its necessities demand.

The power of the State is conceded to select its subjects of taxation. It may tax mortgages or it may omit to tax them. It may tax houses or it may omit to tax them. But the tax upon whatever laid must be uniform. Thus it must be laid upon all tax payers alike. It cannot tax A. on his mortgages or his houses, and exempt B. from a like tax. Nor do I see any distinction here between natural persons and artificial persons, commonly called corporations. Each must bear its due share of the public burdens. This is because the Constitution declares that "all taxes shall be uniform." It is perhaps vain to expect that any system of taxation shall produce exact uniformity; it is, however, both reasonable and possible to lay the taxes in such a manner that substantial justice and uniformity shall be the result.

While the first section of the act of 1885 does not extend the tax on money at interest, mortgages, etc., to corporations, we are not prepared to say that for such reasons it violates the Constitution. The act is a supplement to the act of 7th June, 1879 — P. L. 112 — by the fourth section of which a tax is imposed upon the capital stock of "every company or association whatever, now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or territory of the United States, or foreign government, and doing business in this Commonwealth, or having capital employed in this Commonwealth in the name of any other person or corporation, association or associations, person or persons, or in any other manner except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the Commonwealth annually, a tax to be computed as follows," etc.

The tax, briefly stated is, three mills on the dollar of the appraised value of the capital stock of such corporations as declare either no dividends, or dividends of less than six per cent; and on corporations which pay a dividend of six per cent or over, one-half mill on the capital stock for each one per centum of such dividend; and where profits are made

and not divided, but added to the sinking fund of such corporation, the like tax is imposed.

The act contains other provisions for taxing banks, insurance companies, limited partnerships, etc., which we need not specifically refer to.

We have, therefore, by virtue of the provision of the act of 1879 a tax on the capital stock of corporations, the minimum of which is three mills on the dollar, the exact amount which the act of 1885 imposes on mortgages, moneys at interest and moneyed capital in the hands of individuals. It has been repeatedly decided in this State and is settled law, that a tax upon the capital stock of a corporation is a tax upon its property and assets. It would be an affectation of learning. We refer to the long line of cases asserting this doctrine; it is sufficient to refer to *Com. v. Standard Oil Co.*, where many of the authorities are collected. See 101 Penn. St. 119. The act of 1885 being a supplement to the act of 1879, the two acts must be read together, and thus read we have in the one a tax of three mills on mortgages, etc., in hands of individual citizens, and what is practically and legally, although not in name, a similar tax upon the same class of subjects in the hands of corporations. Wherein is there the lack of uniformity, and wherein has the legislature made a discrimination in favor of corporations as against individual citizens? If there is discrimination at all it is against corporations as their tax may amount to six mills or more according to the amount of the dividends declared. The seventeenth section of the act of 1879 taxed mortgages and moneys at interest owned by individual citizens at the rate of four mills, and the principal objects of this act of 1885 would seem to be to reduce the rate to three mills, and to provide more efficient machinery for the assessment and collection of this tax. In fact the efficiency of the machinery has probably more to do with the opposition to the act of 1885 than any supposed doubt of its constitutionality.

While a different mode of assessing taxation is adopted in dealing with the tax on corporations from that taxing money in the hands of individuals, the result is substantially the same. Were the tax of 1885 on mortgages extended to corporations the result would be double taxation, which, while not beyond the power of the legislature, is not to be presumed in the absence of a clear intent to impose it. The case may be illustrated thus: We will suppose the capital stock of a trust company or other corporation to consist of \$1,000,000, and that this amount has been invested in mortgages or other interests bearing securities. The \$1,000,000 of capital stock is taxed by the act of 1879 at three mills, and more if dividends in excess of six per cent are earned. If now the act of 1885 imposes a tax of three mills upon the \$1,000,000 of securities, it is obvious we have a case of double taxation. The capital stock is nothing. A myth, a mere name excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.

We do not think the act of 1885 is unconstitutional because it does not impose the tax on mortgages, etc., upon corporations. The proviso

in the first section exempting building associations from the operation of the act is harmless because said section does not, and was not intended to apply to corporations of any description. If there really was an exemption of such corporations it would be void under the Constitution, for the legislature can only exempt from taxation such property as that instrument authorizes it to exempt.

The exception of "notes or bills for work or labor done" is clearly a violation of the ninth article of the Constitution. This belongs to a species of class legislation that has become very common, more common than commendable, the object of which is to favor a particular class at the expense of the rest of the community. So far as such legislation affects the question of taxation the Constitution has put an end to it. There can be no more of it. Nor should there be. The Constitution protects all classes alike; the poor and the rich equally enjoy its benefits, and all must share the burdens which it imposes. However popular such legislation may be, it cannot be sustained under our present Constitution.

But for this vice we are not required to declare the act of 1885 void. The second section of article 9 of the Constitution provides: "All laws exempting property from taxation, other than the property above enumerated, shall be void." The exception of "notes or bills for work or labor done" is void under this provision and drops out of the act of 1885.

The exception falls but the act stands. It will be the duty of the assessors to assess and return such bills or notes the same as other moneyed securities in the hands of individuals.

Nor do we think the case is affected by the twentieth section of the act which repeals taxes heretofore laid on manufacturing corporations by the revenue laws. Even if this section amounts to an unlawful exemption from taxation, under the principle already referred to, the exemption would fall, and leave the balance of the act in full force. The act is complete without this section. As the constitutionality of the act does not depend upon the validity of section 20, we do not propose to discuss the effect of the repeal of the tax on this class of corporations. It will be time enough to discuss it when a case arises where the question is distinctly made.

We have some trouble with the ninth section of the act. It provides, as before stated, that, when no return is made under the sixth and seventh sections, the assessor shall make return for such taxable person, "estimating the amount from the best information at his command," to which estimated return the proper county commissioners or boards of revision shall add fifty per centum, and the aggregate amount so obtained shall be the basis for taxation.

We have no doubt of the power of the legislature to impose penalties for the non-payment of taxes. Such penalties are usually in the form of an increased percentage for the delay, or interest at a fixed rate. When so imposed, it is a penalty for withholding from the State a sum of money, the amount of which has been precisely ascertained, and the day of payment fixed by law. It may also be conceded that the legislature may impose a penalty upon the tax payer who impro-

erly withholds information which the State is entitled to have as to the condition or extent of his estate.

This provision in the act of 1885 is an exercise of the taxing power. The tax on mortgages imposed by the act of 1879 had never produced the amount of revenue which it might and ought to have done, for the reason that it was constantly and persistently evaded. Occasionally an honest man would make an honest return, and pay an honest tax. But it is well known that full and fair returns were the exception rather than the rule; while many persons possessed of considerable estate, liable to this tax, escaped it altogether. The machinery provided for its assessment and correction, as before observed, was inadequate. The act of 1885 provided such machinery; that it was effective we may fairly infer from the extent and character of the opposition to it. Taxation is never popular; and the act of 1885 has received its full share of criticism, but the plain object of this particular provision of the act was to make people honest, and keep them so. It was intended to compel each tax payer to disclose to the assessor the full extent of his personal estate, and avoid the unequal burdens which had been laid upon the shoulders of some persons by the neglect of others to return the full amount of their property. No legal objection can be made to this. If the State has the right to tax moneys at interest in the hands of her citizens, and this cannot be denied, she has the right to know to what extent each citizen holds such property. In the exercise of this right, she has the power, and it is a part of the taxing power, to require each tax payer to make known to the assessor the extent of his or her property of this description. She has the further right to punish the failure to make such return by the imposition of a penalty, or otherwise, as may best secure the object to be attained. These powers must be conceded. I have never heard them questioned, and without them the taxing power of the State would be no power at all. It would be a mere privilege.

The exercise of such power, in this instance, cannot be denied to the State unless it clearly conflicts with some constitutional provision. If it is a matter of doubt, such doubt must be resolved in favor of the act.

It is to be observed, in the first place, that the provisions of the ninth section apply only to tax payers who neglect or refuse to make a proper return. They are, by their own act, in default, and are *prima facie* attempting to avoid their share of the public burdens. Now, what hardship does the act impose upon them for their default, or what penalty does it inflict that is unjust? In the first place the assessor is obliged to make a return for them from the best information at his command. This means that the assessor shall inquire from such persons as he may reasonably suppose to have information as to the extent of the defaulting tax payer's estate. Surely this is no hardship upon any one but the assessor. Estimating the amount of the property in this manner, the assessor returns such amount to the proper commissioners or returning boards, who are required to add fifty per centum thereto, and the amount so increased stands as the assessment.

The State imposes this fifty per centum upon the tax payer as a punishment for his default in not making the return required by law.

If no appeal were allowed to the action of the commissioners in adding this penalty, it would be a serious question whether the act could be sustained. It is one of the fundamental principles of English and American law that no man can be condemned in his person or property without a hearing. But the act expressly provides that the tax payer may, on or before the day fixed for appeals, go before the commissioners or board of revision, and present his reasons under oath for his failure to make return, which, if satisfactory to the commissioners or board of revision, they shall substitute the tax payer's return for that of the assessor, to have the like effect as if no failure had occurred.

It will thus be seen that the tax payer holds the key of the position in his own hands, and can relieve himself from the consequences of his own contumacy by coming forward and being honest.

It cannot be truly said that this provision is not "uniform," whether we regard it as a penalty or an assessment. There is no lack of uniformity in the law; if any exists it grows out of its application to particular cases. The assessments are increased at the uniform rate of fifty per centum. That it will produce exact uniformity in its results is not contended, but this flows not from any fault of the law, but from the neglect or refusal of the tax payer to make the return. The inequality being thus the direct result of his own act the tax payer has no standing to complain of it.

The right of the legislature to provide for such an increase of the assessment in the case of the refusal of a tax payer to comply with the law in the matter of the return of his property to the assessor has been recognized in several of our sister States. The latest case to which my attention has been called is that of *Newell v. Town of Whittingham*, 3 East. Rep'r, 649. This case was decided last January by the supreme court of Vermont. The statute of that State directs the "listers," whose duties correspond with those of our assessors, in all cases where a tax payer willfully omits to return under oath a complete inventory of his property, to ascertain the amount of the tax payer's taxable property, appraise the same, and double the sum so obtained as a basis for the delinquent's list. In this case, the tax payer made a return under oath, "to the best of his knowledge and belief." The form of oath was held not to be a compliance with the law, and the assessment was sustained. This was an admittedly hard case, as it was conceded the tax payer has made an honest return and refused to take a more positive form of oath by reason of a tender conscience, yet we do not find throughout the case, not even in the opinion of the dissenting judge, so much as a hint that any one doubted the validity of the act.

By the statutes of the State of California, the penalty for willfully concealing, removing, transferring or misrepresenting property by the owner or agent thereof to evade taxation is an assessment of it at ten times its value or less. The validity of this act was recognized in *Biddle v. Oaks*, 59 Cal. 94, where it was held, under another section of the Code that property which had escaped assessment one year might be doubly assessed the next year.

In *Butler v. Bailey*, 2 Bay (S. C.), 244, it was held that when

a man does not make a return of his taxable property agreeably to the general tax act, he is liable to be doubly taxed, and his estate is liable for the whole of the double tax.

In New Jersey, by the act of 1862, it was provided that any person who shall refuse to be sworn or affirmed by the assessor touching his taxable property shall be subject to a penalty of \$500, and shall be deprived of any right to appeal from any tax for which he may be assessed by such assessor. This act was sustained in the *State v. Appal*, 2 Vr. 358.

In Massachusetts by General Statutes — chap. 11, § 46 — it is enacted “When the assessors of a city or town have given notice to the inhabitants thereof to bring in true lists of all their polls and estates, not exempt from taxation, in accordance with the provisions of the twenty-second section of the eleventh chapter of the General Statutes, they shall not afterward abate any part of the tax assessed on personal estate, to any person who did not bring in such list within the specified time, therefore, in such notice, unless such tax exceeds by more than *fifty per centum* the amount which would have been assessed to that person or personal estate, if he had seasonably brought in said list; and if said tax exceeds by more than *fifty per centum* the said amount, the abatement shall be only of the excess above the said *fifty per centum*; provided, however, that this act shall not affect any person who can show a reasonable excuse for not seasonably bringing in said list.” This was enforced by the supreme judicial court in *City of Charlestown v. County Commissioners of Middlesex*, 101 Mass. 87.

In *Lincoln v. City of Worcester*, 8 Cush. 63, it was said by Chief Justice SHAW, that “perhaps it is true that it is not made the duty of the tax payer to bring in a list; but it is made a condition precedent — Rev. Stat., chap. 7, § 40 — without which he cannot have the remedies provided for him by law. Section 23 provides that if any person shall not have brought in such list, the assessor shall ascertain, as nearly as possible, the particulars of his personal and real estate, and make an estimate thereof, at its just value, according to their best information and belief, and their estimate by section 24 shall be conclusive. The effect of the statute, therefore, is, that a person may, at his option, decline giving in his list, and leave the assessors to ascertain the particulars; but if he does so, he tacitly submits himself to their valuation and assessment, and of necessity waives all those exceptions, which he could take only on condition of having given in a list. He submits himself to what is called in some of the earlier statutes — Anc. Chart. 70, 73 — the doom of the assessors.” See, also, *Otis Co. v. Inhabitants of Ware*, 8 Gray, 509.

I am not aware of any decision of this court which is in conflict with those cited, and in the face of so much respectable authority, we are not disposed to strike down the power of our State to impose this penalty, and thus cripple it in the assessment and collection of its revenue. Indeed we have no right to do so unless it is made to appear that the exercise of such power is a clear violation of the Constitution. This has not been done.

Criticisms have been made upon other portions of the act, relating

more especially to the mode of its execution. While some of them seem harsh, and of a character to be offensive to the tax payer who does not want to pay his tax, they do not come within the range of this discussion. Some portions of it as are objectionable upon reasonable grounds the people can and probably will conduct through their representatives. After a most careful and patient examination of the act, we are unable to see such inequality of taxation, such lack of uniformity, as would justify us in striking it down as a whole upon constitutional grounds. While we endeavor to hold to the line in every instance of a palpable violation of that instrument, it would require a clear case to justify us in setting aside a revenue law of the Commonwealth, and thus throwing the financial affairs of the State into confusion.

Our entire revenue system needs to be remoulded in accordance with the new Constitution. It has been for many years a disjointed system, subjected to frequent and arbitrary changes; in many instances loosely and obscurely worded, making its construction and enforcement matters of no slight difficulty. To recast it now in entire harmony with the organic law is a serious matter. It will require the ripest experience and the highest wisdom. Now that the attention of the legislature has been called to it, we have no doubt the wisdom of that body will prove equal to the emergency.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

MERCUR, Ch. J., dissents.

DIRECTORS OF THE POOR OF DANVILLE AND MAHONING v. TRUSTEES OF THE STATE HOSPITAL FOR THE INSANE.

May 10, 1886.

INSANE PERSON — MAINTENANCE OF — REMEDY — REPEAL — LIABILITY — DISCHARGE.

The act of April 8, 1861, providing that the city or county from which an indigent insane person is sent to the State Lunatic Hospital shall be liable to the trustees of that institution for the maintenance of such poor person, and shall have remedy over against the proper township, etc., in so far as it gives a remedy for the county over against the district, is not repealed by the act of June 13, 1868 — Pamph. Law, 92.

Where the county is liable with remedy over under the act of 1861, the release of it in part by the act of 1868 is a discharge *pro tanto* of the liability of the district.

Error to the court of common pleas of Montour county.

This was a case stated, brought by the Trustees of the State Hospital for the Insane at Danville against the Directors of the Poor of Danville and Mahoning, to recover the charges for the maintenance of certain indigent insane persons. The following is a copy of the opinion of the common pleas, per ELWELL, P. J.

"The institution of which the plaintiffs are trustees, being as appears by the act of 13th April, 1868, establishing it, the act of 27th March, 1873 — Pamph. L. 54 — incorporating it, and by the agreement set forth in the case stated, a State institution, a public

charity, the legislature has unlimited power over its management as well financially as otherwise.

"The grounds were purchased and the buildings appropriated by law from the State treasury and all deficiency in the expense of the care and management of insane patients committed to the care of plaintiff have been supplied by State appropriations. The act of incorporation did not in any degree detract from the character of the hospital as a State institution. The officers having the control are appointed and are merely agents of the State to conduct the affairs of the hospital, according to the laws passed for its regulation.

"The heads of the departments could not personally superintend the management of hospitals for the insane, and, therefore, from time to time as occasion required, new buildings have been erected and persons have been appointed to perform this service. The trustees in the case in hand are officers of the State, although nominally officers of a corporation. In all things pertaining to receptions, management, treatment and control of patients, they possess the power of the State and are clothed with its immunity. Before the passage of the act of 13th June, 1883 — Pamph. L. 92 — they were authorized to charge patients the sum that it cost per week to keep them. They were authorized by act of 14th April, 1845 — *Purd. Dig.* 1116 — act 20th of April, 1869 — *Digest* 1109 — and by act of 8th April, 1861 — *Digest*, 1118 — to receive persons who were acquitted of crime on the ground of insanity, persons who shall have been found unsafe to be at large, or by reason of insanity are suffering unnecessary hardships, insane persons brought by friends with proper certificates, and persons sent by the constituted authorities in the respective counties, districts and townships of the Commonwealth, such authorities being chargeable with the expense of the care and maintenance and removal to and from the asylum of such paupers.

"In *Township of Franklin v. Pennsylvania State Lunatic Hospital*, 6 Casey, 524, the law as it then stood was construed by the supreme court. LOWRIE, Ch. J., said: 'It is plain also that patients in the hospital are not to be supported out of the hospital funds, but by their friends, or out of the funds of the district from which they come. When sent by their friends, there is to be a contract made for their maintenance. When sent by order of government, through any of its functionaries, government regulates the compensation and directs its payment by the local functionaries charged with the duty of supporting those who need governmental care.'

"Under the law as thus construed, the districts where insane persons had a settlement in any district in any county from which they were sent, such district was liable for the expense of keeping directly to the hospital. It was found to be practically inconvenient for the hospital to look to the districts for payment, for remedy of which it was enacted by section 4 of the act of 8th April, 1861 — *Digest*, 1118, pl. 69 — that the city or county from which an indigent insane person was sent to the hospital shall be liable to the trustees for the maintenance of such poor person and shall have remedy over against the proper township, where by the existing laws the township is liable for the

support of such pauper, and the overseers of the poor shall have remedy over against the property of the pauper or against any relatives required by law to maintain him or her to the extent of their ability, under the poor laws.

"Henceforth, in every case where a district was before liable for the maintenance of an insane person, the liability as between the hospital and the district was transferred to the county, and the county was given a remedy for the amount which it had to pay against the district. Thus the law stood when the act of 13th June, 1883 — Pamph. Law, 92 — was passed.

"It was manifestly passed for the purpose of fixing the amount of charges for maintenance and clothing, and for relieving the county from the payment of one-half the amount.

"As we have seen, the county was liable for the whole amount. The third section of the act provides 'that the expense of the care and treatment of the indigent insane in the State hospitals for the insane shall be divided between the State and the county, provided that the maximum charge to the county shall not exceed, including all charges, the sum of \$2 a week for each person.'

"The act of 1861 in so far as it gives a remedy for the county over against the district chargeable for the amount the county is obliged to pay for it, is not repealed by express words, nor by necessary implication. By the relief to the county of one-half that it was before liable for, there is no implication of intention to relieve the districts of the whole amount for which they were before liable.

"But reducing the amount which the county is required to pay, reduces to the same extent the amount which the district has to pay. And this, in our view, is the proper construction of the act and all that was intended to be accomplished by it.

"In this case the trustees took from the directors of the poor of Danville and Mahoning an obligation in the case of each indigent insane person chargeable to that district, to pay \$3 per week for the care and support of the pauper as long as he continued a patient in the hospital, also to pay not exceeding \$50 for any damages which this patient might do to the furniture.

"The amount fixed by the hospital as the cost of board per week was \$3. For that sum per week the district was chargeable without a written obligation. The taking of the obligation did not increase the liability of the district beyond that prescribed by law; nor did it diminish or lessen the liability of the county. Where indigent insane are sent to the hospital by the constituted authorities, the trustees have no authority to take securities and release the county from its liability.

"It follows that in all cases where the county is liable under the law in the first instance, with remedy over, a release of the county by law, in whole or in part, is a discharge *pro tanto* of the liability of the district. And to that effect only was the statute of 1883 intended to have effect.

"It was competent for the Legislature to provide for the payment of the entire expense of the maintenance of the insane of this State out of the State treasury, or by the county, or by the district from whence

they came. But when the whole scope of legislation and the decision under it is that the district shall be ultimately liable for the maintenance of its indigent insane, the county being first liable with remedy over, the mere reduction of the amount which shall be paid by the county is not a total discharge of the statutory obligation of the district, nor of its voluntary obligation to the hospital. To the extent of the relief given by law to the county it is relieved, but no further.

"The defendant not having paid for the support of the indigent insane, placed by it in the hospital and there maintained since the 13th day of June, 1883, is chargeable with the amount for which by the act of assembly of that date the county of Montour is liable.

"And now, April 2, 1886, judgment for the plaintiff for the sum of \$2,122.45 with interest from 26th January, 1886."

H. M. Hinckley, for plaintiff in error. As to construing statutes, *Potter's Dwaris Stat.* 188; *Broom Leg. Max.* 513; *Davis' Appeal*, 12 S. 420; *Pennington v. Coxe*, 2 Cranch, 33; *Com. v. Council of Montrose*, 2 S. 391. "In construing a statute, the real intention when accurately ascertained will always prevail over the literal sense, 1 Kent Com. 472." *Eshelmen's Appeal*, 24 P. F. S. 47; *Black Crk. Imp. Co. v. Com.*, 13 Norr. 455.

L. E. Waller, for defendant in error. "That the law does not favor repeals by implication is a very old rule," per Chief Justice BLACK, in *Brown v. County Commissioners*, 21 Penn. St. 43. "It is well settled that a general statute without negative words cannot repeal a previous statute which is particular even though the provisions of one be different from the other." *Id.*; reaffirmed in *Wright v. Vickers*, 81 Penn. St. 123. The language of section 3 of act of 13th June, 1883, must by every principle of sound construction be considered with the previous acts of its series which provide for the liability of the township or district. "It is an established rule of law that all acts upon the same subject are to be taken together as if they were one law, and compared in the construction of statutes." *Potter's Dwaris Stat. and Const.* 189. "Although two acts are seemingly repugnant, yet they shall if possible have such a construction that the latter shall not be a repeal of the former by implication." "To repeal a statute by implication there must be such a positive repugnancy between the new and the old — they must be so indisputably contradictory — that they cannot stand together or be consistently reconciled," per WOODWARD, J., in *Wright v. Vickers*, 81 Penn. St. 128. Can it reasonably be contended that the third section of act 13th June, 1883, providing that the reduced expense of the care of the indigent insane shall be equally divided between the State and county, in the absence of a repealing clause, does by implication repeal the earlier act fixing the liability of the poor district. Chief Justice LOWRIE, construing act of 1845, April 14, in 1 Wright, 143, declared there was no doubt of liability of poor district in every case except that of criminal insane, and ruled that the poor district should also be liable to the hospital for them. "Cotemporaneous, antecedent and subsequent statutes on the same subject may be examined and considered in construing an act." *Rexford v. Knight*, 15 Barb. 642;

DuBois v. McLain, 4 McLean, 489. Through the whole body of legislation relative to the poor and insane from statute 43 Elizabeth, chapter 2, down to to-day, the doctrine of the liability of the township or poor district, and of certain relatives of such person has been recognized and enforced. This general principle of the legislation appertaining to the indigent insane has been repeatedly recognized and affirmed by this court. It is expressly declared by Chief Justice LOWRIE, in *Township of Franklin v. Penna. State Hospital*, 6 Casey, 522, to be the light by which the legislative intent shall be sought. "When patients are placed in the hospitals for insane they must be supported by their friends or by the district from which they come. When sent by order of government through any of its functionaries, government regulates the compensation and directs its payment by the local functionaries charged with the duty of supporting those who need governmental care: These views derived from the general intent of the law help us in interpretation." This is affirmed in *Shenango Township v. Wayne Township*, 10 Casey, 185. Also reaffirmed in *Wertz v. Blair County*, 16 Smith, 21; and in *Lower Augusta Township v. Northumberland County*, 1 Wr. 143.

PER CURIAM. This case is affirmed for reasons given in the opinion of the learned judge of the court below.

SELTZER v. ROBBINS.

May 10, 1886.

SCHUYLKILL COUNTY — POSSESSION — ACT OF MAY 13, 1871, RELATIVE TO OBTAINING LEASEHOLDS — JURISDICTION.

The act entitled "An act to obtain possession of real estate by purchasers at coroners' sheriffs' and Orphans' court sales within the county of Schuylkill," approved May 13, 1871, does not apply to leaseholds.

Error to the court of common pleas of Schuylkill county. The facts are set forth in the opinion of the common pleas, per GREEN, J., of which the following is a copy.

"This is a proceeding under the act of May 13, 1871 — P. L. 820 — to obtain possession of a certain leasehold estate in the borough of Shenandoah, having about five years to run, and on which a skating rink has been erected. It is objected that the act does not apply to leasehold estates, and that this proceeding will not lie. I find no decisions of the supreme court on this point, but it is claimed that the language of the act shows that it is inapplicable to leaseholders. The act of 1871, which is special, follows closely the act of 16th June, 1836 — P. L. 768 — which is general, and which in its turn follows closely the language of the original act on this subject, of the 6th of April, 1802. I have been unable to find any case showing that leasehold estates were ever considered as included within the remedial provisions of any of these acts. On the contrary, I find an express decision of this court on this point in the case of *Emanuel Baker v. William McAnally*, No. 86, December term, 1873, where, in an opinion delivered by the president judge of this court, the petition for obtaining possession of a leasehold estate under the act of 1871 was dismissed upon the ground that the

act did not apply to leaseholds. Whatever doubts may arise on the subject it is better to follow precedent than act, and let this court of last resort decide the question, than be in conflict with ourselves.

"And now, December 7, 1885, petition is hereby dismissed."

James Ryon and Wm. D. Seltzer, for plaintiff in error. The first clause of section 2 uses the word "premises," and in other places the words "real estate" are used. The act of 1871—P. L. 820—provides, section 1, that whenever any lands or tenements shall be sold within the county of Schuylkill, etc. The words "lands or tenements" are broad enough to include a leasehold. "Land" comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, and embracing every thing above and below the surface. "Tenement" is a word of still greater signification, and in its proper and legal sense it signifies any thing that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial, ideal kind. 2 Bl. Com. 17. The words "real estate" are a modern term and have no special technical meaning. The history of the origin of the term "real estate" is given in Bouvier's Dict., under the head of Real Property. See, also, Williams Real Prop. 6-7. As to leasehold estates, see 2 Blackstone, 285. As to difference between chattels real and personal, *Titusville Novelty Iron Works Appeal*, 27 S. 103. An agreement to lease land for a term of years, with the exclusive right to bore for and collect oil, giving one-fourth to the lessor, held to pass a corporeal interest. *Chicago & Allegheny Oil & Mining Co. v. U. S. Pat. Co.*, 7 Smith, 83. A lease for three years of the right to mine coal in the land of the lessor is a grant of an interest in the land and not a mere license. *Harlan v. Lehigh Coal & Nav. Co.*, 11 Casey, 287. Ejectment will lie to recover the possession of a leasehold estate. *Karns v. Tanner*, 16 Smith, 308; *Dook v. Johnston*, 5 id. 170; *Adams Ejectment*, 60.

M. M. L'Velle and James B. Reilly, for defendant in error.

PER CURIAM. This was an attempt by a purchaser at sheriff's sale to obtain possession of lands under the special act of 13th May, 1871, applicable to the county of Schuylkill only. The petition of the plaintiff does not aver the facts necessary to bring the case within this act. The court then had no jurisdiction of the case, and it committed no error in refusing to award possession of the premises described in the petition.

Judgment affirmed.

APPEALS OF AUGUST ZEALBERG AND ELIAS MAYER.

May 10, 1886.

WAGES — PREFERRED LIEN — NOTICE.

A notice was served upon the sheriff of Schuylkill county that the party notifying claimed a preferred lien upon certain property levied upon under execution, and that the amount of such lien was payable out of the proceeds arising from the sale of the property. The notice, which was intended to secure payment of a labor claim, failed to set forth any business that would come within the enactment; or what was the nature or kind of labor and service for which a preference was claimed; or that the property levied upon was such as

was used in or about or in connection with the business of the defendant in the execution. *Held*, that the notice was of no validity under the acts of 1872 and 1883 against the plaintiff in the execution.

Appeals from the decree of court of common pleas of Schuylkill county.

The sheriff, levied upon certain personal property of Osterman. After the levy and before the sale, Zealberg, also Mayer, gave to the sheriff written notices of labor claims, and requested payment thereof out of the proceeds of the property; the notices were defective in several respects. The plaintiff in the execution asked for a rule upon the sheriff to pay over to him the fund realized by a sale of the property, which rule the court made absolute. The following is a copy of the opinion of the court, *per* PERSHING, P. J. :

"The sheriff, in answer to the above rule, states that he has refused to apply the money in his hands to the writ issued by the plaintiff for the reason that notices were served upon him by two parties that they held claims against the defendant for the wages of labor, the payment of which they demanded as a preferred lien. In these notices the claim is stated to be 'for work and labor done and performed within six months last past, to-wit: — setting forth the number of days in each month and the rate per day — in and about the building, erection and construction of various buildings and dwelling-houses of and for the said defendant in the boroughs of Ashland and Girardville and the township of Butler,' and that the amount claimed was a lien upon all the property levied upon.

"Counsel have argued the question of the sufficiency of these notices and submitted it for the decision of the court, rather than resort to the appointment of an auditor.

"In *Pepper's Appeal*, *Gamble's Appeal*, 2 Pennyp. 113, a notice to the sheriff that there was due to the claimant a sum of money 'for labor and services rendered within six months last past, at and about the works, manufactories, mines and business, and connected therewith, of the defendant,' and that said sum was entitled to be preferred and first paid out of the proceeds of the sale of the property advertised to be sold by the sheriff, 'which property it was alleged was taken at or about the place of business of said defendant, and used by him in carrying on the same,' was held to be 'clearly insufficient within the act of April 9, 1872,' and the decision in *Allison v. Johnson*, 11 Norr. 316. The court said of the notices, 'they contain no indication of the kind of business of Colbert — the defendant in the writ — nor the kind of labor or services rendered, so as to give information to the sheriff, nor to other creditors, as the act evidently intended.' It is apparent that the notices in *Pepper's Appeal* were fully as specific as those in the case under consideration.

"In *White's Appeal*, 15 W. N. C. 313, the claim was for labor done in 'sledding bark and making roads through the woods' for one whose business was 'manufacturing lumber, shipping the same, peeling and shipping bark, and making and delivering cross ties.' Mr. Justice STERRETT said: 'Whatever may be the effect of the supplement of 1883, in enlarging the scope of the original act we think it very clear that it does

not embrace appellant's claim. The court was, therefore, right in holding that the employment was not within the purview of the act and its supplements.' It does not appear that the question of the sufficiency of the notice was raised.

"An able discussion of what are the essential requirements of a notice to the sheriff by a wage claimant under the act of 1872, and its supplement of 1883, will be found in the report of Joseph P. Gross, Esq., auditor, affirmed by Judge BIDDLE, in the case of *Sanger & Wells v. Skinner et al.*, 16 W. N. C. 16. See, also, *Pardee's Appeal*, 4 Out. 408.

"The act provides that moneys due for labor and services, etc., 'shall be a lien upon said mine, manufactory business or other property in and about, or used in carrying on said business, or in connection therewith, to the extent of the interest of said owners or contractors.' The levy in the case in hand includes building materials, such as flooring, joists, shutters, doors, a lot of hardware, also a horse, harness, sleigh, buggies, and a large quantity of household goods and furniture, viz.: Carpets, cooking utensils, bureaus, chairs, a mirror, one organ, etc., together with eight shares of stock in the Citizens' S. and L. Association of Ashland. Now, although the notices served upon the sheriff claim a first lien upon all the property levied under the *fiery facias*, it is not alleged that the goods seized, or any portion of them, were used in carrying on any business, or in connection therewith, in which the defendant was engaged. Possibly the third section of the act might be construed so as to include all the property levied upon, but this is not clear.

"The awkward manner in which the act of 1872 was amended by the act of 1883 has given the lower courts much trouble in their attempts to arrive at a construction consistent with common sense. This will appear by a reference to the cases of *Periepi v. Frankenfeld*, 41 Leg. Int. 175; *Jacobs v. Woods*, 14 W. N. C. 237, and *Thompson, Fry & Co. v. Wingert*, id. 483, in which the decisions are in conflict. Adhering, however, to the rules laid down by the supreme court, we are compelled to regard the notices in the case now before us as of no validity against the plaintiff in the execution. They fail to set forth any business of the defendant that would come within the statute, or what was the nature or kind of labor and services for which a preference is claimed; or that the property levied upon was such as was used in or about, or in connection with the business of the defendant in the execution. It is hardly necessary to say that the *ex parte* affidavits presented at the argument, which are intended to supply omissions in the notices served on the sheriff, cannot be considered in deciding the question before us.

"And now, December 14, 1885, rule made absolute; and it is hereby directed that the sheriff pay the proceeds of the sale of defendant's personal property to the plaintiff in the execution."

James Ryon and Philip Keller, for appellants. *Allen's Appeal*, 32 S. 302; *Allison v. Johnson et al.* 11 Norr. 314; *Pardee's Appeal*, 4 Out. 408; *Adamson's Appeal*, 42 Leg. Int. 512. As to jurisdiction

the fund was not within the grasp of the court, and as there was no assent of the parties, the action of the court was void. *Kauffman's Appeal*, 20 P. F. S. 261; *Hoch's Appeal*, 22 id. 53; *Atkins' Appeal*, 8 id. 86.

Wm. A. Marr, for appellee. *Allison v. Johnson*, 92 Penn. St. 314; *Pardee's Appeal*, 4 Out. 408; *White's Appeal*, 15 W. N. C. 313; *Wills v. Skinner et al.*, 16 id. 16; *Kauffman's Appeal*, 70 Penn. St. 261.

PER CURIAM. These appeals were argued together. They present substantially the same question. The notices were clearly insufficient to give the claims of the appellants a preference under the act of assembly, as is well shown in the opinion of the learned judge. On that opinion the decrees are affirmed, and the appeals dismissed at the costs of the respective appellants therein.

APPEAL OF WILLIAM HENRY SUTTON.

May 10, 1886.

PARTITION — OFFER TO TAKE PROPERTY IN PROCEEDINGS IN — ESTOPPEL.

The offer to take property in partition proceedings must be in writing.

A. made oral bids upon several properties in partition proceedings, one purpart being allotted to him; later he interposed objection to the title of other persons, obtained in the same manner. *Held*, that having assented to the form of bidding and received and retained some of the benefits therefrom, he could not successfully so object.

Appeal from the decree of the orphans' court of Montgomery county.

The facts are sufficiently set forth in the following copy of an extract from the opinion of the orphans' court, per BOYER, P. J.:

"After the return of the inquest, which was confirmed by the court without exception, a rule was granted upon the parties interested to appear in open court, and elect or refuse to take the several purparts at the valuation returnable October 10, 1885. Upon which day all the heirs appeared in person, or were duly represented, in open court, except Penrose Warner, upon whom service of notice was duly proved. The parties entitled who appeared were severally called, and in open court interrogated in the proper order as to their election to take or refuse the several purparts at the valuation put upon them by the inquest. Whereupon William Henry Sutton, as the alienee of the heir first in the order of election, elected to take No. 6 at the valuation, which was \$10,466.67. Whereupon the other parties being called in their order—each being accorded but one bid—Gardiner L. Warner bid \$17,000 for No. 6, which was the highest bid for the same. Wm. Henry Sutton having declined to bid any more, the same was adjudged to the said Gardiner L. Warner, at his bid of \$17,000; and the other purparts were in the same proceeding adjudged to various heirs in like manner; conditioned of course upon the performance by each of the terms imposed by law, and the decree of the court in accordance therewith. Each election and bid was made orally, and immediately reduced to writing by the clerk.

"On the same day Neville D. Tyson, Esq., was appointed by the

court auditor to ascertain liens, and marshal them, and ascertain and apportion owelty and dower; and also to state the costs and expenses of said partition.

"On the 19th day of December, 1885, the auditor filed his report thereon, to which exceptions have been filed, and now pending before the court.

"In the meantime on the 23d day of November—forty-four days after allotment of the purparts—William Henry Sutton filed his petition claiming to have adjudged to him purpart No. 6, which he had elected to take at the valuation, upon the ground that Gardiner L. Warner, to whom it had been adjudged, had not submitted his bid in writing, according to the act of April 22, 1856.

"If at the time of the appearance of the heirs to elect to take or refuse in open court, there had been objection made to oral bids either by Mr. Sutton, or any other of the parties interested, and now complaining, and this had been disregarded, there might be good ground if not for this claim, at least good ground for objecting to the validity of the proceedings. But there was no such objection, and Mr. Sutton himself bid orally in the same manner upon No. 5, and it was adjudged to him at his bid. The parties must, therefore, be considered as having taken their chances under the mode of proceeding adopted, and in which all participated, by which they waived their right to compel the bids to be submitted in writing in the first instance, and they cannot now recall their consent to a merely formal irregularity in which all of them acquiesced.

"The proceedings in this case were conducted in strict conformity with the uniform practice of the orphans' court of this county, under all its judges, before and since the act of 1856, and which has never before been questioned or departed from. Nor in a single instance, during all that time, as far as known, has any dispute or confusion resulted. A practice which has operated so long a time successfully, and to the universal satisfaction of the bench and bar of the county, can scarcely be pronounced inherently vicious, and from its convenience and continued usage we may readily account for a directory clause in an existing act of assembly to the contrary, having been overlooked.

"Since our attention has been called to what is said upon the subject by Justice AGNEW, in *Klohs v. Reifsenyder*, 11 P. F. S. 240, it may be well to conform our future practice to a more literal construction of the formality directed by the act.

"But *Klohs v. Reifsenyder*, upon which the learned counsel for the exceptant mainly relies, does not sustain his position that the bids of heirs above the valuation must in all cases be made in writing to be valid; or in other words, that all such bids not made in writing are nullities. That question was not before the court. The bids in that case were in writing, and, therefore, such a point could not be raised for decision. The direct point in relation to bidding decided in that case was simply that one party could not have two bids upon the same purpart. Incidentally the judge delivering the opinion remarked that the court can compel all parties to hand in their offers in writing together, or permit them to seal them up until the court shall order them all to be opened; as

undoubtedly they could. But neither that case, nor *Bartholomew's Appeal*, 21 P. F. S. 291, which follows it—and is also cited—decides that a bid in open court not made in writing is void, when made, as here, with the acquiescence of all the parties. In *Bartholomew's Appeal* it does not even appear that the bids were made in writing; and, from the report of the proceedings, it might be inferred they were not. But at any rate, all it decides is, as in *Klohs v. Reifsnnyder*, that the same person having one bid cannot have another bid. In the case at bar no second bid by the same person was offered.

"I hold, therefore, that it is too late for Mr. Sutton now to dispute the title of Gardiner L. Warner to the allotment made to him of No. 6, and to have it allotted to himself. . . ."

G. R. Fox, for appellant. There was no warrant of law for these bids; that they were nullities, and, of course, are to be taken as if they had never been made. The act of assembly is decisive of the question. It reads as follows: "In all cases of partition of real estate, in any court, wherein a valuation shall have been made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, who shall, at the return of the rule to accept or refuse to take at the valuation, offer, in writing, the highest price therefor above the valuation returned; but if no higher offer be made for such real estate, or any part thereof, it shall be allotted or ordered to be sold as provided by law." Bright. Dig. 542, pl. 169. It introduces a new and important change into a long-established system, and must be construed strictly. This the supreme court have done. *Klohs v. Reifsnnyder*, 11 P. F. S. 244; *Bartholomew's Appeal*, 21 id. 292. It is said Mr. Sutton has waived his right. How? By standing by his election? Sitting still and saying nothing? What right or business had he to interfere with what the others chose to say or do? If their acts were legal, he could only submit. If illegal, it was not for him to enlighten them. It was for them to manage their own case. The law imposed no duty upon him, but to answer or omit or refuse to answer to the rule. He did answer by making his choice in the legal way. In the *Estate of the Bank of Pennsylvania*, 10 P. F. S. 479, the law is succinctly stated as follows: "No one is held to have waived a right unless it appears that he knew his rights, and intended a waiver of them."

James Boyd, for appellees. As the orphans' court in matters within its jurisdiction proceeds on the same principles as a court of chancery—*Willard's Appeal*, 15 P. F. S. 267—it is not easy to see how the court could have made any other decree, especially when the proceedings were not adverse, but were throughout conducted in perfect harmony and accord, without any protests or objection until forty-two days after the purparts were decreed and adjudged to the heirs, when the appellant presented his petition to the court, asking that No. 6 be decreed and adjudged him, leaving the court's decree to stand in respect to all the other purparts. "In equity, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." 7 Watts, 400;

1 Penn. 470, *Decker v. Eisenhauer*. A party will be estopped from taking advantage of action in which he has acquiesced for his own benefit. 8 Casey, 25, *McCully v. Railroad Co.* As to what is a waiver, 7 Casey, 308, *Lauman v. Young et al.* THOMPSON, J., says: "Acquiescence in acts inconsistent with it—forfeiture—will readily dispense with a right to claim it." 7 S. & R. 99, *Fisher v. Larick*. The defendant may insist on the writ pursuing the form prescribed by the act, but he must take the objection at an early stage of the proceedings. 4 Yates, 456, *Gevett v. Read*. The waiver of a lien may be inferred from the conduct of the party. To the same effect are *Lyons v. Miller*, 4 S. & R. 280; and *Brown v. O'Brien*, 4 P. L. I. 501. The same principle prevails in cases of waivers of the exemption laws, inquisitions and condemnations. 19 Penn. St. 255, *Hammer v. Freas*. "A debtor must claim his exemption out of personal property before the sale commences, or he will be held as waiving his right to the exemption." Is the provision in the act of April 22, 1856, in relation to bids in writing, directory or mandatory? That it is directory the following cases abundantly show: 16 W. N. C. 149; No. 10, of June 18, 1885, *Cummiskey v. Cummiskey*. "The provisions of the acts of assembly relating to partition. According to which the court must examine the title to the property previous to a judgment *quod partitio fiat* is directory only." 6 Binn. 333, *Massey v. Thomas*. An amicable action of ejectment is good, although the act of 1806 declares that all writs of ejectment shall be in the form prescribed by that act and not otherwise. 5 Watts, 428, *Campbell v. Galbraith*; 3 Barr, 365; *Zeigler v. Fisher*, 1 Watts, 76. Notwithstanding the words of the act of 1807, the defendant in ejectment may plead a statement, although the act directs that the plea shall only be not guilty. 7 Barr, 138; *Lockhart v. John*. COULTER, J.: "But these sections must be considered directory only." Referring to the thirty-third section of the act of March 29, 1832, providing that no order of sale shall be granted until the administrator has given bond, and the forty-third section of act of 1834, providing that no executor or administrator shall have power to execute a decree of the orphans' court for sale of real estate, etc., until he shall have given security. If this court should hold that the act of April 22, 1856, imperatively requires that all offers must be made in writing, notwithstanding all the heirs agree to waive it and consent or acquiesce in oral offers, it becomes important to look at the provisions of the act. Section 10 says . . . "The same shall be allotted to such one or more of the parties in interest who shall . . . offer in writing the highest price therefor above the valuation returned." The act is entitled "An act for the greater certainty of title and more secure enjoyment of real estate." It does not purport to be a supplement to the act in relation to the partition proceeding in the orphans' court, but independently prescribes the procedure in all partition cases after the appraisements. There is not a word said in this act about the right of an heir to elect to take a purpart. And we maintain that the right to elect has not existed since the passage of this act, unless with the consent of the heirs, and that all who desire a purpart must make their offer for it in writing, when the court at once, and

without further action, decrees it to the one who makes the highest offer. In no other way can the provisions of the act be complied with, for it is intended to place all the heirs on an equal footing. If this view is not adopted, and the right to elect still exists, then the appellant's election to take No. 6 at the valuation is itself an offer or bid, and like the rest should have been made in writing. If he is entitled to No. 6, he gets it without either an election or offer in writing, which is out of the question if the act is to govern. If all the rest of the heirs must make their offers in writing, most assuredly he must make his in writing also. The act says so in express terms. And not having done so, he is a law breaker himself, and is in no position to find fault with the three heirs who like himself made oral offers for No. 6, and, therefore, has no standing in this contention. There is no new view but that of the court expressed in 1858 and 1861, *vide* 5 Wr. 78; *Mason's Appeal*, READ, J., at foot of page.

PER CURIAM. We think the practice of allotting purparts in partition on oral bids not only pernicious but contrary to the statute. The offer to take must be in writing. Here, however, the appellant was present and participated in the manner of allotment without any objection. He made oral bids on several of the purparts, and one of them was allotted to him. Having thus actively assented to such form of bidding and received and retained some of the benefits therefrom, he cannot now be permitted to interpose an objection to the title of the others obtained in the same manner.

Decree affirmed and appeal dismissed at the costs of the appellant.

KAUFFMAN v. THE SUSQUEHANNA BUILDING AND LOAN ASSOCIATION.

May 10, 1886.

WIDOW'S \$300 — EXEMPTION — PREFERENCE — LIEN — JUDGMENT — MORTGAGE.

A widow is not entitled out of the proceeds of a sheriff's sale of mortgaged premises to the \$300 exemption given by the act of 14th April, 1851, in preference to her husband's mortgage.

A. recovered judgment against B. who owned a piece of land; later B. gave to C. a mortgage upon the land; later B. died leaving a widow, who elected to take for the use of herself and children \$300 of real estate; the land bound by the judgment and mortgage was accordingly set apart for her. In course of time the land was sold under proceedings upon the mortgage. *Held*, that C., the mortgage creditor, took the fund realized from the sale.

Certiorari sur appeal from the decree of the court of common pleas of Northumberland county.

Conrad, in his life-time, was the owner of the fee in a tract of land, situate in the county of Northumberland. After he had acquired his title, Kauffman obtained a judgment against him for \$162.18, which was entered on the 27th May, 1874. This judgment was duly revived, and the lien continued by *scire facias*.

After the original entry of that judgment, under date the 20th August, 1876, Conrad gave a mortgage upon the land to the Susquehanna Building and Loan Association, which was recorded.

Afterward, on the 8th day of October, 1877, Conrad died, without having paid, or otherwise discharged the lien of, either the judgment

or the mortgage. At the time of his death, the judgment was first in order of lien, and the mortgage second; and so the order of lien continued unto the time of seizure and sale by the sheriff, on a *levari facias* upon the judgment on *scire facias* upon the mortgage. The *scire facias* upon the mortgage was issued the 28th September, 1881, and judgment thereupon entered the 20th May, 1882, for \$477.16. The *levari facias* issued the 3d July, 1882, and the land in controversy was sold by the sheriff on the 3d August, 1882, to the mortgagee, for \$160. Of this sum, the sheriff applied \$68.60 to costs, and paid the balance, \$91.40, into court for distribution. An auditor was appointed, and the contest before him and in the court below was, whether the fund should be awarded to the first lien creditor by judgment, or to the second lien creditor by mortgage.

Unto the widow of the decedent, the same tract of land had been appraised and set apart, upon her election to take, of the real estate of her deceased husband, the sum of \$300, under the act of the 14th April, 1851.

It was appraised at the sum of \$275, and, upon return thereof, the appraisement was confirmed by the orphans' court.

The auditor found that, though the lien of the appellant's judgment was prior to that of the mortgage, yet the widow's claim was good as against the judgment, but not as against the mortgage, and, therefore, the fund should go to the mortgagee. And so he reported, as also that Kauffman should pay the costs. The court below adopted substantially the same view, and decreed a confirmation of the report of the auditor.

Geo. Hill, J. Nevin Hill and Wm. A. Sober, for appellant. For a sale upon a prior or subsequent judgment would discharge, as well the mortgage as the judgment, and both the judgment creditor and the mortgagee would be thrown upon the fund. Citations are hardly needed to this point. Some of them are, *The Girard Life Insurance Co. v. The Farmers & Mechanics' Bank*, 7 Smith, 388; *Clarke v. Stanley*, 10 Barr, 472; *Helfrich v. Weaver*, 11 Smith, 385; *Wertz's Appeal*, 15 id. 306. The widow was, perhaps, mistaken in the *forum* when she appeared before the auditor to distribute the fund, or rather those who there appeared for her; for as against her statutory right and title, it was only the remainder that passed. *Sipes v. Mann*, 3 Wr. 414; *Runyan's Appeal*, 3 Casey, 121; *Detweiler's Appeal*, 8 Wr. 243; *Nottes' Appeal*, 9 id. 361; *Hildebrand's Appeal*, 3 id. 133; *Spencer's Appeal*, 3 Casey, 218.

C. M. Clement, for appellee. If the court below erred, as seems to be claimed by counsel for appellant, in awarding the fund to the mortgagee, in no event could it have been awarded to the appellant. The judgment was not given for purchase-money, and the formal adjudication of the land to the widow divested its lien as to all of the real estate appraised, no matter what other rights were preserved. Citations upon this point are hardly necessary, but we refer to *Runyan's Appeal*, 3 Casey, 121; *Detweiler's Appeal*, 8 Wr. 245, and cases cited. The lien of the judgment upon the land bound by the

mortgage having been determined by operation of law immediately upon the confirmation of the appraisement, the question of priority could not arise before the auditor, nor had the appellant any right to participate in the distribution. *Clark v. Stanley*, 10 B. 472; *Rudy's Appeal*, 13 Norr. 338. "Where land is sold at sheriff's sale only those creditors whose claims were liens on the land at the time of the sale can participate in the distribution of the proceeds." The widow of a decedent takes the land under the statute of 14th April, 1851, subject to any mortgage given by the decedent in his life-time. *Bryar v. Campbell*, 4 East. Rep'r, 336; *Nerpel's Appeal*, 10 Norr. 334.

CLARK, J. Under the fifth section of the act of 14th April, 1851, a widow is entitled to retain, out of the estate of her deceased husband, either real or personal property, to the value of \$300. The confirmation of the appraisement is an adjudication which vests the title to the property taken in her. *Runyan's Appeal*, 27 Penn. St. 121. When the adjudication is of real estate, she takes the title of her husband absolutely and may convey it by deed. *Sipes v. Mann*, 39 Penn. St. 41. She is entitled to this exemption as against the judgment, as well as the general creditors, and will be preferred even as to a judgment creditor in whose favor the decedent had waived the benefit of the exemption law. *Spencer's Appeal*, 27 Penn. St. 218. The only limitation to her right, as to real estate expressed in the statute, is that her right "shall not affect or impair any liens for the purchase-money of such real estate."

A similar restriction is the only one found in the debtor's exemption act of 9th April, 1849. In *McAuley's Appeal*, 11 Casey, 209, however, it was held that the act of 1849 was inapplicable to mortgages, whether given for purchase-money of real estate or not; that such debts were not within the purview of that statute. In *Gangwer's Appeal*, 12 Casey, 466, reasons were assigned at length for this interpretation of the statute, and the rule has since been followed in a large number of cases.

In *Nerpel's Appeal*, 10 Norr. 334, the same interpretation was given to the act of 14th April, 1851, and it was there held that a widow was not entitled to her exemption, as secured by the fifth section of that act, in preference to her deceased husband's mortgage, out of the proceeds of a sheriff's sale of the mortgaged premises. This construction was necessarily inferred, from the nature of the mortgage contract. "The mortgage by the decedent," said this court, in the case last cited, "was something more than a mere lien. For all purposes of security to the mortgagee, it was a conveyance of the land. He could have recovered in ejectment the possession of the premises, and held until his principal, with interest, was repaid. Had he resorted to this remedy and the mortgagor had then died, it is not pretended that his widow would have any right to the exemption. The proceeding under the act of assembly by *scire facias* is but a substitute for a foreclosure in equity, and the sale which it provides for does not alter the case. It ought not to be that the election of one remedy, and not the other, should make a difference in the right of the mortgagee."

So, also, in *City of Allentown's Appeal*, 1885, not yet reported,

we said: "The reason why such mortgage shall not be impaired by the statutory exemption in favor of the widow or children is said to arise from the contract by which he pledges the land to his creditors as a security for the debt. And though mortgages are commonly spoken of as mere securities for payment of money, they are such because they are formal pledges of the land. The mortgagee, upon default in performance by the mortgagor of the stipulations in the deed, may by ejectment obtain possession of the premises, and the exemption laws do not apply to the impairing of such a security. *Gangwere's Appeal*, 36 Penn. St. 466; *Nerpel's Appeal*, 91 id. 334."

The confirmation of the appraisal and designation of the widow's exemption was, therefore, an adjudication *in rem*, in her favor; thereafter the land constituted no part of the decedent's estate; the title was thereby transferred to the widow, absolutely it passed to her, liberated from the lien, not only of the general debts but from the lien of all judgments of the decedent, whether entered before or after the mortgage. This restriction, on the remedies of the general and judgment creditors, is plainly expressed in the statute, and is well understood in practice.

There was, therefore, after the date of the adjudication in the orphans' court, one lien only remaining against this land, and that lien was the mortgage, to which, from its nature, the act of 1851 was not applicable; the land was, by force of the statute, absolved or exonerated from all other liens.

The distribution, therefore, concerned only the mortgage creditor and the widow. Kauffman had no standing whatever, before the auditor, and his claim was rightly refused. The title of the widow was not only by the express terms of the decree, but by law, subject to the lien of the mortgage, and as the fund for distribution was inadequate for the payment of that lien, the widow was clearly not entitled to any share in it. The distribution made by the auditor and confirmed by the court was, therefore, in strict accordance with the previous rulings of this court.

We think the costs were rightly imposed upon the appellants; their respective claims upon the fund were utterly unwarranted and unfounded, and it is unjust that the small fund for distribution should be frittered away in a useless litigation, for which they were alone responsible.

The decree of the common pleas is affirmed.

WEAVER v. LYON.

May 10, 1886.

JUDICIAL SALE — SETTING ASIDE FOR INADEQUACY OF PRICE — REVOKING DECREE.

A court, after the acknowledgment of a sheriff's deed, upon application, and upon sustained allegations of inadequacy of price, and an offer of a responsible bidder to bid twenty-five per cent more, decreed that a sheriff's sale of real estate be opened, the acknowledgment of the sheriff's deed be rescinded, the deed be canceled and the purchase-money be returned, etc.; later, being doubtful as to whether it could open the sale after the acknowledgment of the deed for the mere purpose of receiving additional bids, or for any other cause than fraud, especially as no

application had been made until after the expiration of the six days, within which the sheriff could legally sell under the execution in his hands, it ordered a reargument, after which it revoked its former decree. *Held*, there was no error in so doing.

Mere inadequacy of price is not a good cause for which to set aside a sheriff's sale.*

Error to the court of common pleas of Northumberland county.

The land of Weaver was sold at sheriff's sale; after the acknowledgment of the sheriff's deed Weaver presented a petition to the common pleas, asking that the sale be set aside, etc., as the price at which the property had been sold was greatly inadequate, and as a responsible person named would bid at a second sale twenty-five per cent more; the court granted the prayer; later. it ordered a reargument of the matter and revoked its former decree.

A. D. Hower and *S. P. Wolverton*, for plaintiff in error. The learned judge says, the court ought to seize hold of a slight irregularity to set aside the sale. That class of cases which speak of the effect of an acknowledgment of a sheriff's deed upon irregularities in the process or sale have no application to a case like this. They all arise in cases where the validity of titles acquired by sheriff's sales was questioned, generally in actions of ejectment. There was no delivery of the deed and, therefore, no title passed by the mere acknowledgment. In *Duncan v. Robeson*, 2 Yeates, 454, the court says: "The deed does not take effect from its acknowledgment, but from its sealing and delivery." In *Bradlee v. Brownfield*, 2 W. & S. 271, "The acknowledgment of a sheriff's deed is not such a *res adjudicata* as precludes an inquiry into the legality of the proceedings by which the sale was made." In *Cash v. Tozer*, 1 W. & S. 519, this whole subject is fully discussed by Chief Justice Gibson, and on page 529 he says: "A fraud or defect in the sale may, perhaps, not be perceived in time for an objection to the acknowledgment, and to preclude an inquiry into it afterward would be to introduce a very short and severe judicial statute of limitation." In *Robbins v. Bellas*, 2 Watts, 362, the sheriff acknowledged the deed in open court, and it was then deposited with the prothonotary and subsequently by him delivered to the purchaser by order of the court. It was held that the court had no power to order the delivery of the deed without the consent of the sheriff, and that it passed no title because there was no delivery. The following cases clearly show that the court had the power to grant the relief prayed for by the defendant. *Hoffa v. Morter*, 33 Leg. Int. 383; *Shields v. Miltenberg*, 2 Harr. 76; *Rees v. Berryhill*, 1 W. 263; *Sloan's case*, 8 id. 194; *Chadwick v. Patterson*, 2 Phila. 275; *Shakespeare v. Fisher et al.*, 11 id. 251; *Stephens v. Stephens*, 1 id. 108; *Twells v. Conrad*, 2 W. N. C. 30; *Lewis' Petition*, 1 Pitts. Rep. 537; *Mitch. Motions and Rules*, 80; *Jackson v. Morter*, 1 Norr. 294; *Lawrence Sheriff's Sales*, 70; *Conly v. Philadelphia*, 5 Norr. 110; *Stephens v. Stephens*, 1 id. 108; *Vauernan v. Cooper*, 4 Clark, 319; *Scheerer v. Stanley*, 3 R. 276.

* See *Clarke's Ch. Rep.* (Moak's ed.) 85, note; 13 Eng. Rep. 628, note; *Brush v. Shuter*, 3 Abb. N. C. 73; *Clafin v. Clark*, 22 W. Dig. 137; *Lockwood v. Maguire*, 57 How. 266; *Fisher v. Hersey*, 78 N. Y. 387.

P. L. Hackenberg & Son, for defendant in error. "The purchaser must have been guilty of some falsehood before or at the time of the sale which succeeded and he must have obtained the property for less than it otherwise would have sold for." *Barton v. Hunter*, 5 Out. 411. "To invalidate a sale it must be shown that the party purchasing was guilty of actual fraud such as making a false representation or practicing some trick or device and thereby procuring the title for less than its value." *Sharp v. Long*, 4 Casey, 439. All of the adjudicated cases show that it is the fraud of the purchaser only that will avoid the sale. *Lessees of Wetzel v. Fry*, 4 Dall. 218; *Carson's Sale*, 6 Watts, 144, 145, 146. "The law presumes that a public judicial sale is made in good faith. The presumption should stand unless overthrown by statutory evidence of fraud or unfair means." *Barton v. Hunter*, 5 Out. 411; *Shoemaker v. Kunkle*, 5 Watts, 108; *Bear's Estate*, 10 Smith, 99. "That the writ had not been returned at the time of acknowledgment of deed is insufficient to destroy the validity of the sale; that omission may be cured by an acknowledgment of the deed in open court, reciting a sale under the writ." *Jackson v. Morter*, 1 Norr. 296; *Gibson v. Winslow*, 2 Wr. 54. "A defendant must object in reasonable time, and such reasonable time is before the confirmation of the sale and the acknowledgment of the deed. The defendant is estopped from objecting afterward." *Sprague v. Shriver*, 1 Casey, 285. "No objection can safely be heard after the whole is completed, money paid and deed made and acknowledged; I mean no objection merely to forms and which could have been made, which were known, or the parties were bound to know and make at a previous time." *Sergeant v. Ford*, 2 W. & S. 127. The acknowledgment of the deed cures all irregularities. *Crowell v. McConkey*, 5 Barr, 168; *Solomon v. Parnell*, 2 Miles, 264.

PER CURIAM. No error is alleged as between the original parties to this judgment. The attempt is to reach one who purchased the real estate of the defendant by virtue of an execution issued on the judgment. The application was to set aside the sheriff's sale after deed had been duly acknowledged. No fraud was established. Mere inadequacy of price affords no just cause for setting aside a sheriff's sale. It was not error in the court to modify the order which it had previously made.

Judgment affirmed.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY v. BELL.

May 10, 1886.

MASTER AND SERVANT—FELLOW SERVANT—LIABILITY OF MASTER FOR INJURY TO SERVANT.

To constitute one a fellow servant within the meaning of the law that precludes a recovery from the employer in damages for a personal injury inflicted through the negligence of a fellow servant, it is not necessary that the person occasioning the injury and the one injured be at the time engaged in the same particular work: it is sufficient if they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes. *Lehigh Valley Coal Company v. Jones*, 86 Penn St. 432, followed.

A master is liable for the negligence of his agent or subordinate only when the master has placed the entire charge of his business, or a distinct branch of it, in the hands of such agent or subordinate, exercising no discretion or oversight of his own; the agent or subordinate must have a general power and control over the business, not a mere authority to superintend a certain class of work or a certain gang of men.

Error to the court of common pleas of Susquehanna county.

This was an action brought to recover damages by Bell, an employee of the New York, Lake Erie and Western Railroad Company, against the corporation, for an injury occasioned to him by being knocked off the top of a moving car by striking a gas pipe extended over the track. The facts are set forth in the opinion.

W. H. and H. C. Jessup, for plaintiff in error. *Lehigh Valley Coal Co. v. Jones*, 86 Penn. St. 432. The following are cases where the negligence of the first-named employee caused injury to the second, and no recovery was had on the ground of being co-employees: Blacksmith's assistant—blacksmith, *Melville v. Missouri River, etc., R. R. Co.*, 4 McCrary, 194. Boiler-makers—mechanic in repair shop, *Murphy v. Boston & Albany R. R. Co.*, 8 Am. & Eng. R. R. Cas. 510. Brake repairer—brakeman, *Nashville, etc., R. R. Co. v. Foster*, 11 Am. & Eng. R. R. Cas. 180. Brakemen—fellow brakeman, *Chicago & A. R. R. v. Rush*, 84 Ill. 570; *Hayes v. Western R. R.*, 3 Cush. 270; *Atchison, T. & S. F. R. R. Co. v. Plunkett*, 2 Am. & Eng. R. R. Cas. 126. Brakeman—laborer loading dirt on train, *Henry v. Staten Island R. R. Co.*, 2 Am. & Eng. R. R. Cas. 60; *St. Louis & S. E. R. R. Co. v. Britz*, 72 Ill. 256. Brakeman acting as conductor—brakeman, *Robinson v. Houston & T. C. R. R. Co.*, 46 Tex. 540. Car coupler—brakeman, *Whitman v. Wisconsin & M. R. R. Co.*, 12 Am. & Eng. R. R. Cas. 214. Car inspector—brakeman, *Kidwell v. Houston & Gt. N. R. R. Co.*, 3 Woods (U. S. C. C.), 313; *Smith v. Potter*, 2 Am. & Eng. R. R. Cas. 140; *Nashville, etc., R. R. Co. v. Foster*, 11 id. 180; *Mickin v. Boston & Albany R. R. Co.*, 15 id. 196. Car repairer—engineer, *Chicago & Alton R. R. Co. v. Murphy*, 53 Ill. 336. Conductor—brakeman, *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Thayer v. St. Louis, A. & T. H. R. R. Co.*, 22 id. 26; *Smith v. Potter*, 2 Am. & Eng. R. R. Cas. 140; *Dow v. Kansas Pacific R. R. Co.*, 8 Kans. 642; *Sherman v. Rochester & S. R. R. Co.*, 17 N. Y. 153; 15 Barb. 574; *Robinson v. Houston & T. C. R. R. Co.*, 46 Tex. 540. Conductor—car coupler, *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226. Conductor—engineer, *Michigan Central R. R. Co. v. Dolan*, 32 Mich. 510. Conductor—fireman, *Slater v. Jewett*, 5 Am. & Eng. R. R. Cas. 515. Conductor—laborer on gravel train, *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384; *O'Connell v. Balt. & Ohio R. R. Co.*, 20 Md. 212; *Gilshanum v. Stoney Brook R. R. Co.*, 10 Cush. (Mass.) 228. Conductor—laborer riding on train, *Howland v. Milwaukee, etc., R. R. Co.*, 5 Am. & Eng. R. R. Cas. 378. Laborer—loading cars, *McGower v. St. Louis & Iron Mt. R. R. Co.*, 61 Mo. 528. Conductor—laborer shoveling snow on track, *Jeffrey v. Keokuk, etc., R. R. Co.*, 5 Am. & Eng. R. R. Cas. 568. Conductor—surveyor riding on train, *Ross v. N. Y.*

C. & H. R. R. Co., 74 N. Y. 617. Derrick, laborer setting up — brakeman on train, *Holden v. Fitchburg R. R. Co.*, 2 Am. & Eng. R. R. Cas. 94. Engineer — brakeman, *Summerhays v. Kansas Pacific R. R. Co.*, 2 Cal. 484; *Pitts., Ft. W. & C. R. R. Co. v. Devlinney*, 17 Ohio St. 197; *Same v. Lewis*, 33 id. 196; *Sherman v. Roch. & Syracuse R. R. Co.*, 17 N. Y. 153; *Wright v. N. Y. Central R. R. Co.*, 25 id. 562; *Ill. Cent. R. R. Co. v. Keen*, 72 Ill. 512; *Connor v. Chicago, R. I. & P. R. R. Co.*, 50 Mo. 285; *Mobile & M. R. R. v. Smith*, 59 Ala. 245; *Moran v. N. Y. C. & H. R. R. R. Co.*, 67 Barb. 96; *Houston & T. C. R. R. Co. v. Willie*, 5 Am. & Eng. R. R. Cas. 541; *Same v. Meyers*, 8 Am. & Eng. R. R. Cas. 114; *Pitts., etc., R. R. Co. v. Ranney*, 5 id. 342; *Nashville, C. & St. L. R. R. Co. v. Wheeler*, 15 id. 315. Engineer — car repairer, *Valtee v. Ohio & Miss. R. R. Co.*, 85 Ill. 500. Engineer — conductor, *Ragsdale v. Memphis & C. R. R. Co.*, 3 Baxt. 426. Engineer — conductor claiming to be passenger, *Manville v. Cleveland & Toledo R. R.*, 11 Ohio St. 417. Engineer — fireman, *Alabama & Fla. R. R. Co. v. Waller*, 48 Ala. 459; *Murray v. So. Carolina R. R.*, 1 McMullen, (S. Car.) 385; *Paulmier v. Erie R. R. Co.*, 5 Vroom (N. J.), 151. Engineer — station master, *Evans v. Atlantic & Pac. R. R. Co.*, 62 Mo. 49. Engineer — switchman, *Smith v. Memphis & Louisville R. R. Co.*, 18 Fed. Rep'r, 304; *Columnbus C. & I. R. R. Co. v. Troesch*, 68 Ill. 545; 57 id. 155. Fireman — brakeman, *Greenwald v. Marquette, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cas. 133. Fireman — engineer on another train, *Bull v. Mobile & Montgomery Ry. Co.*, 67 Ala. 206. Foreman — laborer, *Hofnagle v. N. Y. Cent. R. R.*, 55 N. Y. 608; *Murray v. Boston & R. R. R.*, 59 How. Pr. 197; *Hanrathy v. North Cent. R. R.*, 46 Md. 280; *Zeigler v. Day*, 123 Mass. 152; *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589; *Hogan v. Cent. Pac. R. R. Co.*, 49 Cal. 128. Foreman — laborer on hand car, *Weger v. Penna. R. R.*, 55 Penn. St. 460. Foreman in yard — brakeman, *Rains v. St. L., I. Mt. & S. R. R. Co.*, 5 Am. & Eng. R. R. Cas. 610. Master mechanic — fireman, *Columb. & Ind. Cent. R. R. v. Arnold*, 31 Ind. 174. Master mechanic — engineer, *Hough v. Railway Co.*, 100 U. S. 213. Section foreman — brakeman, *Lewis v. St. L. & I. Mt. R. R. Co.*, 59 Mo. 495; *Hardy v. Carolina Cent. R. R. Co.*, 74 N. C. 734; 76 id. 5. Section foreman — laborers, *L. & Nashville R. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866. Section foreman — switchman, *Hall v. Missouri Pacific R. Co.*, 74 Mo. 298; *Same v. Same*, 8 Am. & Eng. R. R. Cas. 106. Yard master — brakeman, *Besel v. N. Y. Cent. R. R. Co.*, 70 N. Y. 171. Yard master — laborer, *Graville v. Minn. St. R. R. Co.*, 3 McCrary, 352. The foregoing authorities seem to settle beyond question that the plaintiff and Pope and Vedder, and O'Dea, and all the men in the shops were fellow servants. Nor does the case of *P. & N. Y. C. & R. R. Co. v. Leslie*, 42 Leg. Int. 267, deny this. As to duty of employer to employee, *Whart. Neg.*, § 232; *P. W. & B. R. R. Co. v. Keenan*, 103 Penn. St. 124; *Campbell v. Penna. R. R. Co.*, 17 W. N. C. 73; *Railroad Co. v. Keenan*, 7 Ont. 124; *Rummell v. Dilworth, Porter Co.*, 33 Pitts. Leg. Jour. 256; *Sykes v. Packer*, 3 Ont. 465; *Grimout v. Hartman*, 1 C. P. Rep., No. 15. This question of a safe place to work in is also to

be modified by the further question of whether the place which was safe before has been rendered unsafe by the negligence of fellow servants. The case of *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268, illustrates this. If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work. The decisions of this court furnish illustrations of this application of the rule under a great variety of circumstances. *Albro v. Agawam Canal*, above cited; *Durgin v. Munson*, 9 Allen, 396; *Duffy v. Upton*, 113 Mass. 544; *Avilla v. Nash*, 117 id. 318; *Hodgkins v. Eastern R. R.*, 119 id. 419; *O'Connor v. Roberts*, 120 id. 227; *Kelley v. Norcross*, 121 id. 508; *Harkins v. Standard Sugar Refinery*, 122 id. 400; *Zeigler v. Day*, 123 id. 152; *Colton v. Richards*, id. 484; *Smith v. Lowell Manuf. Co.*, 124 id. 114; *Morse v. Glendon Co.*, 125 id. 282; *Kelley v. Boston Lead Co.*, 128 id. 456. See, also, *Tarrant v. Webb*, 18 C. B. 797; *Hall v. Johnson*, 3 H. & C. 589; *Wilson v. Merry*, above cited. "For patent defects the master as a rule is not liable." Beach Cont. Neg. 363. "A servant assumes the patent risks naturally and reasonably incident to his employment." *P. & W. & Balt. R. R. Co. v. Keenan*, 103 Penn. St. 134. Same principle, *Green & Coates, etc., Ry. Co. v. Bresmer*, 97 Penn. St. 106. "There can be no recovery against the employer for injuries arising from patent risks which the employee has knowingly and voluntarily assumed." *Campbell v. Penn. R. R. Co.*, 17 W. N. C. 73; *Marsden v. Haight & Co.*, 14 id. 527; *Sykes v. Packer*, 3 Out. 465; *Pittsburg & Connellsville R. R. Co. v. Sentmeyer*, 92 Penn. St. 280, is a leading case. *Owens v. N. Y. Cent. R. R. Co.*, 1 Lans. 108; *Gibson v. Erie R. R. Co.*, 63 N. Y. 449; *Davitt v. Pacific R. R. Co.*, 50 Miss. 302; 3 Am. Ry. 533; *Wells, Admr's., v. Burl., C. R. & N. R. R. Co.*, 2 Am. & Eng. R. R. Cases, 243; *B. & O. R. R. Co. v. Stricker*, 51 Md. 47. This court have fixed the degree of care to be observed in all cases by a person about to cross a railroad track. *Penn. R. R. Co. v. Beale*, 73 Penn. St. 504; *North Penn. R. R. Co. v. Heileman*, 49 id. 60. "It is the servant's knowledge which withholds from him the right of action." *Railway Co. v. Bresmer*, 97 Penn. St. 103. When there is no sufficient evidence it is the duty of the court to withdraw the case from the jury. *Phil. & Read. R. R. Co. v. Schertle*, 97 Penn. St. 450; *Howard Ex. Co. v. Wile*, 14 P. F. S. 201; *Hoag v. R. R. Co.*, 4 Norr. 293; *Penn. R. R. Co. v. Fries*, 6 id. 234.

E. L. Blakeslee and *James A. Lynes*, for defendant in error. "Where an absolute duty rests upon the master he cannot screen himself from liability, upon the ground that he employed a competent person to discharge the duty. He must at his peril perform it." Wood Mast. and Serv. 900. In some cases, says COOLEY, J., "the master is charged with a duty to those serving him which he cannot divest himself of by any delegation to others. He is charged with such a duty as regards the safety of his premises." "The suitability of the tools,

implements, machinery, or materials he procures, or employs, as the servants he engages, or makes use of. Whoever, he adds, is permitted to exercise the master's authority in respect of these matters, is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent for his personal negligence." Southern Law Review, April, 1876, p. 123; *Fard v. Fitchburg R. R.*, 110 Mass. 240, p. 255; *Lanning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; 3 Wood Railways, 1469; Shearm. & Redf. Neg. (2d ed.), § 92; *Fuller v. Jewett*, 80 N. Y. 46; Whart. Neg., §§ 221, 232; *Rummell v. Dillworth*, 17 W. N. C. 90; 3 Wood Railways, 1474; Whart. Neg. (2d ed.), § 232; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; 2 Rorer Railroads, 1211, note 3; *Booth v. Boston & Albany R. R. Co.*, 67 N. Y. 593; S. C., 73 id. 38; *Beesl v. N. Y. C. & H. R. R. Co.*, 70 id. 571; *Kilpatrick v. N. Y. C. & H. R. R. Co.*, 79 id. 240; Moak's Underhill Torts, 58; *Mann v. D. & H. C. Co.*, 91 N. Y. 495; *Pantyor v. Tilly Foster Iron Co.*, 99 id. 368. In the case of *Mullen v. Philadelphia & Southern Mail Steamship Co.*, 78 Penn. St. 25, on page 32, this court say: "Where the employer leaves every thing in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the master's negligence, for which the latter is liable. But where the master places the entire charge of his business or a distinct branch of it in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required is a breach of a duty for which the master should be held answerable. The negligence of the agent with such powers becomes the negligence of the master." See, also, *Malone v. Hathaway*, 64 N. Y. 5; Rorer Railroads, 1198; *Greenleaf v. Illinois R. R. Co.*, 14 Iowa, 29; *Worden v. Bult & O. R. R. Co.*, 32 Ind. 411; *Durkin v. Sharp*, 88 N. Y. 225; 3 Wood Railway Law, 1469-1473; *Crispin v. Babbit*, 81 N. Y. 516. O'Dea was in his employ and had no duties in common with the plaintiff, we, therefore, say that neither Vedder or O'Dea were fellow servants with the plaintiff. *Russell v. Hudson R. R. Co.*, 17 N. Y. 134; *Baird v. Pettit*, 70 Penn. St. 477, at p. 482; *O'Donnell v. Alleghany Valley R. R. Co.*, 59 id. 239; 2 Thomp. Neg. 1036; *P. & N. Y. C. & R. R. Co. v. Leslie*, 42 Leg. Int. 267. "In this country the rule has been so far modified as to hold that a servant does not by remaining in his master's employ, with knowledge of defects in the machinery he is obliged to use, assume the risks attendant in the use of such machinery, if he has notified his employer of such defects, or protested against them, in such way as to induce a confidence that they will be remedied. Whart. Neg. 220; *Mansfield Coal Co. v. McEnery*, 10 Norr. 195; *Snow v. Housatonic R. R. Co.*, 8 Allen, 411; 2 Thomp. Neg. 1009. Some cases say if there is a reasonable expectation it will be removed. *Kelley v. Silver Spring Co.*, 12 R. I. 112; Where the servant's attention was occupied by other duties at the time of injury. 2 Thomp. Neg. 1015; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Shanney v. Androscoggin Mills*, 66 Me. 420; *Plank v. N. Y. C. R. R. Co.*, 60 N. Y. 607; *Snow v. Housatonic R. R. Co.*

PAXSON, J. The main question in this case has been so often decided that an extended discussion of it becomes unnecessary. It is sufficient to refer to *Lehigh Valley Coal Company v. Jones*, 86 Penn. St. 432, where the rule is laid down as follows:

"The question arises who are fellow servants in contemplation of law? To constitute such they need not at the time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes. The rule is the same, although the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object. The true reason upon which I think the rule rests is that each one who enters the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow workmen in the general course of his employment are within the ordinary risks."

A large number of authorities are then cited by our brother MEEROUR, who delivered the opinion of the court, in support of his position, which we need not repeat. Indeed, I do not understand that the soundness of the rule was seriously questioned upon the trial below. It was in the application of the rule to the facts of the case that the learned judge fell into error. By the defendant's fifth point he was called upon to instruct the jury "that the men employed in the shops of the defendant, and the men employed in the shop-yard to take in and out cars loaded with supplies for use in the shops, and to load and unload them, all being under one common foreman, are fellow servants, and for the negligent acts of any one of them, not communicated to the general foreman, no recovery can be had." The learned judge answered this point as follows: "We decline to affirm this point. It calls upon us to say in substance, as respects the question here, and the acts under investigation, that Bell and O'Dea and Vedder were fellow servants and co-laborers, and that we decline to do."

The accident by which the plaintiff below was injured occurred in the shops of the defendant company. These shops are not all under one roof, but the foundry, hammer shop, and paint shop are separate from the general machine shop, which is about seven hundred feet long. Between the foundry and paint shop, and machine shop, a track is laid for the purpose of bringing in materials and supplies to the various shops from the main track, and for carrying out the castings, cars, locomotives and repaired and manufactured articles upon the main track, for distribution over the road. All of these works and the men employed therein were under the general charge of one V. Blackburn, who was known as the master mechanic, and under him was a general foreman. The power of employing and discharging men was with the master mechanic. Each shop had its foreman, and under him were certain gang foremen who had charge of gangs of men engaged in the performance of particular duties. O. O. Vedder was gang foreman of the turning department, and had charge of making rods and links, and of gas and steam pipe and fitting. M. H. Pope had charge as a boss

of a gang of men whose business it was to bring in cars loaded with materials and supplies for the shops, from the main track, take them into the paint shop, foundry, and other shops, and unload them there, and to load any manufactured articles or supplies from the shops into cars for distribution along the road. The plaintiff was employed on a car running into the shops for the purposes above stated. In the year 1881, O. D. Falkenbury, who was foreman of the foundry, obtained permission of the master mechanic to run a gas pipe from the paint shop to the foundry. This was done by O'Dea, one of the gas fitters, who carried the pipe across the track at an elevation of sixteen feet three inches above the rail. This occurred on the 29th of June, and the same afternoon the plaintiff was struck by this pipe when standing on the top of a car in passing under it, but was not injured. The pipe was of such a height as not to hit a man seated on the cars, or when standing up if he stooped a little. Pope, the foreman, was told of it and said he would see Hawthorne, the general foreman, about it, and the plaintiff says Pope told him it would be taken down. This was not done, and the next day the plaintiff was again struck by the same pipe, and injured, for which injury this action was brought in the court below.

It is too plain for argument that the men engaged at work in these different shops, including the different foremen and gang bosses, were in the same common employment. It is also equally clear that the plaintiff and the rest of the gang, who with him were running cars in and out of the shop to take in supplies and to take out finished work, were in the same common employment. The difference in rank or position makes no difference as has been repeatedly held. The gang laborer and the gang boss or foreman occupy precisely the same position. It is only when the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate exercising no discretion or oversight of his own, that the master is held liable for the negligence of such agent or subordinate. *Mullen v. The Steamship Co.*, 78 Penn. St. 25. The latter must have a general power and control over the business, not a mere authority to superintend a certain class of work, or a certain gang of men, in order to make the master liable. There was nothing of the kind here. The accident was caused by the negligence of the workmen who put up the gas pipe. If they had been ordered by the master mechanic to put up the pipe where and as it was placed, the negligence, if any, would have been the negligence of the master for which the defendants would have been responsible. Such was not the case. The most that can be urged was that the master consented, or to make it stronger, directed that a gas pipe should be carried from the paint shop to the foundry. If in doing so, the men employed in putting it up did their work negligently, and a fellow workman was injured thereby, it was the negligence of men engaged in the same common employment; hence it was not the negligence of the master, and consequently not that of the company.

This view is not in conflict with the case of *Penn. & New York Canal and Railroad Co. v. Leslie*, 42 Leg. Int. 267. In that case Leslie and Mason were respectively engineer and fireman of a gravel

train, and the negligence complained of was that of a boiler-maker in a repair shop. It was held under the circumstances of the case that there was no connection between them; that the plaintiff had no more business in and about the company's machine shops than if said shops had belonged to some other company or individual. This case was, perhaps, a close one, yet it differs essentially from the one in hand. Here the plaintiff was admittedly employed in and about the shops; his business was to take the material in and out as before stated.

We cannot affirm this case without extending the doctrine of *respondet superior* to an unreasonable length.

Judgment reversed.

WARREN ET AL. v. STEER.

May 17, 1886.

TESTIMONY — EVIDENCE — WITNESS — TITLE — TRUST.

A. was offered as a witness on a trial and his testimony was heard; in the progress of the case and before the testimony was finished, the incompetency of A. was disclosed, whereupon the trial judge ordered his testimony to be stricken out and in the charge instructed the jury to disregard it. *Held*, the court had committed no error in not excluding the testimony of A. till his incompetency appeared.

The rule that where one of the parties to a contract in litigation is by death denied the privilege of testifying in relation to it, the policy of the law will close the mouth of the other, does not apply to actions involving the title to real estate.

B., the husband of C., bid off real estate at a public sale; the purchase-money was applied by D., who was the brother of C.; the deed was made out in the name of C. as grantee; D. took possession and retained it till his death. *Held*, that whether or not a trust resulted to D. depended upon a presumption of an intention to that effect arising from the payment of the purchase-money by him, and as the facts to raise the presumption were shown by parol, of course the presumption might be overcome by parol evidence of an actual intention otherwise.

Error to the court of common pleas, No. 2, of Philadelphia county. This was an action of ejectment; the facts are stated in the opinion.

Walter J. Budd and *Wm. Hopple, Jr.*, for plaintiffs in error. Warren was the "assignor of the thing or contract in action" — Act of 1869 — and, being dead, Steer was clearly incompetent to testify to the declarations made to him by Warren in his life-time. *Karns v. Tanner*, 16 Sm. 297; *Arthur v. King*, 3 Norr. 525; *Hess v. Gourley*, 8 id. 195; *Waltman v. Herdic*, 9 id. 459; *Ewing v. Ewing*, 15 id. 351; *Fross' Appeal*, Leg. Int. 358, Sept. 19, 1884. The deed of Richard W. Steel and wife to Mary Ann Davis, dated February 18, 1854, acknowledged, but not recorded, was produced on call by the plaintiffs in error, who were in possession of the premises. Its admission in evidence to show title in the defendant in error was objected to, unless possession of the premises in Mary Ann Davis was shown, and proof also of the delivery of the deed to her by Steel, the grantor, or by Warren. Steer was called to testify to her possession under the deed. His knowledge was derived from Warren's alleged admissions to him, made after 1856. Steer was incompetent to testify to these admissions. The deed was an ancient one, and was no evidence of title in Mrs. Davis, unaccompanied by proof of possession in her. *Thomas v. Horlocker*,

1 Dal. 14; *Shaller et al. v. Brand*, 6 Binn. 435. "Whilst one of the parties to a contract in litigation is denied the privilege of testifying, the policy of the law is to close the mouth of the other." *Graves v. Griffin*, 7 Harr. 176; *Cambria Iron Co. v. Tomb*, 12 Wr. 387; *Karns v. Tanner*, 16 P. F. S. 297; *Fross' Appeal*, Leg. Int. 358, Sept. 19, 1884. Again, both he and his wife had a direct interest in maintaining Steer's title that was not affected by the release. Mrs. Davis was the trustee for Warren, or he was her agent for the property. If he was her agent, his estate is liable to account to her for the rents of the property prior to his death, and the plaintiffs in error since that time to the date of the conveyance to Steer, and the verdict in this suit in favor of Steer would be conclusive proof of such agency. *Stub v. Lees*, 7 Watts, 43; *Cambria Iron Co. v. Tomb*, 12 Wr. 387. The fact that the property was paid for with the money of Warren is sufficient to establish *prima facie* a trust in his favor. *Lynch v. Cox*, 23 Penn. St. 265; *Best's Ex. v. Graybill*, 28 id. 66; *Barnet v. Dougherty*, 32 id. 371; *Edwards v. Edwards*, 39 id. 369. This *prima facie* trust is liable to be overthrown by proof that the payment was a gift of the money to the grantee of the legal title. If the evidence does not show the intent of the parties in the transaction, the presumption was not that the payment was meant as a gift of the money, but that the grantee consented to take and hold the title in trust. *Lynch v. Cox*, 23 Penn. St. 265; *Edwards v. Edwards*, 39 id. 369. It may be, however, that if the purchaser stands *in loco parentis* to the nominee in the deed, the moral obligation to provide for such a party is recognized and an advancement presumed and a presumption raised of a gift of the money and premises to such nominee. *Edwards v. Edwards*, 39 Penn. St. 369-377. But brothers and sisters are not, with this rule, as to presumed advancement or gift. See *Edwards v. Edwards*, 39 Penn. St. 377. "A gift is a contract executed, and must be accompanied with such a delivery of possession as makes the disposal irrevocable; the delivery must be according to the nature of the subject, and the donor must, in some form, relinquish not only the possession, but all dominion over it." *Fross' Appeal*, Leg. Int., September 19, 1884, p. 358. "The real question is not so much what was intended by the donor, as what the donor's understanding was — what he claimed and did." *Campbell v. Braden*, 15 Norr. 388; *Ewing v. Ewing*, id. 381. The uncorroborated testimony of a single witness contradicting a writing, which writing is corroborated by plaintiff's testimony, is not sufficient to overthrow the written contract. *Phillips v. Meily*, Leg. Int., January 9, 1885, p. 18. The acknowledgment before a magistrate of the due execution of a mortgage by a married woman cannot be overthrown by her mere statement that she did not fully understand the paper. The uncorroborated oath of the maker of an instrument of writing, contradicted by the oath of the opposite party, is not sufficient evidence to submit to the jury upon the question of the reformation of the instrument. *Oppenheimer v. Wright*, Leg. Int., January 9, 1885, p. 18.

Henry Reed and *Wm. W. Wiltbank*, for defendant in error. As to resulting trust, *Strimpfler v. Roberts*, 18 Penn. St. 298. A *feme covert*,

like an infant or lunatic, may be a trustee, but subject, necessarily, to her legal incapacity to deal with real estate vested in her. *Dundas v. Biddle*, 2 Penn. St. 160; *Still v. Ruby*, 35 id. 373. Her husband must join in her deed as in other cases. *Hill Trustees*, *287, note and cases cited; *Perry Trusts*, § 50; 1 *Fonblanque Eq.* 92.

CLARK, J. This ejectment was brought to recover the possession of a lot of ground, situate on the east side of Eighteenth street south of Wood, formerly in the district of Spring-Garden in the city of Philadelphia. Richard W. Steele, it is admitted, was in the year 1854 the owner of the ground in question; in that year Steele exposed the lot to sale by auction at the public exchange, and William J. Warren became the purchaser thereof, his brother-in-law, Henry Davis, bidding it in for him, at the sum of \$600 or \$650. Warren, it is conceded, also paid the purchase-money from his own funds, together with all the expenses of the conveyance, but took the title in the name of his sister, Mary Ann Davis, wife of Henry Davis. The defendant's contention is, that a trust resulted to William J. Warren, as the source and origin of the consideration, and their claim is under him.

The plaintiff claims title under a conveyance from Mary Ann Davis, executed after the decease of William J. Warren, and dated May 6, 1875.

As the case stood, when Edward J. Steer was offered as a witness, he was clearly competent; when in the progress of the trial, and before the testimony was closed, his incompetency appeared, his testimony was stricken out, and in the charge the jury was distinctly instructed to entirely disregard it. The learned court was not obliged to anticipate the defense, and could not exclude the witness until his incompetency appeared. The first assignment of error is, therefore, not sustained.

Neither Henry Davis nor his wife were parties to the suit, and after the execution of the release to them by Edward J. Steer they had no interest in the result. The subject-matter of the suit was the title and possession of real estate, and the action ejectment. The rule laid down in a large number of cases in this court, and recently declared in *Fross' Appeal*, 15 W. N. C. 543, that where one of the parties to a contract in litigation is, by death, denied the privilege of testifying in relation to it, the policy of the law will close the mouth of the other, applies to suits upon choses in action only; although it would be difficult, perhaps, to assign the reason for the distinction, a long line of cases show that the rule has never been held to apply to actions involving the title to real estate. Henry Davis was, therefore, not incompetent as a party to the suit, nor upon the ground of interest or upon any rule of public policy. He was clearly competent prior to the passage of the act of 1869, and that act has not rendered any witness incompetent, who was not so before its passage. The fourth, fifth and sixth assignments are, therefore, not sustained.

It is well settled as a general rule of equity, that where a purchaser of real estate pays the purchase-money out of his own funds, as his own, taking the title in the name of another, the ownership of the money

will draw to it an equitable interest in the land; he will be presumed to have bought for himself, and the beneficial title to the property will be in him. To this general principle there are well-known exceptions, but the case in hand does not fall within them. It is not claimed that William J. Warren occupied any such relation to Mary Ann Davis, the nominee in the deed, as created any obligation on his part, moral or otherwise, to provide for her; although a sister she must, in this transaction, be treated as a stranger. *Edwards v. Edwards*, 3 Wr. 369.

The intention of the parties, at the time, is the essential element; for if Warren paid the consideration as his own, and not for his sister, the beneficial title is his; his declarations afterward made, and not bearing upon his intention at the time, cannot affect his title, or vest in his sister an estate, which at the execution of the deed was the estate of Warren himself.

Henry Davis is the only witness who testifies as to the circumstances attending the purchase of the property by Warren. He says that on the day of the purchase, Warren came to his house in Camden, and said to him: "Henry, there is a lot in dispute between me and Mr. Steel;" the best of my knowledge, he said that they had a lawsuit about it, and it went to court, and they could not collect the expenses off the lot; and he says: "It is to be sold at the Exchange to-night; I want you to come over and bid it in; if you will I will give it to your wife and make her a deed for it. My brother-in-law was a speculator, and I thought he might get me into trouble, and I says to him, 'William, if there is nothing wrong in it, I will do it.'" He states that he attended the sale at the Exchange as requested; that Warren stood beside him, and urged him to bid, and that the property was knocked down to him at the sum stated.

The declarations of the parties subsequently made, and their conduct in the management and control of the property, are only material as they bear upon the intention of the parties at the time.

Davis testifies that in the same year — 1854 — he was about to remove to Cape May; that Warren brought the deed to his house in Camden, laid it upon the bureau, stayed several hours; took tea with the family, and as he was about to leave said: "Mary Ann, as long as you are going to move away, I will take the deed, and take care of it for you, and if any thing happens, I will see to it for you;" that he took the deed with him, and has since retained it in his possession; that he frequently spoke of the lot as "Mary Ann's lot," and at one time said: "I am going to put your wife up a house on that lot; these two walls are mine adjoining, and all I have got to do is to pick into these walls, put in the joist, build the front and back, and I have got a house I have almost collected rent enough to pay it." He further states that at another time, whilst the witness resided at Rio Grande, Warren said in the presence of Mrs. Davis, that the lot was doing her no good, and if they were agreed he would sell it, and give her the money; "when he came back again," says the witness, "he said: 'Mary Ann, I have come to get a deed for that property; I am offered \$3,000 for it; and I want to sell it for you; I cannot unless you give me a deed.'" I told him I could not or would not. Then he coaxed me to do it without any money

or any valuation on it; he tried to coax me to do it. Says I, "William, I won't do it." It never was mine; it was my wife's. It was mine by promise. You promised it to me if I would go and buy it; you promised to give it to my wife; it was mine by promise and her'n by deed." And says I, "I shall not sign the deed." Well, he says, "it is good for nothing without you do." Says I, "I have nothing to do with it; it don't belong to me; it belongs to my wife."

Mr. Davis is corroborated, to some extent, by the testimony of Samuel and Susan Izzard; the latter stated that in July or August, 1872, Mr. Warren came to Rio Grande, where Henry Davis then lived; that whilst he was there he had a conversation with her, in which he stated that he came down to see Mrs. Davis, to get a deed for the property that Mrs. Davis held for some property in the city; that he had an offer for it, and thought he would come down and get the deed, and sell the property, and give her the money, \$3,000; that the money would do her more good than the property.

The deed, it is true, was never fully delivered to Mrs. Davis, but as Warren was the active party in the purchase, the delivery to him was sufficient. The title of Steele was certainly divested as soon as the purchase-money was paid and the deed passed to Warren; the title thereafter was a matter between Warren and Mrs. Davis; she was not bound to accept it; but it is shown that she did, and she now claims that it is in fact the absolute expression of the intent of the parties.

On the other hand, it is shown that Warren, from the date of his purchase, held the deed in his own hands; that he entered into and continued in the apparent, actual uninterrupted possession and enjoyment of the property, until the time of his decease, in the year 1874; that in 1855 he erected upon it a carpenter shop, leased it from year to year, in his own name, to various tenants, received the rent, kept up the repairs, paid the taxes, and to the time of his decease never accounted, or was called upon to account, to his sister, or any other person, for the possession, or for the rents, issues and profits which have accrued. Since the decease of William J. Warren, his widow and heir at law, the defendants below, have continued in the enjoyment of the property, and are still in the possession, claiming under him.

Whether or not a trust resulted to Warren at the time of the purchase in 1854 depends wholly upon a presumption of an intention to that effect, arising from the payment of the purchase-money by him; the facts to raise this presumption are shown by parol, and of course the presumption may be overcome by parol evidence of an actual intention otherwise.

If the testimony of Henry Davis is believed, the property was purchased directly for the benefit of Mrs. Davis, and the purchase-money was paid upon the footing of an express promise to that effect; under such a state of facts no presumption of a trust in his own favor could arise. This is what the court distinctly declared in the answer to the defendant's fifth point. But if the testimony on this point was not believed, or if the language employed by Warren was such as to render his purpose and meaning uncertain or ambiguous, the fact that afterward, and apparently in pursuance of the promise to convey to his sister, the

property was actually conveyed to her, taken with the several declarations of Warren subsequently made, certainly tends to show that this was the settled purpose of his mind at the time. The retention of the deed, the continuity of the possession in Warren, his continued act of ownership and control, are facts of a strongly rebutting character, but their effect was wholly for the jury.

We are of opinion that there was abundant evidence to justify the submission; the veracity of the witness and the conflict in the evidence were matters with which we have nothing to do. Upon a careful examination of the whole record we find no error, and

The judgment is affirmed.

KINGSBURY v. DAVIDSON.

May 17, 1886.

HUSBAND AND WIFE—SEPARATE PROPERTY OF MARRIED WOMAN—ONUS PROBANDI.

When a creditor seizes property in the possession of a husband for his debt, the presumption is that it belongs to him and not to his wife; if the wife interposes a claim to the property she must, to sustain her position, establish, by clear and satisfactory evidence, that it is her property.

A married woman, putting money of her separate estate into the money drawer used in the management of her husband's business, does not thereby forfeit her right to receive it again either in the identical coin or notes, or in other of equal value.

Error to the court of common pleas of Bradford county. The facts are stated in the opinion.

D. C. De Witt, for plaintiff in error. *Wingered v. Fallon*, 14 Norr. 184; *Sixbee v. Bowen*, 10 id. 153; *Heily v. Ray*, 2 Pear. 216; *Rush v. Vought*, 5 Smith, 437; *Holcombo v. Banks*, 11 id. 343; *Diven v. Diven*, 6 id. 111; *McCurdy v. Canning*, 14 id. 40; *Gillan v. Dixon*, 15 id. 395. In *Rush v. Vought*, 5 id. 444, AGNEW, J., says: "Equity will enforce a trust on a contract, but cannot create a title where none exists."

B. M. Peck, *D'A. Overton* and *E. B. Parsons*, for defendant in error. In the absence of clear and satisfactory proof that property purchased by wife after marriage was paid for out of her separate funds, the presumption is that it was paid for by means furnished by her husband. *Bradford's Appeal*, 29 Penn. St. 513; *Topley v. Topley*, 31 id. 328; *Walker v. Reamey*, 36 id. 410; *Rhodes v. Gordon*, 38 id. 277; *Aurand v. Schaffer*, 43 id. 363; *Bowers' Appeal*, 68 id. 126. That it was paid for out of the profits of business managed by her husband, as her agent, is not enough. *Gamber v. Gamber*, 18 Penn. St. 363; *Keeney v. Good*, 21 id. 349; *Hallowell v. Horter*, 55 id. 375; *Bucher v. Ream*, 68 id. 421. Even partnership effects are liable to be attached in a suit brought against one of the partners to recover a private debt. *McCarthy v. Emlen*, 2 Dall. 277; *Morgan v. Watmough*, 5 Whart. 125; *Megee v. Bierns*, 3 Wr. 50.

CLARK, J. This action is, in form, a foreign attachment, brought by George B. Davidson, who resides in Bradford county, in this State,

against A. C. Bently, a resident of Waverly, in the State of New York, in which a young trotting horse named Waxey B., alleged to be the property of the defendant, was attached in the hands of L. S. Kingsbury, the garnishee. On the 14th February, 1883, judgment was entered in favor of the plaintiff and against the defendant, in the sum of \$494.38.

The present contention arises upon the trial of the *scire facias*, against the garnishee; the plea is *nulla bona*, and the defense under it is, that the trotting horse attached is not the property of the defendant, but was in fact owned by Mrs. A. W. Bently, the defendant's wife. It is admitted that the horse, Waxey B., when a colt, was the property of one T. J. Berry; that he was of good blood, but was then poor, unhealthy, and of little value. In October, 1878, when the colt was some eighteen months old, Berry placed him in the hands of Bently, to be cared for and trained for the track as a trotter.

Mrs. Bently at this time, it was shown, was, or assumed to be, the owner of a livery establishment at Waverly, which was conducted in her name. The testimony was somewhat conflicting as to whether or not Bently took charge of the colt on his own account, or in the interest of his wife, but, at all events, the bargain was that Bently or his wife was to take the colt, care for and "cultivate" him, and when sold one-half of the proceeds should belong to Berry, and the other half to Bently or his wife, as the case may be. It appears, however, that in March, 1879, Mr. Berry went over to Waverly and sold the colt to Mrs. Bently for \$70. The testimony is wholly to the effect that the sale was of the entire interest, not of the one-half only; and as the husband was present and participated in the transaction, the purchase by the wife, whatever the right of the husband may have been, must be treated as a purchase of the entire title, if she paid her own money upon it.

When the creditor seizes the property in the possession of a husband for his debt the presumption is that it belongs to him, and not to the wife, and this, as stated by the learned court below, is a violent one and is adhered to for the purpose of protecting creditors. If the wife sets up a claim to it as against the husband's creditors she must show that it is hers; the burden of proof is upon her, and the evidence must be clear and satisfactory.

Mrs. Bently testified, and in this she was to some extent corroborated by her husband, that her mother, who lived in Kansas, had on several occasions given her money; that in the fall of 1878 her mother was at Waverly, and gave her \$70; that she kept this money in the drawer with the money received from the livery, but separate from it, and in the spring of 1879, when she bought the colt from Berry, she applied \$50 of this money on the purchase; that the remaining \$20 remained in the drawer, and was used and applied by her indiscriminately, with the other moneys therein, in buying such things as she needed. In sixty days thereafter she took \$20 from the same drawer, and in compliance with her contract paid the balance of the purchase. The colt, it appears, afterward grew to be a valuable horse and exhibited unusual power for speed; he was estimated to be worth from \$1,500 to \$2,000.

There is no evidence that Mrs. Bently purchased and paid for the

livery with her own funds; as to Bently's creditors, the presumption is that the livery was his, but the \$70 which Mrs. Bently received from her mother was her money, and it did not become any less hers from the fact that she kept it in the money-drawer of the livery.

If the evidence of Mrs. Bently be true, and it is not contradicted, the \$50 which she first paid upon the purchase of the colt was the identical money she received from her mother in the previous autumn and in which her husband could have no possible interest. The evidence is that the credit for the balance was given to her and not to the husband; she then had money on hand of her own sufficient to pay it, and it was upon the faith of her ability to pay the credit was given. The money which she afterward did pay was taken from the drawer, in discharge of the debt the drawer owed her, for the money she had previously deposited in it. If, instead of being the wife of Bently, she had been his business manager or clerk, it would not be doubted, we think, that she might reimburse herself for funds of her own she had thus applied, and we cannot see upon what rule of law a wife may not do the same.

The learned court seemed to suppose that in order to validate her right to this colt Mrs. Bently was obliged to show that she had a right to the livery also; that she could not put her own money into the money-drawer used in the management of her husband's business without absolutely forfeiting her right to it. She might, we think, have put her money in the drawer, or indeed in his pocket-book, and suffered him to carry it upon his person for her, or she might have loaned it to him, and in either case she had a right, with his consent, to receive it back again, in the same or other bills as she chose. There is no evidence that by depositing the money in the drawer she intended to bestow the money as a gift to her husband, on the contrary, she assumed to be the owner of the livery, as between herself and her husband she was the owner; the money was put into the drawer as her own money, and was drawn out again as her own. We think the learned court erred in giving binding instructions to the jury that in any event, under the evidence, the plaintiff below was entitled to receive at least two-sevenths of the value of the horse. The whole question was one of fact for the determination of the jury, and the cause should have been so submitted.

The judgment is reversed and a venire *facias de novo* awarded.

CONLYN AND BARBER v. PARKER, FOR USE, ETC.

May 17, 1896.

JUDGMENT—SCIRE FACIAS TO REVIVE—DEFENSE—MARRIED WOMAN—COVERTURE—AFFIDAVIT OF DEFENSE.

On a *scire facias* to revive a judgment, the merits of the original judgment cannot be inquired into so as to admit a defense which might have been set up in the original suit.

A judgment was entered upon a judgment bond signed by A. and also by B., the latter a married woman, the fact of her coverture was not, however, placed upon the record; later, the defendants signed an amicable *scire facias* to revive; later, the husband of B died, and, later, a *scire facias* was issued to revive the judgment again, to which B. filed an affidavit of defense, alleging that she was

a married woman at the time of executing the judgment bond, and she also entered a plea of coverture whereupon a motion was made to strike off the plea and enter judgment for want of a sufficient affidavit of defense; this the court ordered should be done. *Held*, there was no error in so ordering.

Error to the court of common pleas of Cumberland county.

This was a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense. The following is a copy of the opinion of the common pleas, per HERMAN, P. J.:

"It cannot be said that the judgment sought to be revived in this case is void on its face, for nowhere does the fact of marriage appear either in the record of the original judgment entered to No. 185, January term, 1869, or in that of its revival to No. 174, January term, 1874, as was the case in *Dorrance v. Scott*, 3 Whart. 308; *Caldwell v. Walters*, 6 Harr.; *Quinn's Appeal*, 5 Norr. 453. The judgment stands against Thomas Conlyn and Margaret Barber, simply, and is, on its face, a perfectly good judgment, which for any thing appearing of record therein would not be reversed. Instead of joining issue with the defendant on the plea of coverture, as was done in *Seymour v. Hubert*, 11 Norr. 499, this plaintiff moves to strike off the plea, and demands judgment under the rules, for want of a sufficient affidavit of defense. This he may do. On a *scire facias* to revive a judgment, no defense can be made except for matters arising subsequent to the judgment, the merits of the original judgment cannot be inquired into so as to admit a defense which might have been set up in the original suit. *Seymour v. Hubert*, *supra*, 1 Trick. Law of Liens, §§ 227, 228, 229. In *Seymour v. Hubert*, it was said: 'Instead of an application to open the original judgment, the coverture of each of the makers of the note was severally pleaded and denied in the replication. The defendant in error did not demur to the sufficiency of the plea, nor move to strike it off, but accepted the issue tendered. It was substantially the same as if it had been framed in the original judgment. The defendant in error thereby waived her right to exclude the evidence of coverture.' But here the plaintiff declines to accept the issue tendered and moves to strike off the plea, and this he is entitled to have done, for he has not in any way waived his right to exclude the evidence of coverture. The plea being stricken off, the plaintiff will be entitled to judgment for want of a sufficient affidavit of defense. The affidavit sets up nothing more than the coverture of Margaret Barber as a defense, and as has been seen, this is clearly insufficient on a *scire facias* to revive a judgment, the coverture having existed at the time of the giving of the original judgment, and the fact nowhere appearing in the record thereof or of its revival.

"And now, March 25, 1884. It is ordered and adjudged as follows: The plea of coverture entered on behalf of Margaret Barber, one of the defendants, is stricken off, and thereupon judgment is entered for the plaintiff against both defendants named in the writ, for want of a sufficient affidavit of defense, for the amount of the debt and interest of the judgment sued for, to-wit: the sum of \$649.32. By the court."

Hepburn, Jr., & Stuart, for plaintiff in error. A judgment confessed by a married woman is, as a personal security, absolutely void —

a nullity. *Dorrance v. Scott*, 3 Whart. 309; *Schlosser's Appeal*, 8 P. F. S. 493; *Wells v. Van Dyke*, 10 Out. 111. It will not support an execution, and the purchaser at a sheriff's sale thereon takes no title. *Speer v. Sample*, 4 Watts, 367. The ruling of the court below was based entirely on a suggestion — scarcely even a *dictum* — in *Seymour v. Hubert*, 11 Norr. 499, and, on the general principle that on a *scire facias* to revive a judgment, no defenses can be made except such as arise subsequent to the rendition of the original judgment. This principle is true as a general rule. It arises, however, not from the fact that a judgment is a record of such high authority that its validity cannot be questioned; for it can be questioned, in some instances, even collaterally, but from the fact that the party defendant has already had his day in court, and is, therefore, estopped from alleging what it was his duty at that time to have alleged. But the law imputes no laches to a married woman. *Caldwell v. Scott*, 6 Harr. 79. It imposes on her no duty to appear and defend against the original judgment. She never had her day in court, and was not bound to take notice of the proceedings against her. Hence the reason for the rule is, in her case, wanting; and *cessante ratione legis, cessat ipsa lex*. The court below seemed to rely upon the fact that it nowhere appeared on the record that Margaret Barber was a married woman, and that, therefore, the ruling in *Dorrance v. Scott*, 3 Whart. 309; *Caldwell v. Walters*, 6 Harr. 79, and *Quinn's Appeal*, 5 Norr. 453, was not applicable to the present case. But *non sequitur*. It is not because the fact of marriage appears on the record that such original judgment is void, but because of the marriage itself. The case of *Hartman v. Ogborn*, 4 P. F. S. 120, is distinguishable from the other cases above cited. The purchaser at sheriff's sale on a judgment obtained on a mortgage given by a married woman, in her maiden name, was held to take a good title. There the record showed no disability, but it was not on that ground that the purchaser took a good title, but because the proceedings were *in rem*, not *in personam*. Here no innocent purchasers are affected. No notice of the fact of marriage is necessary. The action is between the original parties. The revived judgment is, except for certain purposes, a mere continuation of the original action. *Bruner's Appeal*, 10 Wr. 75. It really continues the vitality of the original judgment, with all its incidents from the time of its rendition. *Irwin v. Nixon's Heirs*, 1 Jones, 425. This judgment being a nullity, and having no vitality, cannot be revived at all.

Edw. B. Watts, for defendant in error. The rule of law is too well established to require the citation of authorities, that the only defense on a *scire facias* to revive a judgment is a denial of the existence of the judgment or proof of subsequent satisfaction or discharge; the merits of the original judgment cannot be inquired into. *P. C. & St. L. Railway Co. v. Marshall*, 4 Norr. 187; *Dowling v. McGregor*, 10 id. 410.

PER CURIAM. This was a *scire facias* to revive a judgment, regular on its face, recovered against the plaintiffs in error on a *scire facias* issued to January term, 1874. That a *scire facias* issued on a judg-

ment against the same parties to January term, 1869. There was nothing on the record, either of the original or of the revived judgment, to show the coverture of either defendant therein.

The plea of coverture to the present *scire facias* was wholly inappropriate and insufficient to prevent the entry of judgment, and there was no error in striking it off. It is no denial of the existence of the judgment on which it issued, nor of satisfaction or discharge thereof. *P. C. & St. Louis Railway Co. v. Marshall*, 85 Penn. St. 187; *Dowling v. McGregor*, 91 id. 410.

Judgment affirmed.

LINCK v. WOLF.

May 17, 1886.

MECHANICS' LIEN — LOCALITY OF THE BUILDING — DESCRIPTION OF IT.

A building against which a mechanics' lien was filed was described in the claim as being "on a lot or piece of ground situate in Delaware township, Northumberland county, State of Pennsylvania, on the south side of public road leading from McEwensville to Watsontown." In point of fact the building was erected upon a road, by way of which the distance from McEwensville to Watsontown was about ten miles, whereas there was another highway running between the two towns by way of which their distance apart was but two and one-half miles. *Held*, there could be no recovery upon the claim filed that would bind the building sought to bound.

The claim was filed for material furnished for and about the erection and construction of a building. "Size of house of brick 28x24 feet, two stories high, with kitchen attached 16x16 feet and with L used for bedrooms 9x16 feet, with curtilage appurtenance about one acre of ground." The brick house was an old structure, the roof of which was renewed; the kitchen was new. *Held*, the lien should have been filed against the new addition.

Error to the court of common pleas of Northumberland county.

The facts are set forth in the following copy of the charge of the common pleas, per ROCKEFELLER, P. J.

"It occurs to me at present that the question in this case is one of law principally, if not wholly, and that it must, therefore, be decided by the court.

"This is a *scire facias* on a mechanics' lien, filed under the mechanics' lien law, by Jacob H. Linck against Peter Wolf, owner or reputed owner, and Charles de Chambot, contractor. The plaintiff claims \$67.15 with interest, against the building and grounds covered thereby and so much other ground, immediately adjacent thereto and belonging to the said Peter Wolf, as may be necessary for the ordinary and useful purposes of the same and set forth as follows: Then follows the name of the parties as set forth in the lien and the amount and kinds of materials furnished.

"The act of 1835 required the register of a mechanics' lien to contain a specification of the location of the building, its size, the number of stories, or such other matter of description as shall be sufficient to identify the same. Hence as stated by the supreme court, in the case of *Washburn v. Russell*, 'it is evident that the building must be described with at least convenient certainty as regards both its locality and its structure.'

"The locality of the building is described in the lien in this case as follows: The said building is located on a lot or piece of ground situated in Delaware township, Northumberland county and State of Pennsylvania, on the south side of public road leading from McEwensville to Watsontown. 'That is the whole description as to locality.' A number of cases have been decided by the supreme court at different times on the question of what is a sufficient description of the locality of a building in a mechanics' lien, and in all of them it has been held that the locality of the building must be substantially stated. It was stated in the case of *Simpson v. Murray*, 2 Barr, 76. 'Although as stated in *Ewing v. Barrett*, 4 W. & S. 468, every mistake in filing a claim, however trivial, will not invalidate the lien, yet the building must be described substantially so as to identify it.

"In one case the building was described as being on the west side of a public road leading from one place to another, but locating it as adjoining another person's land, thus fixing its location. In the present case, as I have stated, the location is only fixed by stating that it is on the south side of the public road leading from McEwensville to Watsontown. Perhaps by straining the matter a little, for the purpose of enabling the plaintiff to record what may be a meritorious claim, we might decide, that the description as between these parties and as the case now stands, would be sufficient. But as we view it at present, the difficulty in the case is that it is an erroneous and incorrect description. If this house was located on the south side of a public road leading from McEwensville to Watsontown, that would be one thing.

"But the evidence of the plaintiff and defendant shows that it is not the case. There is a road leading directly from McEwensville to Watsontown, almost a straight road, the distance being about two miles and a half, and that is the road, as we understand, that is known as the road between those two points, and Mr. DeChambot, one of the defendants in this case, who was a witness called by the plaintiff, testified that the building was not located along that road or on the south side of it. He was called as a witness on the part of the plaintiff and he testified that the building against which this lien was filed, is not located along this road, not on the south side of it. This and the other evidence in the case shows clearly that it is not so located. It seems clear from the evidence that Mr. Wolf is the owner of a brick building, and the one too in question in this case against which the lien was filed, but along another road, about three miles and a half to the north of this road referred to leading from McEwensville to Watsontown. It is clear it is not on the road leading between those points. It is true you can go that way, as there is a road leading from Watsontown to Mr. Wolf's house, a distance of some four miles. Then you can go some distance to what is called the State road, and thence from there to McEwensville, a distance of some six or seven miles, as stated by the witnesses, making the distance around about ten miles to go by way of Mr. Wolf's house. Now, it cannot be pretended that that is the road mentioned in this mechanic's lien filed in this case, and, therefore, it is clear to my mind, that not only is the description of the locality of the building insufficient in this lien, but that it is also an erro-

neous description; so that on a judgment obtained in this case, if one was obtained, and a sheriff's sale had under *levari facias* he would describe the building as it is described in the lien, and the purchaser would get title to a house and lot situated in Delaware township, on the south side of the road leading from McEwensville to Watsonstown, if there was any such house there owned by Peter Wolf. 2 Barr, 76, already referred to. Now that being the case, it strikes me at present that there can be no recovery on this lien, and that your verdict must be in favor of the defendant.

"Other questions arise in the case, which I may just as well dispose of so that, if the case should go to the supreme court, the whole matter can be decided, and thus end this litigation. The lien, then, describes the building against which it is entered as follows: 'A brick house 28 by 24 feet, two stories high with kitchen attached, 16 by 16 feet, with curtilage appurtenant and about one acre of ground.' The evidence shows that the brick house, 28 by 24 feet, two stories high, which is the main building, is an old structure, and that it was not remodeled and substantially turned into a new building; that the shingles were taken off and replaced with either new shingles or slate, we don't know which; that the rafters were not taken down but some other slight improvements made. But it cannot be said under the evidence, we think, that it was rebuilt or constructed into a new building. Now, there is no general act of assembly in this State, that I am aware of, that allows a mechanic's lien to be filed against an old building simply for repairs. But it is contended on the part of the plaintiff that there was a new building. That is, that the kitchen attached to this old building, 16 by 16, with an L, used for bed-rooms, 6 by 16, was a new building. If the materials were furnished in this case on the credit of the kitchen and the L attached to the old building, the mechanic's lien would doubtless be good against it even if the materials so furnished were used in the old building or not used at all in either. In the case of *Wharton Brothers v. Douglass & Son*, 11 Norr. 66, the supreme court decided that where materials are furnished for a new building intended to be used in connection with an old manufacturing establishment, the mechanic's lien therefor should be filed specifically against the new erection, and it is fatal to the claim to file it against the general building. In the case now before the court, the lien is filed against the old building, that is the general or main building, stating, however, the size of the kitchen attached to it and the L which, perhaps, distinguishes the case somewhat from the case of *Wharton v. Douglass* that I have just referred to. And if the case stood on that alone, perhaps I would not be so sure about my decision being correct."

S. P. Wolverton and William A. Sober, for plaintiff in error. In *Ewing v. Barras*, 4 W. & S. 467, it was held that "certainty to a common intent is sufficient in a description of property in a mechanic's lien." *Kennedy v. House*, 5 Wr. 39; *Knabb's Appeal*, 10 B. 186; *Shaw v. Barnes*, 5 id. 18; *Springer v. Keyser*, 6 Whart. 187. In *Driesbach v. Keller*, 2 Barr, 77, it is held: "Repairs and additions may constitute a new erection within the act." In *Nelson v. Camp-*

bell, 4 Casey, 156, it was held that "it is not necessary that a new building should be distinct from and independent of older buildings, in order to sustain a lien for work done and materials furnished, toward the erection and construction of the building. The lien in such cases attaches to the whole building, and so much of the ground of the owner adjoining, as is necessary for the use and enjoyment of the building, for the purpose for which it was designed." The facts of that case so nearly accord with those of this, that it seems difficult to distinguish the principles involved in both. The interpretation put upon the mechanics' lien law, and thereupon the rule laid down by this court in that case, seems to have been the result of grave consideration, uniformly followed from then until now. See *Lightfoot v. Krug et al.*, 11 Casey, 348; *Pretz and Gausler's Appeal*, id. 349; *Harman v. Cummings and Wife*, 7 Wr. 322.

Lorenzo Everett and C. R. Savidge, for defendants in error. There is nothing to show where, upon the south side of said road, the building is. Said road is more than two miles long. Neither courses and distances, nor adjoiners, nor other description of the location is given. "It is evident that the building must be described with at least convenient certainty as regards both its locality and structure." *Washburn v. Russell*, 1 Barr, 499. There must be enough in the description of the locality, and other peculiarities of the building, "to identify it, to point it out with reasonable certainty, with certainty to a common intent." *Kennedy v. House*, 5 Wr. 39. There is no contradictory testimony. All the witnesses agree that the building is not on the road leading from McEwensville to Watsontown. It cannot be pretended that the road on which this building actually is located is the road mentioned in the mechanics' lien; hence the description of the locality of the building is erroneous, and the court below was not in error in directing a verdict for defendants. *Simpson v. Murray*, 2 Barr, 76. In the case of *Wharton Brothers v. Douglas & Son*, 11 Norr. 66, the supreme court decided that "where materials are furnished for a new building intended to be used in connection with an old manufacturing establishment, the mechanics' lien therefor should be filed specifically against the new erection, and it is fatal to the claim to file it against the general building."

PER CURIAM. The learned judge correctly instructed the jury to find for the defendant. The lien was filed against the old building which was repaired, and not against the new addition. The description of the location of the building was not only inaccurate, but actually misleading.

Judgment affirmed.

LEONARD v. COMMONWEALTH.

May 17, 1886.

CONSTITUTION—LEGISLATION—PRIMARY ELECTION—CANDIDATE—ELECTION LAW.

The Constitution of 1874 provides for the future, as well as the present, therefore, when it speaks of a violation of any election laws, it does not mean merely such election laws as were in force when it was adopted, but also such as might lawfully be passed in the future by the legislature.

The act of June 8, 1881 — P. L. 70 — entitled "An act to prevent bribery and fraud at nominating elections, nominating conventions, returning boards, county or executive committees, and at the election of delegates to nominating conventions in the several counties of the Commonwealth," is a constitutional election law within the intent of section 9, article 8, of the Constitution.

The word "*candidate*" in the Constitution is to be understood in its ordinary popular meaning; and one seeking official preferment is within the meaning of the term, whether he is an aspirant for a party nomination or for an election.

The words "any election" law, in the Constitution, means any law relating to popular elections, inclusive of primary elections.

Error to the court of common pleas of Schuylkill county. The facts are set forth in the opinion.

James B. Reilly, W. J. Whitehouse, T. H. Walker and M. M. D'Velle, for plaintiff in error. Martin Devlin was called as a witness by the Commonwealth. The defendant's request for an offer, as to what was proposed to be proved by the witness, was answered. "We propose to ask him in relation to his services, serving him and acting for him in procuring his election." The offer was vague and indefinite and did not contain an averment to prove any fact material to the issue, and should have been rejected by the court below. *Farrington v. Woodward*, 1 Norr. 256; *Cummings v. Williamsport*, 84 Penn. St. 472. "It makes no difference at what time any person came into the conspiracy; every one who enters into the common design is in law a party to every act which had been previously done by any of the others in pursuance of it." *Freeman v. Stine*, 34 Leg. Int. 96. "Where a number of persons are engaged in a common enterprise, the words uttered by one of them are evidence against the others." *Com. v. Eberle*, 3 S. & R. 9; *Com. v. Tack*, 1 Brewst. 511. This case, though in form a civil action, "is a quasi criminal proceeding," says so eminent a jurist as the late Chief Justice THOMPSON, of this court, in his opinion in the case of *Com. v. Cluley*, 56 Penn. St. 277. The presumption of law is in favor of the defendant's innocence always, and in this case also is that he was lawfully in the exercise of the duties of his office. See *Campbell v. Com.*, 96 Penn. St. 344. The charge against him was that he was "guilty" of crimes and misdemeanors. Hence we contend that the burden of proof was upon the Commonwealth, and that it was bound to sustain its charges and make out a case of guilt beyond a reasonable doubt. Even in ordinary civil suits this court has decided "that the burden of making out a *prima facie* case with reasonable certainty is on the plaintiff" — *Wood v. Donohue*, 94 Penn. St. 128 — and this rule, we submit, is the one that should have been laid down in this case. Nowhere in the Constitution is there an allusion to any other than a "general" election by all the citizens of the Commonwealth, and every word and line upon the subject clearly and plainly refer only to such elections.

D. C. Henning, James Ryon, John W. Ryon and Lewis C. Cassidy, for Commonwealth.

PAXSON, J. This was a writ of *quo warranto* issued at the instance of the attorney-general by which John Leonard, defendant below, was required to show by what authority he held the office of commissioner of Schuylkill county. It was conceded that the relator was a candidate

for said office at the general election in 1884; that he was returned as elected by a large majority; that he received his certificate of election and in the manner designated by law took upon himself the duties of said office.

In the suggestion filed the Commonwealth charges that the defendant, whilst a candidate for said office, was guilty of bribery, fraud and the willful violation of the election laws, with several averments setting forth times, places and persons when and with whom such offenses were committed.

The defendant in his answer denied all the allegations of fraud, etc., contained in the suggestion, and after a replication by the attorney-general, the case was tried before a jury, with the result of a verdict in favor of the Commonwealth; whereupon the court below entered judgment upon the verdict and ousted the defendant from his said office. It was to correct alleged errors in the trial of the cause that this writ of error was taken.

The ninth assignment raises a question which underlies the whole cause. By the defendant's ninth point the court was asked to instruct the jury: "That the act of June 8, 1881 — P. L. 70 — entitled "An act to prevent bribery and fraud at nominating elections, nominating conventions, returning boards, county or executive committees, and at the election of delegates to nominating conventions in the several counties of this Commonwealth," is not one of the election laws of this Commonwealth, and the violation of its provisions is not a violation of any of the election laws with which this defendant now stands charged."

The learned judge declined to affirm this point.

The real question is whether the act of 1881, above referred to, is an election law within the intent of section 9 of article 8 of the Constitution, which declares that: "Any person who shall, while a candidate for office, be guilty of bribery, fraud or willful violation of any election law, shall be forever disqualified from holding any office of trust or profit in this Commonwealth; and any person convicted of willful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years."

The Constitution provides for the future as well as for the present. Hence when it speaks of a violation of any election law, it does not mean merely such election laws as were in force when it was adopted. The opposite view would be extremely narrow, and with a change in the election laws, this valuable clause in the organic law would drop out. It means any election law then in existence or thereafter to be passed by the legislature, which that body had a right to pass. I do not understand this view to be seriously controverted; the objection to the act of 1881 is that it relates only to primary elections, nominating conventions, and the like, and not to the general election at which candidates previously nominated are voted for and elected to office; that laws regulating primary elections are not such election laws as are contemplated by the article of the Constitution above quoted.

This renders necessary an examination of the act of June 8, 1881. The first section provides "that hereafter, if a candidate for any office

within this Commonwealth shall directly or indirectly give, offer or promise to give, or procure any other person to give, offer or promise to give, to any elector any gift or reward in money, goods or other valuable things, or any security for the payment or the delivery of money, goods or other valuable things, or any office, emolument or employment, on condition, expressed or implied, that such elector shall cast, give, retain or withhold his vote or use his influence at a nominating election or delegate election, or cast, give, or substitute another to cast or give, his vote or use his influence at a nominating convention, for or against the nomination of any particular candidate for nomination, so as to procure such person to be voted for at any election to take place, the person so hiring, procuring, influencing, abetting, endeavoring or offering, either directly or indirectly through others, their aiders or abettors, to procure the person to be voted for by such electors shall be guilty of a misdemeanor, and, on conviction, shall be sentenced to pay a fine not exceeding \$300, and be imprisoned for a period not exceeding three months.

The second section imposes a like penalty upon any elector who shall accept a bribe or reward of any kind for giving or withholding his vote for the nomination of a person for office.

The third section imposes the same penalty for an offer to sell a vote at such election or convention.

The fourth section imposes a penalty upon "repeating," as it is called, at such elections, and for the voting thereat by persons not duly qualified to vote at the general election.

The fifth section prescribes and punishes the offense of bribing delegates to nominating conventions.

The sixth and last section punishes the bribery of executive committees or returning boards charged with the duties of counting the votes cast at a primary election, etc.

This brief synopsis of the act shows it to be what its title indicates, an act to prevent frauds at nominating conventions and primary elections.

Just here we are met with the allegation that the act is unconstitutional. If this point is well taken we need go no further, for the plain reason that if it is unconstitutional it is no act at all, and hence is not an election law within the meaning of article 8 of the Constitution.

The argument has failed to satisfy us that the act in question is objectionable upon constitutional grounds. Indeed, the force of it was spent upon an act which is not before us, and with which at present we have no concern, viz. : the act of 29th of June, 1881, entitled "An act to regulate the holding of, and to prevent frauds in, the primary elections of the several political parties in the Commonwealth of Pennsylvania."

The proposition that the legislature may not prohibit and punish frauds at primary elections and nominating conventions is certainly a novel one. The argument that it is not valid because not expressly authorized by the Constitution is unsound. The converse of the proposition is true, that is to say, the legislature may pass such laws unless prohibited from doing so by the Constitution. If we were considering the Federal Constitution there would be some force in this argument,

for the national government is one of limited powers, and what is not found in the Constitution does not exist. At present, however, we are discussing the Constitution of a State, the powers of whose legislature are supreme, excepting in so far as they are restricted by such instrument, or impinge upon powers granted to the national government.

The act in question is a perfect law so far as its validity depends upon mere form. It is complete within itself. It defines and punishes offenses of the gravest character, the existence of which has been known to every intelligent person in the State for many years, and which more than any thing else has undermined and weakened our whole system of government. To say that the legislature may not lay its hand upon a public evil of such vast proportions is to say that our government is too weak to preserve its own life. There is not a line in the Constitution which in express terms, or by any reasonable implication, forbids this legislation.

Regarding the act of 1881, therefore, as a lawful exercise of legislative power, is said act an "election law" within the meaning of the Constitution?

Before I proceed further with the discussion of this grave question I will notice the case of *Commonwealth v. Wells*, decided by this court in October last, and reported in 17 W. N. C. 164. This case was cited as being conclusive against the contention of the Commonwealth in the case in hand.

In *Commonwealth v. Wells*, the point was whether a wager upon the result of a primary election was within the meaning of the acts of March 21, 1817—P. L. 204—and July 2, 1839—P. L. 544—prohibiting wagers or bets upon the result of elections. The preamble and first section of the act of March 24, 1817, are as follows: "Whereas, the practice of laying wagers or bets on the event of any elections, or the success of candidates for public offices, has a great tendency to promote immorality and corruption; therefore, be it enacted, etc., that wagering or betting on the event of an election, held under the Constitution or laws of the United States, or the Constitution or laws of this Commonwealth, are hereby prohibited, and all contracts or promises founded thereon are declared to be entirely null and void." The penal provisions of this act were repealed and supplied by the act of July 2, 1839, the particulars of which are not important for the purposes of this case.

It was held by this court that the acts in question relate only to the election of public officers at a general election. It was said by our brother TRUNKY, in delivering the opinion of the court: "These provisions are part of enactments which relate to the election of public officers, and have never been understood otherwise. The act of 1817 expressly refers to betting on the success of candidates for public offices, and the penal provisions against betting on the result of elections, enacted in 1839, are embodied in an act which relates exclusively to elections for public officers. The subject respecting which betting is prohibited is unmistakable, and the word 'election' cannot be justly construed to apply to other subjects. We are to look at the words in the first instance, and when they are plain we are to decide on them.

If they be doubtful, we have then to have recourse to the subject-matter. The meaning of the words 'any section within this Commonwealth,' when read with the context, is plain; and when considered with the subject-matter, there is no footing to conjure a doubt whether they may refer to the election of officers for a private corporation, or of a meeting of citizens. But if taken by themselves they apply to all elections; and if limited only by the words 'any election held under the Constitution or laws of this Commonwealth,' they may apply to the election of the officers of an insurance company or bank."

The opinion then goes on to demonstrate that a primary election of the kind referred to in the act of 1881 is as much without the purview of the act of 1839 as is the election of bank or other corporate officers. All this is very plain. When the acts referred to prohibit and punish the betting on elections, they manifestly mean elections when some one is elected to a public office; not to elections when delegates are to be chosen to nominating conventions. We reaffirm this ruling in all its fullness. But does it apply to the case in hand?

The clause of the Constitution referred to must receive a liberal construction. It is to be interpreted so as to carry out the great principles of government, not to defeat them. It is not to receive a technical construction like a common-law instrument or statute. *Commonwealth v. Clark*, 7 W. & S. 127; *Morrison v. Bachert*, 17 W. N. C. 353. The object aimed at in the constitutional provision was the purification of our elections. The act of 1881 is in the direct line of this object. It recognizes the fact that many of the frauds which affect elections, and sometimes thwart the will of the people, are perpetrated in what may be termed the preliminary stages of an election; in those proceedings by means of which candidates are selected for the people to vote for at the general election, we have already said that it is competent for the law-making power by approximate legislation to repress and punish such frauds.

It remains to notice the precise language of the ninth section of April eighth: "Any person who shall, while a candidate for office, be guilty of bribery, fraud or willful violation of any election law," etc.

Was the defendant a candidate for office at the time the alleged violations of law occurred? It is not denied that he was nominated and elected, and was, therefore, unquestionably a candidate for office subsequent to his nomination by the convention. I am now considering the question whether he was a candidate prior to his nomination, and at a time when most of the alleged corrupt offenses occurred.

The word "candidate" in the Constitution is to be understood in its ordinary popular meaning; as the people understood it, whose votes at the polls gave that instrument the force and effect of organic law. Webster defines the word to mean "one who seeks or aspires to some office or privilege, or who offers himself for the same." This is the popular meaning of the word "candidate;" it is doubtless the meaning which the members of the constitutional convention attached to it, and the sense in which the people regarded it when they came to vote. We, therefore, say in every-day life, that a man is a candidate for an office when he is seeking such office. It is begging the question to say

that he is only a candidate after nomination, for many persons have been elected to office who were never nominated at all.

We hold, therefore, that the defendant was a candidate for office within the meaning of the Constitution as well as the act of 1881. If, while such candidate, he was guilty of either bribery, fraud or the willful violation of any election law, he comes directly within the terms of the constitutional provision. The matters of bribery and fraud may be passed over in this discussion which relates more particularly to the last of the offenses named, viz.: The "willful violation of an election law."

What is an election law? Here again we must bring to our aid the common and popular use of words. Our laws are intended for the people who are presumed to read and understand them. They are not like the edicts of the Roman Emperor Caligula which Dio Cassino says were written in very small characters and hung up so high that the people could not read them. When laws are made by a popular government, that is to say, "a government of the people, by the people and for the people," we may safely assume that words in a statute or a Constitution are used in the sense in which the people who made the statute or Constitution understood them. So that when the people inserted in their Constitution the words "any election" law, it is fair to assume that they meant any law relating to elections. It is idle to say that a statute which prescribes the hours when the polls shall open and close is an election law, while a statute which punishes bribery or fraud in an election officer is not an election law. They both relate to the same subject, and the one is as much an election law as the other.

Conceding all this, it was contended on behalf of the defendant, that primary elections are not elections at all within the meaning of the Constitution, and that a statute regulating them is not an election law.

That they come within the mischief intended to be remedied is too plain for argument. Under our frame of government a vast system of political machinery has grown up by which elections have been for many years practically controlled. It is so far reaching in its effects that the people have, in many instances, little to do at the polls beyond the ratification of what had been already done by nominating conventions. Such conventions have often been controlled by the very influences which the Constitution and the act of 1881 seek to strike down. The influence which these primary elections have for good or evil upon the politics of the country is overshadowing. In many portions of the State, as is well known, a nomination by a convention of one of the parties is practically the equivalent of an election. In some instances it is the precise equivalent, as in the case where there are two persons to elect, and the elector is allowed by law to vote for but one. The importance of the relation of the primary to the general election must be apparent to every one who does not shut his eyes that he may not see, and stop his ears that he may not hear. Primary elections and nominating conventions have now become a part of our great political system, and are welded and riveted into it so firmly as to be difficult of separation. The act of 1881 recognizes this fact; it treats primary elections as part of a great system; it declares them to be elections to

be regulated by law to some extent; and prescribes and punishes certain frauds committed thereat. It concerns elections in a most important sense. How, then, can we say that it is not an election law, when the legislature has declared that it is?

Moreover, the relation of nominating conventions to the general election, and the importance of that relation is recognized by the Constitution itself. This is notably so in article 7, which prescribes the oath of office, and which requires all senators and representatives, and all judicial, State and county officers, to swear that "I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure my nomination or election," etc.

As before observed, the Constitution must be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted. If we give it the narrow construction claimed for it, a candidate for office might resort to all manner of bribery and fraud in procuring his nomination, yet, if he conduct himself properly after his nomination, he could wholly evade the constitutional prohibition. This applies with especial force to cases where a nomination is the equivalent to an election. In such instance the nominee may well be an honest man between his nomination and election, for he has no motive to be a rogue.

By the words "any election law," the framers of the Constitution, and the people who adopted it, evidently meant to include any act which the legislature might thereafter enact for the purpose of purifying our elections. The act of 1881 was passed to give effect to this constitutional provision, and it matters little at what stage of the campaign the fraud is committed. It is as much an election law when it strikes at the fraud at the primary election, as when it arrests the fraudulent ballot, just as it is ready to be dropped into the box at the general election. We would belittle the Constitution, and fritter away one of its best and wisest provisions, were we to give it the narrow, technical construction claimed for it by this defendant.

We are of opinion that the act of June 8, 1881, is an election law within the meaning of section 9, article 8, of the Constitution.

This disposes of all that we regard as important in the case. A number of assignments have been filed, alleging error in some of the minor details of the trial. Upon examining them carefully, I do not find any of them of sufficient importance to justify a reversal, nor to require me to add to the length of this opinion by their discussion.

The judgment is affirmed.

HOOVER ET AL. v. SENSEMAN.

May 17, 1886.

VENDOR AND PURCHASER — QUANTITY OF LAND CONVEYED — DEFICIENCY — MUTUAL MISTAKE.

A. purchased from B. a tract of land, both parties believing it to contain fifty-six acres and seventeen perches; the purchase-money, viz.: \$185 an acre, was paid and the deed delivered; later it was discovered that the tract contained but fifty acres and fifty perches, whereupon A. brought *assumpsit* against B., averring mutual mistake. *Held*, that A. could recover.*

* See 2 East. Rep'r, 883, note.

Error to the court of common pleas of Cumberland county.

Esther and Benjamin Hoover sold at public sale a tract of land to Joel Senseman. At the sale it was represented and believed that the tract contained fifty-six acres and seventeen perches. It was stricken off at \$7,500. The deed was executed and delivered and all the purchase-money paid. Thereafter, it was discovered that the tract contained only fifty acres and fifty perches. Senseman, therefore, brought suit in *assumpsit*, averring mutual mistake, and setting out the facts which he alleged showed the mistake. Defendants demurred to this count of the *narr.* on the ground that, on the facts averred, there could be no reovery.

Judgment was given for the plaintiff on the demurrer for \$810 with interest. The following is a copy of the opinion of the common pleas, per HERMAN, P. J.:

"The question for the court arises out of the issue joined in the demurrer to the first count of the declaration. The demurrer must be considered as admitting the facts as set forth in that count, and upon their sufficiency in law is the judgment of the court to be given.

"This may be said to fall within the third class of cases involving the right of the vendee to recover for a deficiency in the quantity of land purchased, as classified by Judge SHARSWOOD, in *Kreiter v. Bomberger*, 1 Norr. 59. The contract of sale as both parties understood it was fully executed and the purchase-money paid before suit brought. The defendants sold the tract of land representing and believing it to contain fifty-six acres and some perches, and the plaintiff, relying upon and believing the representation of the defendants that it did contain that quantity, purchased it and paid the purchase-money at the rate of \$135 an acre. In the sale and conveyance the quantity was an essential part of the contract. But it turns out that they were both mistaken as to the quantity, for instead of fifty-six acres and some perches, it contains but fifty acres and fifty perches, and thus, the plaintiff paid for six acres more than he got, and believed he was getting, and the defendants received the price of six acres more than they conveyed, but which they believed they did convey. It is a clear case of mutual mistake of the contracting parties as to a material part of their contract, and one that in good conscience should be corrected by the defendants refunding the money they have thus mistakenly received and the plaintiff mistakenly paid. Though a sale of land be consummated by payment of the consideration and delivery of the deed, the vendee may recover for a deficiency on proof of fraud or mutual mistake. *Kreiter v. Bomberger*, *supra*."

W. Penn Lloyd and Hepburn, Jr., & Stuart, for plaintiffs in error. Where there has been a sale, whether by the acre, or by the tract, and the contract has been completed by deed, and payment of the purchase-money, the contract will not be opened — nor can there be a recovery for the excess. *Coughenour's Adm'rs v. Stauff*, 77 Penn. St. 191. In that case all the cases were reviewed, and they settle beyond controversy, that, where there is a clear intent to sell by the acre, and the contract is still in *feri*, the rule is to compel payment according to quantity. A survey is presumed to be intended. *Baily v. Snyder*, 13

S. & R. 160; *Paull v. Lewis*, 4 Watts, 402; *Hershey v. Keembortz*, 6 Barr, 128. But the intent to measure must be certain — equal to a stipulation — otherwise in the absence of fraud “redress cannot be given to either party after the bargain is closed.” *Galbraith v. Galbraith*, 6 Watts, 117. The intention, or stipulation, must be to survey and convey. *Glen v. Glen*, 4 S. & R. 493. “Where the contract is executed by deed, and bond, or other security taken for the unpaid purchase-money, the rule is not to open a contract so far executed; nor can there be a recovery for an excess. The cases are numerous. *Dagne v. King*, 1 Yeates, 322; *Boar v. McCormick*, 1 S. & R. 168; *Glenn v. Glenn*, 4 id. 488; *Large v. Penn*, 6 id. 488; *McDowell v. Cooper*, 14 id. 299; *Dickinson v. Voorhees*, 7 W. & S. 353; *Hershey v. Keembortz*, 6 Barr, 128. “This rule as to the closing of the contract by deed holds even when the contract was for a sale by the acre. *Smith v. Evans*, 6 Binn. 102; *Cronister v. Cronister*, 1 W. & S. 442; *Farmers & Mechanics’ Bank v. Galbraith*, 10 Barr, 490.”

J. W. Wetzel, for defendant in error. Relief is granted in equity when there is an innocent mistake on both sides, as freely as in cases of a fraudulent concealment or suppression of facts. This relief is granted that justice may be done to the parties, and the same reason exists in one case as in the other. This principle is recognized in *Mays v. Dwight*, 1 Norr. 464, and numerous other cases. It is a familiar principle. In *Jenkins v. Fritz*, 7 W. & S. 203, the mistake of the surveyor, misleading both vendor and vendee as to the quantity, was held a sufficient ground for relief. In *Miles v. Stevens*, 3 Barr, 21, a description of land as including the mouth of a creek, was held to be a representation that a harbor was there, and when it was found that a harbor was not included, relief was granted the vendee. See third section of syllabus of this case. In *Quick v. Stuyvesant*, 2 Paige, 83, the vendee was compelled to reconvey when land was not appropriated to the purpose for which it was conveyed. Nothing is more clear in equity, than the doctrine that a contract founded on a mutual mistake of the facts, constituting the very basis or essence of it, will be avoided. *Kerr Fraud and Mistake*, 416, and note; also pages 399, 400, 406. All questions of this kind depend upon the contract and facts of each particular case. *Bailey v. Snyder*, 13 S. & R. 160. In *Kreiter v. Bomberger*, 1 Norr. 59, Judge SHARPSWOOD explicitly divides the cases wherein a vendee can recover for an alleged deficiency in the quantity of land purchased by him into three different classes. Why cannot such a mistake be corrected? Who does the correction injure? What argument can justify the retention of money gotten under such mistake? *Rapalje & Lawrence Law Dictionary*, page 829, Ed. 1883, defines mutual mistake to be when the parties have a common intention, induced by a common or mutual mistake. The judgment entered by the court on the demurrer was proper. *Wyoming County v. Bardwell*, 3 Norr. 104; *Ruff v. Ruff*, 38 Leg. Int. 72; *Murphy v. Richards*, 5 W. & S. 279.

PER CURIAM. The demurrer admits all the facts averred in the first count of the declaration. That avers the sale and purchase to have

been at a specific price per acre, and through a mutual mistake six acres more than was contained in the piece of land was sold, bought and paid for. In view of the price paid per acre — \$135 — this is too large a deficiency not to relieve against in equity. As the plaintiffs in error thus obtained money which they are not in equity entitled to retain, this action lies, and the judgment is correct.

Judgment affirmed.

THE BOROUGH OF CARLISLE v. THE CARLISLE GAS AND WATER CO.

May 17, 1886.

LICENSE — USE OF FIRE PLUGS — REVOCATION.

A water company for supplying the citizens of a borough with water permitted the municipality to draw gratuitously from fire plugs attached to the mains of the company; this privilege was exercised for a long time. *Held*, that the permission granted was not rendered irrevocable by such exercise thereof.

Error to the court of common pleas of Cumberland county.

The borough of Carlisle owned one thousand one hundred and twenty-four shares of the capital stock of the Carlisle Gas and Water Co. On the 9th of May, 1882, a dividend of \$1,686 was declared on this stock, payable on and after May 20, 1882. The whole of this dividend was paid except \$152.50, against which the company claimed an offset.

In the year 1854, prior to the month of November, the borough at its own cost and expense procured and put in, at convenient and practicable points in its streets and alleys, a number of fire-plugs, and connected them with the company's main pipes laid through the streets. These fire-plugs were used by the fire companies from the introduction of water into the borough down to 1882, during all which time the borough maintained and exercised a supervision over them as its own property, using the water from them gratuitously; in 1882 the company passed a resolution assessing the borough \$5 annually for each plug. The borough declining to pay this, the water company then deducted the amount from the dividend due the borough. The latter then brought *assumpsit* to recover; the case was submitted for trial without jury, HERMAN, P. J., deciding in favor of defendant.

Hepburn, Jr., & Stuart, for plaintiff in error. *Lemuel Todd and Henderson & Hays*, for defendant in error.

PER CURIAM. Under the facts found this judgment is correct. The fire-plugs were not put in under any contract which precluded the company from imposing reasonable charges for the use of the water. The fact that the borough was permitted to use it gratuitously for several years did not make such permission irrevocable. The right to change the rates was expressly reserved by rule 13 of the company. The borough had knowledge of that right. It is a large stockholder in the company, and is entitled to appoint one-third of the managers thereof. This right it exercises annually. It was duly notified of the changes and of the annual rates imposed on it. The rate is not unreasonable. The borough has not abandoned the fire-plugs nor has it discontinued the use of the water by the fire companies whenever necessary. We concur in the conclusion of the court.

Judgment affirmed.

JOHNSON & Co. v. ENSIGN & SON.

May 17, 1886.

PURCHASER — FEIGNED ISSUE — RIGHT OF PROPERTY — SECURITY.

Tyler & Scouller, on December 4, 1879, agreed with William F. Johnson & Co., in substance, as follows: "Said Tyler & Scouller agree to purchase raw hides and skins sufficient to supply their tannery in North East, Penn., for the time being, and cause the same to be delivered to said Wm. F. Johnson & Co., at said tannery, and will have every hide of the different lots marked with a number, to distinguish the lots, and to send to said W. F. Johnson & Co., at Boston, bills of said hides and skins as they are being delivered at said tannery. Said Wm. F. Johnson & Co. agree to remit to said Tyler & Scouller such sums of money as shall be requisite to pay for said hides and skins their market value, in North East, Penn., at the time of delivering thereof at said tannery, and as fast as delivered. Said Tyler & Scouller agree to receive and tan for said W. F. Johnson & Co. the said hides and skins in a workmanlike manner, with all reasonable dispatch, and to send the same as fast as tanned to said Wm. F. Johnson & Co., at Boston. Said Wm. F. Johnson & Co. agree to sell said tanned hides and skins, and pay to said Tyler & Scouller, as compensation for said tanning, such sums as shall equal the proceeds of the sales of said leather, after deducting therefrom the said purchase-price of the hides and skins from which the leather was made, also five per cent on the gross amount of the sales, freight on the leather, interest at the rate of seven per cent per annum, and all premiums which said Wm. F. Johnson & Co. may pay for insuring the said hides and skins while in tannery or store-house at North East. Said Tyler & Scouller shall be liable for, and shall pay for, to said Wm. F. Johnson & Co. any loss or damage to said property by theft or otherwise; said hides and skins always, and under every state of the tanning process, to remain the exclusive property of Wm. F. Johnson & Co., and nothing herein contained shall in any way or manner be construed as making said Tyler & Scouller and Wm. F. Johnson & Co. partners."

On February 27, 1885, Tyler & Scouller confessed judgment to W. A. Ensign & Co., upon which a *fi. fa.* issued, under which execution the sheriff levied upon all the hides, etc., in possession of Tyler & Scouller whereupon Wm. F. Johnson & Co., and others, claimed the property levied upon. In an issue directed to try the question of ownership, it was *held*, that, as far as third persons were concerned, Johnson & Co. were lenders of the money, and not purchasers of the property, and that they could not hold the property as security for their advances against creditors who had taken it in execution.

Error to the court of common pleas of Erie county. The facts are stated in the syllabus.

The following is a copy of the points submitted by plaintiffs.

"The court is requested to charge the jury as follows:

"1st. If the jury find from the evidence that Wm. F. Johnson & Co. under contract with Tyler & Scouller, dated December 4, 1879, paid Tyler & Scouller for the hides and skins in their tannery and had them marked with a private mark to designate that they were the property of Wm. F. Johnson & Co., then, and in that case, they became the property of said Wm. F. Johnson & Co., and the plaintiffs are entitled to a verdict in their favor.

"2d. That if the jury find from the evidence that Wm. F. Johnson & Co. innocently bought from Tyler & Scouller the hides embraced in lots 97 to 106 inclusive, and were by them kept at the tannery of Tyler & Scouller to be tanned under the said contract of December 4, 1879, then said hides were the property of Wm. F. Johnson & Co. and the verdict of the jury should be in favor of Wm. F. Johnson & Co. for the hides embraced in lots 97 to 106 inclusive."

The following is a copy of the answers to the above points :

"1st. As between Johnson & Co. and Tyler & Scouller, the relations would be as provided in the contract in evidence, which is of course the law of the case, so far as the parties to it are concerned, but as against the creditors of Tyler & Scouller, under whose execution the property was seized, the case is otherwise. The evidence shows that the transaction was a loan or loans by Johnson & Co.

"The point is refused.

"2d. This is refused. There was no change of possession as required by law, and while I am of opinion that purchaser may leave unfinished goods with a manufacturer to be completed, and that in such case, the fact of property being left in possession of the seller, would not be fraudulent as to creditor, the case here presented is of a different nature. Johnson & Co. were lenders only and not purchasers. so far as third person is concerned, and they cannot hold the property as security for the advancers as against creditors who have taken it in execution.

"The point is refused."

Davenport & Griffith, for W. F. Johnson & Co. It is true that in the ordinary sale of personal property possession ought to be taken by the purchaser, but it frequently happens that the property is of such a kind as to render it practically impossible for the purchaser to take actual possession, and then again it often occurs that the purchaser bargains with the seller to do certain work before delivery is to be made, in fact before it is in condition for the purchaser to use. *Barr v. Reitz*, 3 Smith, 257; *Chase v. Ralston*, 6 Cas. 238; *Haynes v. Honsicker*, 2 id. 58; *Herron v. Fry*, 2 Penn. 263. So there are many cases which allow the force of those circumstances which take away any false color or appearance of ownership remaining in the seller. *Mc Vicker v. May*, 3 Barr, 224, and other cases cited; *Clow v. Woods*, 5 S. & R. 281.

F. F. Marshall and *John P. Vincent*, for defendants in error. "An agreement to sell a chattel in an unfinished state, to be delivered at a future time, is an executory contract, for a breach of which an action for damages lies, but it does not pass the property in the chattel." *Pritchett et al. v. Jones*, 4 Rawle, 260. In the above-cited case the hides were in the vats being tanned, and was a fair and open transaction; yet the court held that being left in the possession of the vendor, the property was subject to execution as the property of the vendor. "A contract by a merchant to deliver hides to a tanner, to be charged at cost and five per cent commission, and interest after six months, and when tanned to be returned to the merchant to be sold by him, and out of the proceeds of the sale the first cost and five per cent to be deducted and the balance to be paid to the manufacturer, is such a sale as will subject the hides to levy and sale, as the property of the manufacturer. The law will allow of no device to elude the principle which forbids a lien to be created on chattels as a security separate from the possession." *Jenkins v. Eichelberger*, 4 Watts, 121. "Acts which, though not fraudulently intended, yet as their tendency is to defraud creditors,

if they vest the property of the debtor in his grantee, are void for legal fraud. Whenever the subject of the sale is capable of actual delivery, it must accompany and follow the sale. The possession of the chattels by the vendee must be exclusive of the vendor." *McKibbin v. Martin*, 14 P. F. S. 352. "Actual change of possession must accompany a voluntary sale of chattels, and the possession must continue in the purchaser. It is not the place the property occupies that gives color of possession to the vendee, but the connection the place has with the vendor." *Barr v. Reitz*, 3 P. F. S. 256; *Wagner v. Commonwealth*, 15 W. N. C. 75.

PER CURIAM.—There is no error in refusing to affirm the points submitted by the plaintiffs. We fully concur with the learned judge that so far as third persons were concerned, the plaintiffs were lenders of the money and not purchasers of the property. It follows they cannot hold the property, as security for their advances, against creditors who have taken it in execution.

Judgment affirmed.

APPEAL OF SPENCER L. FINNEY, EXECUTOR, ETC.

May 17, 1886.

WILL — WIDOW'S EXEMPTION.

When a widow in her claim of exemption has in her life time specified the particular property which she elected to retain, her legal representatives, in the distribution of the husband's estate, will be restricted to the designation made by the widow.

A. died seized of an estate of \$109.34 in cash, as also bonds, notes, mortgages, household goods, etc.; B., his widow, elected to retain \$300 out of his estate *in cash*; before any of the securities or household goods were converted into money, B. died. *Held*, that her legal representatives, in their claim for payment of the sum elected to be retained by B., should be restricted to the \$109.34.

A will must be construed so that every clause may take effect, if such be possible. No part will be rejected as repugnant if any fair and reasonable construction can be given to the whole which will render every part effective.

Where a will leaves the mode of distribution doubtful, the court will apply the principle of the statute of distribution.

A will contained bequests as follows:

"Item.—I give and bequeath to my beloved wife, Elizabeth Housel, all my household furniture or goods during the term of her natural life, and direct that no security be required from her for the same, and I also give and bequeath unto my said wife, Elizabeth Housel (after my just debts and funeral expenses shall have been paid and fully settled by my executor), the one-third of my personal estate to her own use and benefit absolutely, the household furniture shall not be included in the appraisement of my personal estate as aforesaid."

"Item.—As I hold judgments against my said wife, Elizabeth Housel, which are entered up in the court of common pleas of Northumberland county against the property which I now occupy, it is my will and I so direct that no part of said judgments shall be collected by my executor or heirs from my said wife, Elizabeth Housel, during the term of her natural life, but the same shall be kept revived as a lien against her property aforesaid, until after her decease, and after her death the proceeds thereof shall be divided equally among my surviving children and the children of such as are deceased, the said children of such of my children as are deceased to take the share of their respective parents."

Held, the testator had intended an appraisement of his entire estate, except as specifically provided, and a distribution upon the basis of the appraisement, the widow taking her full share

Appeal from the decree of the orphans' court of Northumberland county.

Mrs. Elizabeth Housel owned in her own right a house and lot; binding this property were two mortgages which became vested in John Housel, her husband; in his life-time he made a will in which he referred to the mortgages as "judgments." After the death of Housel his estate was found to consist of \$109.34 cash, as also bonds, notes, the mortgages against his wife's property, and some household goods; his widow, before any of the securities were turned into money, served a notice upon the executors of her husband's will, the body of which was as follows:

"SIR.—You are hereby notified that I, Elizabeth Housel, widow of deceased, make claim for \$300 out of the estate of my deceased husband which is allowed by law. I desire said sum to be paid me in cash."

Later the widow died. In the distribution of the estate of Housel, two questions arose: first, what the widow, under her claim for \$300, was entitled to receive; and second, what she was entitled to receive under the will of her husband. [See syllabus for extract from the will.]

Wm. H. Hackenberg and Simon P. Wolverton, for appellant. The act of 1851 obliged an appraisement of the property allowed by it, which obligation, it will be observed, is omitted from the act of 1859. This latter act, read in the light of the judicial construction that has from time to time been placed upon it, leads to the conclusion that an election to take in cash or money gives the widow the right to receive money out of any property named in the act, and that need not be appraised. Judge PENROSE grasped the spirit of judicial opinion on this question, and struck the key-note to this case in the case of *Koch's Appeal*, 12 W. N. C. 305, when he said: "So far as the widow's exemption had been paid out of the proceeds of realty sold under order of court for the payment of debts, it is clear that the credit claimed was properly disallowed for the reason that there had been no petition to have the land set apart and no return by appraisers, showing that it could not be divided." *Huffman's Appeal*, 31 Smith, 329; *Nixon's Appeal*, 6 W. N. C. 496. But there was other moneys in the accountant's hands arising from the conversion of personal security, and as she claimed to be paid cash an appraisement was not necessary — *Larrison's Appeal*, 12 Casey, 130 — nor is it material that the cash arose from the proceeds of securities converted after the decedent's death. *Id.*; *Soult's Appeal*, 1 Norr. 153. It is also well settled that where the interests of other parties have not been affected by the delay, the widow's claim to take in cash may be made at the audit of the executor's account. *Baldy's Appeal*, 4 Wr. 328. See *Larrison's Appeal*, 12 Casey, 130; *Kirpatrick's Estate*, 5 Phila. 98. "The intention of the testator, to which all other rules are in subordination, is the governing rule in the construction of wills." *Beltzhoven v. Costen*, 7 Barr, 18; *Stoner & Barr's Appeal*, 2 id. 431. In the court below the appellees cited authority to the effect that where a will contained two contradictory clauses the first must give way to the second. It is submitted that this rule of construction has no application to this case,

because the clauses in this will are not irreconcilable. The latter clause is not to be adopted if both can stand together. *Snively v. Stover*, 28 P. F. S. 484; *Newbald v. Boone*, 2 id. 174; *Stickel's Appeal*, 5 Casey, 236; *Sheetz's Appeal*, 1 Norr. 217. A will is not to be so read as to contradict itself, if it is possible to reconcile the apparent contradictions. *White v. Allen*, 81 Ind. 224. It is only where the different clauses of a will are irreconcilable upon any reasonable interpretation, that effect will be given to the latest in preference to the earliest clauses; where all can be harmonized full effect will be given to all. *Van Vechten v. Keator*, 63 N. Y. 52. "In cases of doubtful construction the law leans in favor of a distribution as nearly conformable to the general rules of inheritance as possible." *Amelia Smith's Appeal*, 11 Harr. 11; *Minter's Appeal*, 4 Wr. 115. All rules of construction favor that contended for by the appellant. "The first taker is regarded as the preferred object of the testator's bounty, and in doubtful cases the gift is to be construed so as to make it as effectual to him as possible." *Wilson v. McKeegan*, 3 P. F. S. 80; *McFarland's Appeal*, 1 Wr. 300; *Amelia Smith's Appeal*, 11 Harr. 11. Particular expressions that would stand in the way of general ones are to be construed in subordination to the general, or disregarded. *Mussleman's Estate*, 5 Watts, 13; *Dobler's Appeal*, 14 P. F. S. 9. In order to give effect to the general intent the court will overlook a particular intent inconsistent therewith. *Findlay v. Riddle*, 3 Binn. 150. If a general intent and a particular intent are inconsistent with each other the latter must yield to the former. *Middleworth's Adm'r v. Blackmore*, 24 P. F. S. 418; *Hitchcock v. Hitchcock*, 11 Casey, 393. By one clause of his will a testator gave to his wife a certain tract of land, and by a subsequent clause he gave to his children the same equally and alike in his real estate, the real estate to be sold after his wife's death. *Held*, that the wife took a fee-simple estate and not merely an estate for life. *Brownfield v. Wilson*, 78 Ill. 315. Where a testatrix left one-fourth of her succession to certain collaterals and next made money legacies and special legacies of property in kind to others, leaving the remainder of her property to her husband. *Held*, the legatee of the one-fourth was entitled to one-fourth of the whole assets after the payment of debts. *Chedwick's Succession*, 34 La. Ann. 1239.

C. G. Voris and *Wm. F. Derr*, for appellees. The appellants contend that the widow's claim may be made before the auditor on distribution, and cite *Baldy's Appeal*, 14 Wr. 328; *Kirkpatrick's Estate*, 5 Phila. 98. In *Kirkpatrick's Estate*, 5 Phila. 98, it was held, "where the interests of other parties are not affected by the delay, the estate being all in money in the hands of the executors, the widow making her claim before the auditor is not too late." In *Davis' Appeal*, 10 Casey, 256; *Baskin's Appeal*, 2 Wr. 65; *Huffman's Appeal*, 31 P. F. S., it is held that the right of a widow to retain \$300 out of her deceased husband's estate is a personal privilege which she may waive in whole or in part. And a waiver is presumed from her acts and omissions. The word "retain" as used in the acts of 1851 and 1859, denotes that the widow is to continue to hold, to keep posses-

sion of property belonging to her husband's estate at the time of his death — it refers to the condition of his estate at that time. "The act contemplates a retention by the widow or minor children of property belonging to the decedent at his death." *Hunt's Appeal*, 4 Out. 590.

Neither the widow, nor the minor children, are claiming the \$300 out of decedent's estate. The widow died without issue over a year before the claim was made before the auditor. It is her executor that now seeks to complete her election and to secure the balance of the \$300, not for the beneficiaries named in the acts of assembly, but for persons or objects not contemplated by the exemption acts. *Lewis' Estate*, 3 Whart. 162. "It is a general rule that when a will contains two clauses, totally inconsistent and incapable of being reconciled, the latter shall have a preference." *Stickle's Appeal*, 5 Casey, 234; *Fox's Appeal*, 11 W. N. C. 236; *Robinson v. Martin*, 2 Y. 525. The intention of the testator is the governing rule in the construction of wills. *Beltzhoven v. Costen*, 7 Barr, 18; *Stoner and Barr's Appeal*, 2 id. 431. But as is said in *Middlewarth's Adm'r v. Blackmore et al.*, 24 P. F. S. 414; *Blackmore v. Hickman*, 32 id. 288: "The intention of a testator is not to be ascertained by considering the language of the devise only; the construction must be that which is consistent with the whole scheme of the will. A devise may be restrained by subsequent expressions." *McGlaughlin's Ex'r v. McGlaughlin's Adm'r*, 12 Harr.; *Fox's Appeal*, 11 W. N. C. 237; *Shreiner's Appeal*, 3 S. 106. There is no latent ambiguity in this will, and the intention of the testator must be gathered from the four corners of the will. *Comfort v. Mather*, 2 W. & S. 450. "The legal construction of a will cannot be explained or altered by parol declarations of the testator of his understandings of its meaning, or his intention to do something else." See, also, *Woodman v. Good*, 6 W. & S. 173. The supreme court will not consider a question not raised in the court below. *Michael Weaver's Estate*, 1 Casey, 434. "In construing a will, the circumstances of the testator, his character, his family and the amount and the character of his property, may be taken into consideration." *Postlewaite's Appeal*, 68 Penn. St. 477; *Follweiler's Appeal*, 6 Out. 581.

CLARK, J. The first question raised on this record is, whether or not the executor of the last will and testament of Elizabeth Housel, deceased, is entitled to receive in this distribution the full sum of \$300, on her claim for exemption as the widow of John M. Housel, deceased, or, \$109.24 only, the amount of money on hand at the time the claim of exemption was made.

The act of 14th April, 1851, provides that "the widow or children of any decedent dying within this Commonwealth may retain either real or personal property, belonging to said estate, to the value of \$300, and the same shall not be sold but suffered to remain for the use of the widow and family; and it shall be the duty of the executor or administrator of such decedent to have the property appraised," etc.

In *Larrison's Appeal*, 19 Casey, 130, it was held that "property" within the meaning of this act, embraced money, bonds and other evidences of indebtedness, and that when such property was chosen to be

retained, there was no necessity for an appraisement of it. The act of 8th April, 1859, was, in this respect, declaratory merely of the law as it had previously existed. The widow or children of a decedent may, therefore, elect to retain \$300, "or any part thereof, out of any bank notes, money, stocks, judgments, or other indebtedness" belonging to the decedent's estate. But when the widow in her claim of exemption has, in her life-time, specified the particular property which she elected to retain, her legal representatives in the distribution of the estate must, we think, be restricted to the designation which she thus made.

John M. Housel, the testator, whose estate is now for distribution, died 16th March, 1884; his estate consisted of \$109.24 cash, some bonds, mortgages, promissory notes, etc., a small amount of household goods, etc. A few days after the letters were issued, Elizabeth Housel notified the executor, in writing, that she claimed \$300 out of the estate of her deceased husband, allowed by law to her as his widow, and stated specifically, that she desired that sum to be paid to her "in cash." No appraisement was made or taken by the executor, under her claim, indeed it may be conceded, none was necessary. On the twenty-eighth May following, the widow also died, and the claim is presented by the executor of her last will and testament.

Her claim was for "cash;" \$109.24 was all the cash then belonging to the estate, and to this extent only her legal representatives are now entitled under that claim in this distribution. If her demand had been made after the bonds, notes, or other securities had been realized, a different question would be presented, but she died before they had been converted to money. She might have claimed her exemption, partly in money and partly in any of the securities, or wholly in the latter; but she did not, and we think the learned court was right in restricting the claim to the cash on hand when the claim was made.

The second question is supposed to arise upon the construction of the last will and testament of John M. Housel, deceased. Elizabeth, his wife, at the time of her marriage, was the owner of a certain house and lot of ground in Milton. It was incumbered by mortgage to the amount of \$2,400; a second mortgage was afterward executed upon the same property in the sum of \$1,000, and both were subsequently purchased by and assigned to her husband, who was in the possession of the property at the time of his decease.

In the last will and testament of John M. Housel, deceased, it is—*inter alia*—provided as follows: "Item—I give and bequeath to my beloved wife, Elizabeth Housel, all my household furniture or goods during the term of her natural life, and direct that no security be required from her for the same; and I also give and bequeath unto my said wife, Elizabeth Housel—after my just debts and funeral expenses shall have been paid and fully settled by my executor—the one-third of my personal estate to her own use and benefit absolutely; the household furniture, however, shall not be included in the appraisement of my personal estate before distribution as aforesaid."

"Item—As I hold judgments against my said wife, Elizabeth Housel, which are entered up in the court of common pleas of Northumberland county against the property which I now occupy, it is my will

and I so direct that no part of my said judgments shall be collected by my executor or heirs from my said wife, Elizabeth Housel, during the term of her natural life, but the same shall be kept revived as a lien against her property aforesaid until after her decease, and after her death the proceeds thereof shall be divided equally among my surviving children and the children of such as are deceased; the said children of such of my children as are deceased to take the share of their respective parent."

It is conceded that the testator was mistaken as to the nature of the securities he held upon his wife's property, and that the "judgments" referred to in the will were in fact the mortgages mentioned. The question is, whether or not, upon a fair construction of the will, the bequest to the widow of the one-third of the personal estate to her own use and benefit, in the clause first quoted, was intended to embrace one-third of the "judgments" referred to in the second.

The widow's claim here, is based upon the assumption of a surrender of her right under the intestate law and her acceptance of the will; she stands upon an equity which is superior even to that of a child; she is not to be treated as a mere volunteer but as a purchaser, and is, therefore, entitled to a fair and reasonable construction of the will in her interest. *Reid v. Reid*, 9 Watts, 263.

The provisions for the widow would appear to have been the subject of his chief solicitude. He gave to her the household furniture, etc., during her life-time; one-third of his personal estate after payment of debts, etc., absolutely, and provided that her indebtedness to him should not be collected whilst she lived.

The bequest of one-third of his personal estate is in the most distinct and unequivocal language, and in order apparently that there might be no occasion for mistaking his intention in this respect, he directs that the household furniture is not to be included in the distribution, in which the amount of that one-third is to be ascertained. The gold watch which he bequeathed to his son James, was not to be taken into the appraisement, and it is quite probable that the testator intended that it should in like manner be excluded. Let that be as it may, it is certain that the will does not indicate any intention of the testator that any other portion of his personal property, excepting what he thus particularly specified, was to be excluded from the computation of the widow's third.

It is true that in the second item, he refers to the judgments—mortgages—he holds against his wife, and directs that no part of these judgments shall be collected from her during her life, but that the same shall by revival be maintained as liens, etc., and that after his decease the proceeds shall be divided as he directs, but this, as we understand it, does not involve any inconsistency with the clause first quoted. The bequest of one-third of the judgments to the widow does not conflict with a provision that they shall not be collected within a given period, whether that be the period of her life-time or the life-time of one of his children, or any other period of time.

There is no provision that the widow shall have the benefit of the judgments during her life-time, they were not to be collected but they

were to be revived, and the interest thereon to accumulate until her death, and the "proceeds," that is to say, the money arising or obtained therefrom, to be distributed to his children.

A will must be construed so that every clause may take effect, if that be possible. No part will be rejected as repugnant if any fair and reasonable construction can be given to the whole, which will render every part effective. *Nathan v. Morris*, 4 Whart. 389; *Mutter's Estate*, 38 Penn. St. 314; *Seibert v. Wise*, 70 id. 147. But even if the direction in this second clause of the will may be considered ambiguous or of doubtful meaning, which we do not think it is, it must be construed in subordination to the original bequest, the terms of which are clear and unequivocal. *Sheet's Appeal*, 82 Penn. St. 213.

It will be observed, also, that the absolute share of the widow under the will, as we have interpreted it, is in accordance with her rights under the intestate laws; and it has been held in numerous cases that where the will leaves the mode of distribution doubtful, the court will apply the principle of the statute of distribution. *Ministers' Appeal*, 40 Penn. St. 111; *Horwitz v. Norris*, 60 id. 111; *Crim's Appeal*, 89 id. 333; *Huffner v. Wyncoop*, 97 id. 13.

By every rule of construction we think this will should be read as giving to the widow her full share of the personalty. The testator clearly contemplated an appraisement of his entire estate, except as specifically provided, and a distribution upon the basis of that appraisement; one-third to the widow of the appraised value. He explicitly directs what shall be omitted from this appraisement and distribution, to-wit, his gold watch and his household furniture; if he had intended to exclude the mortgages it is reasonable to suppose he would have said so.

It was suggested at the argument that the question of interest had been reserved, to be disposed of in the future.

We infer from this that there may be matters bearing upon the question of the widow's responsibility for interest, or upon the extent of that responsibility, of which we are not informed. We will not, therefore, attempt a distribution upon the basis of this opinion, but will remit the record, in order that this may be done in the court below.

The decree of the orphans' court is reversed, and it is ordered that the record be remitted in order that distribution may be made in accordance with this opinion; and it is ordered that the appellees pay the costs of this appeal.

COMMONWEALTH OF PENNSYLVANIA v. RAILING.

May 17, 1886.

CRIMINAL LAW—PENAL CODE, §87—DEATH FOLLOWING ATTEMPT TO PROCURE ABORTION.

Section 87 of the Penal Code took the crime of causing death by an attempt to procure abortion out of the class designated as murder, and made it a felony of lesser grade, and prescribed the punishment of it. Hence, no penalty therefor can be inflicted, or any thing be done in punishment thereof, otherwise than as directed by that section.

Error to the court of oyer and terminer of Cumberland county.

Charles Railing was indicted at the April quarter sessions of 1884, for the crime of abortion, under the eighty-seventh section of the Criminal Code. At the following August sessions he was convicted and sentenced. The facts on which the conviction was based were that, on the 22d day of January, 1884, the defendant took one Annie Faust — who was then pregnant — from her home, in Penn township, to Carlisle; that the object of the visit was to procure an abortion; that Railing went with her to the office of a physician, and there personally employed the person whom he found in charge of the office to perform said abortion; that such operation was thereupon performed; that as the result of this operation she gave birth, on the twenty-fifth day of January, to an undeveloped foetus, and, on the twenty-sixth day of January, in consequence thereof, died.

A writ of error to the supreme court was sued out, and the case was reversed and remanded to the court below for further proceedings, because the dying declarations of Annie Faust had been admitted in the trial, the supreme court holding that dying declarations were admissible only in homicide cases.

The bill on which Railing was tried and convicted contained four counts. The first count charged the felonious administration of unknown drugs, with intent to procure a miscarriage, and the consequent death of the woman; the second charged with like intent and consequences the use of an instrument; the third in like manner charged the use of unknown means, and the fourth the use of certain unknown poison drug and substance.

On this bill the court allowed a *nolle prosequi* to be entered. A new indictment, containing three counts, charging Railing with the murder of Annie Faust, was presented to the grand jury, and a true bill on all counts found.

The first count charged him generally with murder, but specified no means, the second charged murder in an attempt to procure an abortion, and alleged the means to be an instrument; the third in like manner charged the same offense, and alleged the means to be the administration of poison drugs and substance unknown.

A *nolle prosequi* was entered on the first count, and the remaining counts were quashed.

At common law, in Pennsylvania an indictment for murder in such a case would lie, and the only question for the determination of the supreme court in this case was: Is the remedy at common law supplanted by the eighty-seventh section of the Penal Code, which punishes the causing of death by an attempt to procure abortion?

John T. Stuart, district attorney, and H. S. Stuart, for plaintiff in error. That this was murder in the second degree at common law in Pennsylvania before the act of 1860 cannot be doubted. This is clearly set forth by Judge KING in *Commonwealth v. Keeper of the Prison*, 2 Ash. 227. This is true in general at common law, 2 Bish. Crim. Law, 691; *Rea v. Fretwell*, Leigh & C. 161; *Finkler's case*, 1 East P. C. 264; 1 Hale Pleas of the Crown, 429-430. Now this unquestionably was the law until the enactment of the eighty-seventh section of the Criminal Code. This section provides that if any person shall unlaw-

fully administer to any woman pregnant with child any drug, or use any instrument with intent to procure her miscarriage, and the woman shall die in consequence, the person so offending shall be guilty of felony, and the penalty attached is a fine not exceeding \$500, and imprisonment not exceeding seven years. Now this is exactly the crime of murder in the second degree at common law. The statute creates no new crime, but treats the crime as it was at common law. It adds not a single incident; it subtracts none. To this common-law crime it attaches a penalty. Now, we hold that "where a statute only inflicts a punishment on that which was an offense before," there is no necessity of mentioning the statute. 2 B. 339, *Com. v. Searle*. In the same case Lord HALE's idea that "if an offense be at common law, and also prohibited by statute, the party may be indicted at common law," is quoted and approved. When a statute creates an offense, or expressly prohibits that which was not an offense at common law, then the statutory remedy must be followed; but when it merely attaches a penalty to that which was an offense before, then the indictment may be at common law, and the statutory penalty may be inflicted. *Com. v. Searle, supra*; *White v. Com.*, 6 Binn. 179; *Russell v. Com.*, 7 S. & R. 489. The act of 1860 contains a re-enactment of the old law of March 21, 1806, which declares that "in all cases where a remedy is provided, or a duty enjoined, or any thing directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted or any thing done agreeably to provisions of the common law for such cases, further than shall be necessary for carrying such act or acts into effect." Now, the cases *Com. v. Searle, supra*; *White v. Com., supra*, and *Russell v. Com., supra*, were all decided subsequent to the act of 1806, and this act was called to the attention of, and duly considered by the court. It only conflicts, therefore, with the infliction of the common-law penalty, and still allows the conviction to be at common law. The punishment is statutory. The decisions on the act of 1806 all indicate that where a new mode of procedure is directed by an act of assembly, there the common-law remedy is gone; but where no new tribunal is provided, no new mode of procedure, nothing is done by the statute but change the penalty there the common-law remedy is not taken away. In the case of *Com. v. Evans*, 13 S. & R. 426, the mode of procedure was changed. The action was no longer criminal, but penal, and the act of 1806 consequently compelled a resort to the statutory remedy. But if the eighty-seventh section of the Code does create a new offense—if the "death of the woman is not a constituent element of the offense," as it was in the crime of murder at the common law, then there is a remnant of the crime at common law not covered and punished by the act of assembly, and this remnant is the death of the woman. By the same act the defendant commits two crimes, one of which, to-wit: abortion, is punishable under the eighty-seventh section of the Code, and the other that of murder, which is left by the Code as it was at common law.

F. E. Beltzhoover and *S. Hepburn, Jr.*, for defendant in error. The one hundred and eighty-third section of our Criminal Code declares that

"In all cases where a remedy is provided or a duty enjoined by any act or acts of assembly of this Commonwealth, the direction of such act or acts shall be strictly pursued, and no penalty shall be inflicted or any thing done agreeably to the provisions of the common law in such cases further than shall be necessary for carrying such act or acts into effect." In this case a remedy has been plainly and specifically provided by the act of assembly for the punishment of the crime which is committed when a woman dies in consequence of an attempt to produce a miscarriage on her. This remedy must be strictly pursued as it was in the indictment which was preferred and tried for abortion. It is not necessary to do any thing agreeably to the provisions of the common law to carry the act of assembly punishing abortion into effect. It was, therefore, clearly right for the learned court below to sustain the motion to quash the indictment for murder. It is a mere pretext to get around the decision of the supreme court excluding dying declarations in trials for abortion to indict for murder at common law while admitting that only the penalty for abortion can be imposed if a conviction were obtained for murder. If the district attorney had no legal evidence of the crime contemplated by the law and with which he charged the defendant, it was his duty to say so, and the ends of justice would be thus better subserved than by wresting the law from its plain meaning to secure a conviction by a device. The whole tenor and purpose of the law of crimes and criminal procedure in this State manifestly are in harmony with this construction. In consecutive sections, murder of the first and murder of the second degree and voluntary manslaughter and abortion are clearly defined and their punishments specifically provided. 1st. Murder in the first degree is punished capitally. 2d. Murder in the second degree is punished for the first offense by imprisonment not exceeding twelve years, and for the second offense by imprisonment during life. 3d. Voluntary manslaughter is punished by a fine not exceeding \$1,000, and by imprisonment not exceeding twelve years. 4th. Causing the death of a pregnant woman with instruments or drugs in an attempt to produce a miscarriage is punished by a fine not exceeding \$500 and imprisonment not exceeding seven years. Thus the fundamental law of the State clearly and distinctly separates, defines and punishes these four offenses as different, distinct and separate crimes. Under section 11 of the Code of Criminal Procedure which provides that in all indictments it is sufficient to charge the crime substantially in the language of the act of assembly prohibiting it, both the indictments are but indictments for abortion under the eighty-seventh section of the Criminal Code — the form of the last one being manifestly changed only for the purpose already stated. In the case of *Commonwealth v. Jackson*, 15 Gray, 188, the supreme court of Massachusetts have settled this question exactly as contended for by the defendant in error. See, also, *Robbins v. State*, 8 Ohio, 131.

MERCUR, Ch. J. In *Railing v. Commonwealth*, 16 W. N. C. 452; S. C., 2 East. Rep'r, 892, the unlawful acts charged were presented under an indictment of another form. We reversed that judgment for error in admitting certain declarations in evidence. The indictment there charged the defendant with having

administered a drug to Annie Faust with intent to produce a miscarriage, and that her death resulted as a consequence of so administering it. That indictment was framed under the eighty-seventh section of the Criminal Code of 31st March, 1860. It declares if any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be so, any drug, poison or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding \$500 and to undergo an imprisonment by separate or solitary confinement at labor not exceeding seven years.

Section 183 of the same Code declares in all cases where a remedy is provided or duty enjoined or any thing directed to be done by any act or acts of assembly of this Commonwealth, the directions of said acts shall be strictly pursued, and no penalty shall be inflicted or any thing done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect.

Thus section 87 took the crime therein specified out of the class designated as murder, and made it a felony of lesser grade, and prescribed the punishment therefor. Hence no penalty therefor shall be inflicted or any thing be done in punishment thereof otherwise than as directed by said section.

The present attempt is to convict the defendant of murder, on a new indictment, for committing the same acts on the same person, as charged in the former indictment. The punishment prescribed for the lowest grade of murder, is imprisonment by separate or solitary confinement not exceeding twelve years, and for the second offense, for the period of his natural life. Thus the statute not only makes the acts with which the defendant is charged an offense less than murder, but also prohibits as severe a punishment therefor. It may be urged that on an indictment for murder a conviction might be had of voluntary manslaughter. This is undoubtedly true; but that does not help the case. The punishment prescribed for such a conviction is a fine not exceeding \$1,000, and by imprisonment not exceeding twelve years.

Thus the attempt to indict for murder and punish as if murder, the commission of the acts specified which the statute does not make murder, cannot be successful. It follows the learned judge committed no error in quashing the indictment. The conclusion at which we have arrived appears to be in accordance with *Robbins v. State*, 8 Ohio St. 131, and *Commonwealth v. Jackson*, 15 Gray (Mass.), 188.

Judgment affirmed.

SHAEFFER v. HOFFMAN ET AL.

May 17, 1886.

STATUTE OF LIMITATIONS — PROMISE TO PAY.

A clear, distinct and unequivocal acknowledgment of the debt is sufficient to take a case out of the operation of the statute of limitations; the admission must be consistent, however, with a promise to pay, in which event the law implies a promise.

Error to the court of common pleas of Northumberland county.

This was an action of *assumpsit* to recover a balance alleged to be due upon a promissory note; defendants pleaded the statute of limitations. The verdict was for defendants.

J. J. Reimensnyder and Geo. B. Reimensnyder, for plaintiff in error. In the case of *Palmer v. Gillespie*, 95 Penn. St. 340, all the cases on the question as to what is necessary to take a debt out of the operation of the statute of limitations were carefully reviewed and considered by this court, and it was held that it was error to say to the jury that there must be an express promise to pay. "It is not essentially necessary that the promise be actual or express, provided the other necessary facts are shown. A clear, distinct and unequivocal acknowledgment of a debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so the law will imply the promise without its having been actually or expressly made. There must be no uncertainty as to the particular debt. It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning." *Warner v. Stein & Greenawalt*, 97 Penn. St. 322. The case should have been submitted to the jury with instructions as to the law. *Lawson v. McCartney*, 8 Out. 356.

S. P. Wolverton, Geo. Hill and J. Nevin Hill, for defendants in error. In order to take a case out of the operation of the statute of limitation, an acknowledgment of the debt must be distinct and unequivocal, and so distinct as to preclude hesitation. In *Emerson v. Miller et al.*, 3 Casey, 278, the defendant said "that he would attend to it, fix it, or settle it before he went away." *Held* not sufficient. In *Wesner v. Stein*, 1 Out. 322, *held*, "Where an acknowledgment or admission is relied on, to avoid the bar of the statute of limitation, in the absence of an express promise to pay the debt, it must amount to a clear and unambiguous recognition of an existing debt, so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular debt to which it applies. It must, moreover, be consistent with a promise to pay." In *Miller v. Bashore*, 2 Norr. 356, the words used were: "And after he is paid I will pay you all I owe you, and, if I can do any thing for you before that time, I will do so. You need not trouble yourself about me, that I will not pay you, for I expect to pay all I owe," *held* to be insufficient. In delivering the opinion of the court, Mr. Justice GORDON says: "In order to effect such a result, there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay." In *Weaver v. Weaver*, 4 P. F. S. 152, at the foot of an account, the party against whom the balance appeared, signed the following: "Having received an order for a deed to me from Martin Weaver, I hereby agree to settle with him for the above balance, and any other just claim between us, March 13, 1849." *Held* not sufficient to take the case out of the statute. *Shaffer v. Shaffer*, 5 Wr. 51. "Where the bar of the statute is sought to be removed by a new promise, the promise, as a new cause of action, ought to be proved in a

clear and explicit manner, and be in its terms unequivocal and determined. 2 Greenl. Ev., § 440. Mr. Greenleaf has collected a considerable number of cases, and he deduces from them the doctrine that if there be circumstances accompanying an acknowledgment, "which repel the presumption of a promise or intention to pay, or if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to possible inferences which may affect different minds in different ways, it has been held that they ought not to go to a jury as evidence of a new promise to revive the cause of action. § 450. This is assuredly settled in this State. Thus in *Morgan v. Walton*, 4 Barr, 321, which was *assumpsit* for a book account, the proof was that the defendant had said to the son of the plaintiff: "I owe your father, but tell your father I cannot pay him this fall, nor before next spring; but next spring I intend to settle with your father, and pay him what I owe him." Either pay him what I owe him or his account. The witness was not sure which. This was held insufficient, because it left an uncertainty whether the debtor referred to the part of the account not barred by the statute, or to the whole together." *Kensington Bank v. Patton*, 2 Harr. 479. Held, "It must be a promise to pay on demand; an immediate unqualified promise to pay, without reservation or conditions." To the same effect are the following authorities: *Junior S. F. E. Co. v. Douglas*, 2 Pen. 63; *Gillingham v. Gillingham*, 5 Harr. 302; *Kyle v. Wells*, id. 286; *Bolt v. Sterner*, 2 Pen. 154; *Morgan v. Walton*, 4 Barr, 321; *Morgan v. Carpenter*, 2 W. N. C. 306; *Jenseman v. Hersman*, id. 693; *McClellan's Ex'rs v. West*, 9 P. F. S. 487; *Larson v. McCartney*, 8 Out. 356.

PAXSON, J. Whether the rejection of the plaintiff's deposition was erroneous or otherwise is not a material question in this case. There was nothing in the deposition to take the note in controversy out of the statute; hence its rejection did the plaintiff no harm. The following is the material part of the deposition: "Witness says, four years after the date of the note, he showed note to Jacob Hoffman, and twice since; he said each time this note had to be fixed, and on one of these times he said he and William had to pay it. About two years after he had showed Jacob Hoffman the note the first time, he showed it to him the second time, and it was at this time — the second time — that he said he and William would have to pay it — means William Hoffman. About two and a half or three years after he had shown Jacob Hoffman the note the second time, he showed it to him the third time, when he said yes, he signed it, that it was his name, and it would have to be fixed. This spring it was two years that I had the conversation with Jacob Hoffman concerning this note, when he again said it had to be fixed. Witness says that frequently within six years, prior to the bringing of this suit, Jacob Hoffman said that it had to be or must be fixed."

In order to understand this deposition it must be borne in mind that by an exceedingly awkward arrangement the witness is made to speak in the third person. The language is not literally that of the witness, but of the justice of the peace who took it down, and he has accompanied it with explanation of what he supposes the witness to

mean. But taking the deposition for all it is worth, it does not make out the plaintiff's case. It is not such an acknowledgment of the debt from which an unequivocal promise to pay can be inferred. It does not prove an express promise to pay, nor an implied one. The acknowledgment of his signature to the note would not of itself be an acknowledgment of the debt. The latter might have been paid or there might be a valid defense to it. The expression that it must be "fixed" and that "he and William would have to pay it" are equivocal. In the one instance it is not the equivalent of "pay;" in the other it involves another person, and may refer to a supposed liability rather than a present intention to pay. Such expressions as these were held insufficient to toll the statute in *Emerson v. Miller*, 27 Penn. St. 278. "The decisions of this court apply very strict rules to acknowledgments to take a case out of the statute of limitations, and very rightly so. We mean to adhere to them in letter and spirit." *Johns v. Lantz*, 63 Penn. St. 324. It is not essentially necessary that the promise be actual or express, provided that the other necessary facts are shown. A clear, distinct and unequivocal acknowledgment of the debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise, without its having been actually or expressly made. *Palmer v. Gillespie*, 95 Penn. St. 340. Tested by this rule we find nothing in the deposition to toll the statute.

Nor do we think the testimony of the witness, James Strohaker, is any stronger. Without quoting it at length, it is sufficient to say that the defendant acknowledged that he signed the note as bail, and that he and William Hoffman "would have to fix it," or that "they would have to pay it." The witness puts both expressions in the mouth of the defendant. Neither is sufficient. A statement by the defendant that he and some one else would have to fix a note, or would have to pay it, contains nothing from which an implied promise that the defendant alone would pay. And it has been already seen that the acknowledgment must be consistent with a promise to pay.

As there is nothing in the case to toll the statute, the court below did not err in directing a verdict for the defendant. This renders a discussion of the remaining assignments unnecessary.

Judgment affirmed.

STROUP v. McCLOSKEY.

May 17, 1886.

LEVY — LAND SOLD AT SHERIFF'S SALE — DESCRIPTION.

Land was levied upon and sold at sheriff's sale. *Held*, that what was covered by the levy was to be ascertained by the language used and by the adjoiners called for, points of the compass specified yielding to adjoiners actually intended and called for.

Error to the court of common pleas of Clearfield county.

This was an action of ejectment brought by Stroup against McCloskey to recover the possession of six acres and eighty perches of land which McCloskey claimed to have purchased at a sheriff's sale of real estate of

Stroup. The following is a copy of an extract from the charge of the common pleas, per KREBS, P. J.:

"He (defendant) asserts and claims, that under this levy and sale, and sheriff's deed to him, he again became the owner of these six acres and eighty perches of land, and that, therefore, he has no right to give it up to the plaintiff — that the plaintiff is not entitled to recover. Whether that contention be true or not depends upon the construction that shall be placed upon the levy made by the sheriff, because that is the matter which is to determine the rights of these parties. Where a levy is plain and intelligible from its reading, its construction and application is for the court. If that levy be taken on the ground and it corresponds to the location of the land upon the ground, there can be no room for doubt, and the jury cannot have any question to pass upon. Its construction, in such case, is for the court, and is a question of law. Where the facts are undisputed, it is wholly a question for the court to determine and instruct the jury what their verdict should be.

"After the writ of execution in favor of W. S. Gilliland against Solomon Stroup, to No. 78 December term, 1878, was lodged with the sheriff, he returns, that: 'On the 20th of August, 1879, by virtue of the attached writ, I levied on the following described real estate, situated in Karthaus township, Clearfield county, Pennsylvania: East by public road; south by land of Isaac McCloskey; west by same; north by land of David Price — containing twenty-five (25) acres more or less. All cleared, having thereon erected a two-story frame house, frame barn, and out-buildings, to be sold as the property of Solomon Stroup.'

"Subsequently the sheriff makes a deed-poll, which has been offered in evidence in this case, in which the boundaries are identical with the boundaries called for in the levy — no varyings or discrepancies whatever.

"Now then, how was this twenty-five (25) acres more or less to be located? The defendant has offered in evidence and proved that the land of David Price does lie part way on the north of the land in dispute, and that it is bounded otherwise by the land of Isaac McCloskey on the west. The plaintiff has not attempted to disprove those facts as existing. As they are not disputed, they are to be taken as admitted. But the plaintiff has proven that the call for a public road on the east is a mistake; that the public road does lie on the south — twenty-five rods south of the land in dispute; that the call for Isaac McCloskey on the south is a mistake; and that no public road is found where it is called for, and the contention on the part of the plaintiff by his counsel is, that these mistakes are to be considered by the jury as showing that the sheriff was mistaken as to the courses of north, south, east and west, at the time he made this levy; that when he said 'north' he must have meant east, and when he said 'east by public road,' he must have meant, south by public road. Now, gentlemen of the jury, we cannot agree with this contention. The tract of land is to be located — where it does not call for marked lines or corners, and does call for adjoining land — it must be located by these adjoiners if they are found on the ground. So that if you take this levy and go upon

the ground and find it calls for David Price's land lying on the north, you are bound to get that call. If you find land called for on the west, and upon an examination of the ground you found the land called for, lying on the west, then you must go to that call. If you find the call on the east is something different, and the call on the south is a mistake, it does not compel, nor does it excuse you, if you disregard the calls on the other two sides. It is a true principle of law that you must begin where there is an admitted corner or call. If others are disputed, you must start from an admitted call or corner and locate the land from that, in a way that answers the most of the calls in the levy. Two of these calls are satisfactorily answered — that is undisputed by the testimony in the case. Two of them are not answered — that is evidently a mistake by the sheriff as to the location of this land in that direction, but that does not require us, nor does it excuse us for disregarding the other two calls which are on the ground.

"It is admitted, that if the call for David Price on the north were to be started there and the land located from there southward, and the call on the west, of Isaac McCloskey, were to be taken as found, that then it would cover the land in dispute. But another point is raised by plaintiff's counsel in this case, and that is, that because the naked legal title to this disputed piece still remained in Isaac McCloskey that, therefore, the sheriff must have known that fact, and must have intended that as a call on the west, although it does lie, in point of fact, on the north. We do not agree with that contention. We think that would not be a proper construction to put upon the undisputed facts in this case. We do not think it would be right to take this land from the defendant upon a construction of that kind — on the mere fact that the naked legal title was still in Isaac McCloskey, although the plaintiff — Solomon Stroup — was in undisturbed possession of this land. In our judgment this would be sufficient to justify the court in directing you to find a verdict for the defendant.

"There are also other undisputed facts in this case. The fact that after the purchase of this land by Solomon Stroup — plaintiff — he used and occupied it with his other land; fencing it up with as much more, or according to the testimony of the witnesses, 'almost as much,' as was in this disputed piece, and farming the two together as one part, or original farm. In our judgment that would control to the extent of the levy and sale, if there was nothing else — no calls — or the land was simply described. Twenty-five acres more or less, situated in Karthaus township. We do not look for that degree of accuracy in a sheriff's levy that we do in a deed made by a conveyancer, and we must extend or limit the location of the land described in the levy according to the calls and marks on the ground, where any are given. Taking these calls as given in this levy, and applying them to the location, with David Price on the north, and Isaac C. McCloskey on the west, the conclusion comes to our mind irresistibly that this land is within the limits of the sheriff's levy, and being so, that your verdict must be for the defendant."

Murray & Gordon, for plaintiff in error. "A party is entitled to bring out every circumstance relating to the fact which an adverse

witness is called to prove." *Bank v. Fordyce*, 9 Barr, 277; *Jackson v. Litch*, 12 Smith, 456. "A party may cross-examine as to the *res gesta* given in evidence, though it be new matter." *Markley v. Swartzlander*, 8 W. & S. 172. "It is well-settled law that a call may be shown to be a mistake by the work on the ground." *Caldwell v. Haller*, 4 Wr. 167. "And it is equally well settled that where there are insensible or conflicting calls, that location should be made which will answer most of the calls." *Hegarty v. Mathers*, 7 Casey, 357. "To what particular piece of land descriptive words in a deed refer is a question for the jury." *Naglee v. Ingersoll*, 7 Barr, 185. "The construction of written instruments is undoubtedly the exclusive province of the court, and the *quantum* of estate conveyed by a deed is referable to the judge alone; but where that estate is situate, what are its limits and contents, must frequently depend upon evidence *dehors* the writing; and, thus, it is often a pure question of fact, or of law and fact compounded, upon which a jury must be called to pass." *Collins v. Rush*, 7 S. & R. 102. "This is particularly true of loose written returns of writs of execution, which ignorance and carelessness combine to divest of every feature approaching to certainty. With us inaccuracy of description in these inceptions of title is so often indulged, that it has been found necessary to make a liberal use of assisting evidence, documentary and oral, in correcting mistakes, explaining ambiguities, and applying indeterminate delineations to disputed localities." *Hoffman v. Danner*, 2 Harr. 25, 28; *Shoemaker v. Ballard*, 3 id. 94; by WOODWARD, J., in *Hetherington v. Clark*, 6 Casey, 396; and by AGNEW, J., in *Susquehanna Boom Co. v. Finney*, 8 Smith, 208. In the latter case AGNEW, J., says: "So what property is or is not embraced in a levy which is obscure in its terms may be shown by parol evidence." *Shakely v. Scott*, 3 Watts, 60; *Hoffman v. Danner*, 2 Harr. 25; *Atkinson, Lessee, v. Cummins*, 9 How. 499. "In two of these cases, adjoiners mistakenly called for by the sheriff's levy were rejected and land bounded by them excluded."

Frank Fielding, for defendant in error. If there be doubt arising from the terms of the levy itself, the rule is that it shall be construed most favorably to the purchaser. "The levy on the tract, generally, would embrace whatever interest the defendant had in it, unless there was something else in the levy restricting it to a particular part or share of the land." *Inman v. Kutz*, 10 Watts, 90. "In levies of real estate upon execution more laxity of description is allowed than in deeds of conveyance; it is sufficient if the terms used show what was intended to be levied on; where doubtful expressions are employed, the construction should be favorable to the plaintiff, to enable him to obtain payment of his debt from the property of his debtors." *Inman v. Kutz*, *supra*; *Wright v. Chestnut Hill Ore Co.*, 9 W. 482. "If the owner of a tract of land purchase a small piece of land adjoining it, for the purpose of using it with the larger tract, he thereby makes it a part of the whole, and a levy and sale by the sheriff of the tract of land, without any description of the part purchased, will convey the whole to the purchaser." *Burkholder v. Sigler*, 7 W. & S. 155. "Levying upon any thing less than one whole tract or lot of land, with the appurtenances, is clearly against the act of assembly." *Snyder v. Castor*,

2 Binn., note a. "One who accepts part of the purchase-money arising out of a sheriff's sale is estopped from denying the validity of the sale." *Stroble v. Smith*, 8 Watts, 280.

PER CURIAM. Whether the land in contention was included in the levy and deed was a question of fact. It was to be ascertained by the language used and by the adjoiners called for. The jury were correctly instructed that the points of the compass specified were to yield to the adjoiners actually intended and called for. We see no error in the charge, answers to the points nor in the rejection of evidence.

Judgment affirmed.

SHAW v. BETTS ET AL.

May 17, 1886.

EXECUTOR — ACTING EXECUTOR — COMPENSATION — ONUS PROBANDI.

When a sum of money is decreed to two persons jointly and one of them claims more than a moiety thereof, he takes on himself the burden of proving in some manner his right thereto.

A., B. and C. were executors of the last will of D. A. was the acting executor; upon a settlement \$2,700 commission was allowed, whereupon the representatives of B., deceased, brought *assumpsit* against A. to recover one-third thereof. A. claimed that, as he had performed all the labor incident to the executorship, he was entitled to a greater compensation than either of his co-executors. *Held*, the burden of proof rested upon him to establish his position.

Error to the common pleas of Clearfield county. The facts are sufficiently stated in the syllabus.

Orvis & Snyder, for plaintiff in error. The number of the executors is not to make any difference in the rate of commission; if their trouble be unequal a share of the commission ought to be assigned to each proportioned to his trouble. *Walker's Estate*, 9 Serg. & Rawle, 223; *Aston's Estate*, 5 Whart. 240; *Wickersham's Appeal*, 64 Penn. St. 67. Where one of two executors renders greater service to the estate than his co-executor he will be entitled to a greater share of the commissions. *Grant v. Pride*, 1 Dev. (N. C.) Eq. 269; *Hodge v. Hawkins*, 1 Dev. & B. (N. C.) Eq. 564; *Waddill v. Martin*, 3 Ired. (N. C.) Eq. 562; *White v. Bullock*, 20 Barb. 91. "Before one-half of the whole commissions earned could be employed in paying a debt due by one of the accountants individually to the estate, it must be affirmatively shown that such is of right the debtor executor's proportion of such commissions." *Stevenson's Estate*, 1 Pars. 20. "The amount allowed includes the whole commissions to which both are entitled for all services included in the account which it is not for us to apportion." *Davis' Estate*, 1 Phila. 360; *Wickersham's Appeal*, 64 Penn. St. 67. "It is clearly settled that one executor shall not be charged with the *devastavit* of his companion, and shall be liable only to the extent of the assets which came to his hands." Toller's Laws of Executors, 368; Wms. Exrs. (6th ed.) 1924. "And even in the case of executors, modern good sense, looking beyond the technical reason of the rule, which was supposed to be applicable to the peculiarity of the trust devolved on them, seems to have broken

down the distinction between them and other trustees, by denying that, in reason, an intent to be jointly chargeable is deducible from the mere fact of joining in a receipt." Per Lord ELDON, 16 Ves. 479; *McNair's Appeal*, 4 R. 148; *Bown's Appeal*, 1 D. 311; *Sterrett's Appeal*, 2 Penn. St. 420-1; *Vernon v. Henry*, 6 Wr. 192; *Stell's Appeal*, 10 Barr, 152-3. And the same rule appears to be held in several of the States. *Peter v. Beverly*, 10 Pet. 532; 1 How. 134; *Roach v. Hubbard*, 6 Litt. (Ky.) 325; *Sparhawk v. Buell*, 9 Vt. 41; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17; *Clarke v. Clarke*, 8 Paige (N. Y.), 152; *Barks v. Wilkes*, 3 Sandf. (N. Y.) Ch. 99; *Fennimore v. Fennimore*, 3 N. J. (2 Green) 292; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Clarke v. Cotter*, 2 Dev. (N. C.) Eq. 51; *Knox v. Pickett*, 4 Desau. (S. C.) 199; *Kerr v. Waters*, 19 Ga. 136; *Gaultney v. Nolan*, 33 Miss. 569. "But there is another unanswerable objection to the present attempt. There is no such thing as the liability of one joint trustee for the misfeasance or non-feasance of another, unless that other, from insolvency, is unable to answer for himself. Until then there can be no loss; and it is only when a loss occurs the non-receiving trustee is ever held liable." *Stell's Appeal*, 10 Barr, 153.

W. I. Shaw and Oscar Mitchell, for defendants in error. When two or more persons each receive an undivided interest in a property the presumption of law, in the absence of any other evidence, is that they have an equality of interest. *Edwards v. Edwards*, 3 Wr. 369, 384, 385. "In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions." 1 Bouv. Law Dict. 595. "Where the affirmative is supported by a disputable presumption of law, the party supporting the negative must call witnesses in the first instance to overcome this presumption." Tayl. Ev., § 339. "The correct view is that the burden of proof is upon a party undertaking to prove a point." 1 Whart. Ev., § 354. "When executors join in administering the assets, each is responsible for the safety of the fund and is not excused from loss by the misconduct of his fellow." *De Haven et al. v. Williams et al., Executors of Williams*, 30 P. F. S. 480, 482-3. "The acts of one co-executor bind all the others by reason of the confidence reposed in them individually, in consequence of which each has full power over the assets." *Beltzhoover v. Darrah et al.*, 16 S. & R. 329, 337; *De Haven et al. v. Williams et al., Executors of Williams*, 30 P. F. S. 480, 482. "An executor cannot make an agreement with his co-executor whereby he can relieve himself from liability to the estate." *Watt's Estate*, 25 Pitts. L. J. 95; 1 Rhones O. C. 282. "Ordinarily an executor is not liable for non-feasance, but if he enters upon the execution of any part of the trust he cannot stop short, and must do all that is requisite to conduct the business to a successful termination." *De Haven et al. v. Williams et al., Executors of Williams*, 30 P. F. S. 480, 482-3. Again, "if the whole of the proceeds of an estate pass into the hands of one of the executors originally, and his co-executor permit him to use them and concur in the application of them, he is unquestionably

chargeable with the default of his co-executor." *Clarke v. Clarke*, 8 Paige (N. Y.) Ch. 152, 159. In the management of partnership business the law would not imply, in the absence of any agreement, that a partner who renders a little more service is to be compensated for the inequality of services rendered. *Beatty v. Wray*, 7 Harr. 518-519; *Thornton v. Proctor*, 1 Anstr. 94; *Bradford v. Kimberly*, 3 Johns. Ch. 436; *Franklin v. Robinson*, 1 id. 165. "At first view it might seem unjust that a co-operator should contribute more than his share to an enterprise without remuneration for the excess; but his share depends on the nature of the bargain. These services are inappreciable and insusceptible of specific charge. A partner could not keep an account of every hoop or nail driven by him." *Beatty v. Wray*, 7 Harr. 516, 519-520. "One of several executors has no right to retain the whole of the commission allowed to them by the court, on the ground that he had solely transacted the business of the administration." S. P., *Smart v. Fisher*, 7 Mo. 580. "The compensation of executors is not determinable by any established practice or rule, being graduated by the responsibility incurred, the amount of the estate, and the amount of labor expended." *Harland's Account*, 5 Rawle, 323, 329; *McCausland's Appeal*, 2 Wr. 466, 470; *Montgomery's Appeal*, 5 Norr. 230, 234-235; *Norris' Appeal*, 21 P. F. S. 106, 126.

PER CURIAM. If the learned judge committed any error in this case, it was in being too favorable to the plaintiff in error. There is certainly nothing giving him any just cause of complaint. When a sum of money is decreed to two persons jointly and one of them claims more than a moiety thereof, he takes on himself the burden of proving, in some manner, his right thereto.

Judgment affirmed.

OVERSEERS OF THE POOR OF PENN'S TOWNSHIP v. OVERSEERS OF THE POOR OF THE BOROUGH OF SELINGSGROVE.

May 17, 1886.

PAUPER — SETTLEMENT.

A. was born in Penn's township, in May, 1854; at nine years of age she became insane; in March, 1883, B., her father, who had settlement in Penn's township, made complaint and she became a charge upon the township, and was placed by the overseers of the poor in the State Hospital for the Insane, at Danville; in September, 1883, B. entered into an agreement with the overseers of the poor to take A. back into his household; the overseers of the poor to pay any resident physician employed by B. to attend A. for her insanity, and to have the right to remove her again to the hospital, if in their judgment proper; in March, 1884, and whilst A. was an inmate of the home of B., the latter moved his family to a house he had purchased in Selingsgrove; in July, 1885, A. again became chargeable; up until near this time, Penn's township had furnished her relief. *Held*, A. had not acquired a new settlement in Selingsgrove, and further, that she remained a charge upon Penn's township.

Error to the court of quarter sessions of Snyder county.

The facts are set forth in the opinion of the quarter sessions, per BUCHER, P. J., of which opinion the following is a copy:

"The question for solution is the settlement of Sarah Jane Hoffman, a pauper. The facts of the case are few and simple. We find them to be as follows:

"First. The name of the pauper is Sarah Jane Hoffman. She is the daughter of Charles Hoffman, and was born in Penn's township, Union county — now Snyder county — on May 18, 1854. Both the pauper and her father had settlement in Penn's township aforesaid, on the 9th day of March, A. D. 1883. On that day the father made complaint on oath, before two justices of the county, 'that a certain child of his, by name Sarah Jane, is not well, and is unmasterly in his household and he is not able to support her any longer, and that, under his circumstances, he requests help from some other source in order to relieve him from his distressed condition.' Whereupon the said justices issued an order of maintenance, directed to the overseers of Penn's township. At this time the daughter was upward of twenty-eight years of age, and had always been a member of her father's family. Indeed, the evidence is, that she was insane since she attained the age of nine years, and this explains the expression, 'Sarah Jane is not well and unmasterly,' used by the father in his complaint before the justices.

"Second. The order of relief was delivered by the father to the overseers of Penn's township, in March, 1883, a few days after it was issued, and they accepted the daughter as a pauper, and, in the same month and year, placed her in the insane asylum, at Danville, at the expense of the township, where she remained until October, 1883. On September 9, 1883, whilst the pauper was being maintained in the asylum by the township, the overseers of the poor entered into a written contract with the father, by which the latter agreed to bring her from the asylum, and return her there if necessary, and find all necessary medicines at his own expense, the overseers of the poor to pay any resident physician employed by the father for medical attendance rendered the pauper for the insanity by reason of which she was removed to the asylum, and reserving the right, on the part of the overseers of the poor, to return the pauper to the asylum at any time, if they considered this less expensive than to pay the physician's charges aforesaid. There was a stipulation in this contract, that it should not continue longer than until April 1, 1884. The evidence is, that this was inserted because the term of office of one of the overseers of the poor would expire then; but it was said at the time that a new agreement could be made after that with the new overseers, or the father could make a new agreement with them.

"Third. In the month of October, 1883, a few weeks after this agreement was made, the pauper was taken from the asylum, and again became an inmate of the father's family. The father had bought a house and lot in Selinsgrove, almost one year before he entered into this agreement with the overseers of the poor, and his intention then was to remove into the new house. The conveyance for this property was given in evidence, but neither the deed itself, nor a copy thereof, is attached to the depositions. In March, 1884, the father removed from Penn's township, to this house and lot, which he had purchased at Selinsgrove, taking with him his pauper daughter as a part of his family. They resided on that property from March, 1884, until July 25, 1885, more than one whole year, when the daughter became chargeable.

"Fourth. It is in evidence that Dr. B. F. Wagenseller attended the pauper from the time she returned from the asylum, in the fall of 1883, whilst living with her father in Penn's township, as well as in Selinsgrove, during the year 1884 and partly 1885, and charged the bill to the township. Dr. F. J. Wagenseller attended the pauper, too, and furnished her with medicines on April 18, 1884, and October 16, 1884, to the amount of \$9.50, which was paid by one of the overseers of the poor of Penn's township, February 25, 1885. F. J. Schoch testifies that he is a partner in the drug store carried on in the name of Geo. C. Wagenseller; that the books show an account against the overseers of the poor of Penn's township, beginning March 10, 1884; that the first settlement of the account was December 13, 1884, when the overseers paid \$10.75; that they paid the next account March 2, 1885, \$15.55, in his presence, and that, whilst the account contained charges for medicines furnished to other paupers, the account for medicines furnished the pauper in dispute was included; that the overseers of Penn's township knew they were furnishing medicines for this pauper, and that they looked over the account to see for whom the medicines were furnished. Geo. C. Wagenseller corroborates Mr. Schoch, and swears that the last item in the settlement of December 13, 1884, was furnished the pauper August 30, 1884, and amounted to \$1.40, and that, after this, other supplies were furnished to the pauper, which were paid March 2, 1885, by the overseers of the poor. We are mindful of the fact that the account of Dr. B. F. Wagenseller is disputed by the township, upon the ground that the township is not liable after April 1, 1884. The doctor testifies that Mr. Stetler, one of the overseers, came to see him in the spring of 1885, just before his term of office expired, acknowledged the account and promised to pay it, assigning as a reason for non-payment then, that his money was exhausted. It is not necessary to decide here whether the township is liable for this bill or not. It is sufficient for us to say, that we find, from the evidence, that the overseers of Penn's township did furnish relief to the pauper from the time of her return from the asylum in October, 1883, during her residence in Penn's township as well as whilst she was residing with her father in Selinsgrove from March, 1884, up until near the time when she became chargeable there.

"Fifth. We find as a fact that Sarah Jane Hoffman was a pauper on Penn's township when she was taken to Selinsgrove, and that this relation was not broken or disturbed at the time when she became chargeable on Selinsgrove, in July, 1885.

"The contention of the appellee on these facts is that Daniel Hoffman, the father, acquired a settlement in Selinsgrove, by virtue of his ownership of a freehold estate, situate therein, and dwelling thereon one whole year, and that the settlement thus obtained by him was cast upon the daughter, so that her settlement is in Selinsgrove. We have before adverted to the fact that neither the conveyance for the Selinsgrove property to the father, given in evidence, nor a copy thereof, is attached to the depositions. Therefore, we are unable to say, from an inspection of the conveyance, whether it gave the father a freehold estate or not. However, it seemed to be conceded at the argument

that such was the fact, and we, therefore, treat the conveyance as if it carried a freehold, whereby the father became seized of a freehold estate. Now, our statute provides that a settlement may be gained in any district by any person who shall become seized of any freehold estate within the district and who shall dwell upon the same one whole year. Notwithstanding this, the appellant insists that the father acquired no settlement in Selinsgrove, because his daughter—for whose support he was liable, whilst he was acquiring a settlement by virtue of his residence on his freehold in Selinsgrove—was a pauper in Penn's township, and the township assisted him in maintaining her. In short, it is urged that the father could not have maintained himself and family in Selinsgrove had it not been for the aid furnished him by Penn's township in relieving him in part at least from the burden of supporting the pauper in dispute, and that, therefore, he is not within the spirit and intention of the statute, so as to enable him to acquire a settlement in Selinsgrove. The law in Massachusetts and other eastern States undoubtedly is, as is said by Mr. Justice ELWELL in *Scranton Poor District v. Directors et al.*, 10 Out. 449, that while a man is receiving relief as a pauper he cannot gain a settlement anywhere, and that relief afforded to a member of his family, for whose support he is liable, is as a rule paid to him. He cites many authorities in support of this position, which can be there found. However, in the case then before him, he discharged those authorities, and ruled the question upon the plain language of the act of assembly. He there held if this had been the purpose it would have been an easy matter to say so. Whilst it is difficult to distinguish clearly a difference in the principle which should govern both cases, yet there is a difference in the facts. In the case decided by myself, *Alpheus Wertz* was a pauper himself. In *Scranton v. Danville*, *Jesse Coats* was not a pauper himself, but his wife was, and he was permitted to acquire a new settlement and communicate it to her, although she was fastened on the old whilst he was acquiring the new settlement. The reasons for excluding a pauper in one district from acquiring a settlement in another whilst this relationship continues are so satisfactory to our mind that we are constrained to hold that such is the law until the supreme court plainly decides otherwise.

“Then, applying the principle laid down in *Scranton v. Danville*, *supra*, to the case in hand, we must reach the conclusion that *Charles Hoffman*, the father of the pauper, acquired a settlement in Selinsgrove himself, because he was not a pauper himself when he went there to reside on his freehold estate. The contention of the appellee is that this settlement was communicated to the pauper daughter, because she was insane and a part of his family, and had not acquired a settlement elsewhere in her own right, and had not been emancipated. In support of this, appellee relies upon *Overseer of Washington v. Overseer of Beaver*, 3 Watts & Serg. 548; *Stephen v. Gurnes*, 5 Harr. 38, and kindred cases. These established that children are not to be considered emancipated at the age of twenty-one years, who are compelled to remain longer with their parents on account of some infirmity of body or mind, which render them incapable of tak-

ing care of themselves. In the case in hand, this relationship was disrupted at a time when both the father and daughter had settlement in Penn's township by the father placing her upon that township in the sole charge of the overseers of the poor, who removed her from the control of her father and confined her in the insane asylum at Danville. This was in March, 1883, and she was then upwards of twenty-eight years of age. She remained separated from her father about seven months. Then, with the consent of the overseers of the poor, as established by their written agreement above recited, she was permitted to return to her father's house, not absolutely free from their control, but subject to be returned to the asylum at their pleasure, if they found it cheaper to maintain her there. Notwithstanding this return to her father's house she still remained a pauper on the township, and the township was bound to maintain her, the only difference being, that, with the aid of her father, it cost the township less to maintain her there than at the hospital. We find from the evidence, too, that this was the inducing cause that prompted the agreement and brought about her return. It was distinctly decided in *Overseers of the Poor of Washington v. Overseers of the Poor of East Franklin Township*, 3 Pennyp. 107, that where a female child, living with her father, became insane at the age of eighteen years, and, at the age of twenty-three, was charged as a pauper on the township in which he then lived, his subsequent removal to another township does not affect her status as a pauper, or make her chargeable upon the township to which he removed, and in which he acquired a new settlement. The only difference in the facts of that case and the one in hand is, that there the pauper did not accompany the father to the new district where he acquired the settlement, whilst in our case she did go with him.

"The decision in that case must rest upon the ground that the separation of father and daughter, by her removal from his house as a pauper, was equivalent to emancipation. We see no other ground upon which it can stand. It is the settled law, both in England and this country, that, if the child, although more than twenty-one years old, has not been emancipated or obtained a settlement of its own, that it can acquire a derivative settlement from the father obtained in a new district, although it may have never set foot in the new district. Thus we see the fact that the daughter accompanied the father to Selinsgrove can have no weight in the solution of the question before us. If he had allowed her to remain in Penn's township and had paid her board there, and the overseers of the poor had found the medical attendance for her there as they did in Selinsgrove, her right to a settlement in Selinsgrove derivatively through her father would have been just as complete as if she had accompanied him there. Residence is not necessary to acquire a derivative settlement. The vice in the contention of the appellee is this, the separation of the daughter from her father, she having been adjudged a pauper, was equivalent to emancipation, and she cannot acquire a derivative settlement through him in Selinsgrove. She cannot be regarded as a part of her father's family in Selinsgrove, because she was not dependent upon him alone for support, but the township, too, was bound to maintain her and did

assist him in so doing. The truth is, she was a pauper whilst with him, and her status was the same as when she was first placed upon the township of Penn's. Whilst she remained a pauper, she was incapable of acquiring a new settlement.

"And now, February 22, 1886, the order of justices is confirmed, and it is further ordered that the overseers of the poor of the township of Penn's pay to the overseers of the poor of the borough of Selinsgrove, the costs, together with their reasonable expenses incurred in behalf of the pauper, to which Penn's township excepts and bill sealed."

Chas. S. Wolfe and Chas. P. Ulrich, for plaintiff in error. *Scranton Poor Dist. v. Directors of Poor, etc.*, 10 Out. 446; *Overseers of Washington v. Overseers of East Franklin*, 3 Pennyp. 107. That the separation of a child of sound mind, above the age of twenty-one years, from the father's family would work an emancipation and prevent it from ever again acquiring a derivative settlement, through the parent, may be admitted. So it would be with a minor child of sound mind, who had married, or contracted some other relation, so as to wholly and permanently exclude the parental control. How is it with an insane child, whether under or beyond its majority? The insane child, of whatever age, stands in the same position as to emancipation as the minor child. *Shippen v. Gaines*, 5 Harr. 38; *Washington v. Beaver*, 3 W. & S. 548. A removal to an insane hospital, that wholly and permanently excludes parental control, without any return to or becoming part of the family, as in the case of Sarah Jane Neal, in *Overseers of Washington v. Overseers of East Franklin*, 3 Pennyp. 107, works, as decided in that case, an emancipation. Her parents had no control over her, whatever, from the time she was sent to Dixmount, in September, 1870, until the order of removal was taken out, on December 17, 1881. *Overseers of Montoursville v. Overseers of Fairfield*, Leg. Int., April 9, 1886; as to emancipation, BURNS, J. P., and Par. Off. Chitty, 26th ed., vol. 4, title "Poor"—3, pp. 292-3; *Rex v. Wilmington*, 5 P. & A. 525; *Rex v. Roach*, 6 T. R. 247. It is the "arrival of the time when, in estimation of law, the child wants no further protection from the father"—*Rex v. Roach*, 6 T. R. 247—whether infancy, idiocy or lunacy creates the necessity for such protection. *Overseers of Washington v. Overseers of Beaver*, 3 W. & S. 548; *Upton v. Northbridge*, 15 Mass. 237; *Rex v. Much Cowame*, 2 B. & Ad. 861.

A. C. Simpson and F. S. Simpson, for defendant in error. The case of *Scranton v. Danville* may stand as an authority for such persons whose status have not been fixed, and who cannot and have not been emancipated without overturning the case of *Washington v. East Franklin*, 3 Pennyp. 107; *Brady Township v. Clinton Township*, 1 Penn. C. C. 127—recently decided by Judge CUMMING of Lycoming district. The law applicable to the one case is not applicable to the other class of cases. What possible difference can it make in the solution of the legal questions in this case, whether the overseers of the poor of Penn's township kept the said pauper at the Danville asylum, or placed her at her father's house, so long as she remained under their control? A person who has become chargeable to, and is being relieved

as a pauper by one district, cannot while so chargeable acquire a new settlement in another district. This principle has been recognized many times, not only in Pennsylvania, but in many other States of the Union. In the case of *Overseers of the Poor of the Borough of Lewisburg v. Overseers of the Poor of the Borough of Milton*, this very question came before this court, and the judgment of the court below, rendered by his honor, Judge BUCHER, was affirmed by the judgment of this court. See No. 202, May term, 1879. In support of this position we also cite the following cases: *East Sudbury v. Waltham*, 13 Mass. 460; *East Sudbury v. Sudbury*, 12 Pick. 1; *Brewster v. Dennis*, 21 id. 233; *West Newbery v. Bradford*, 3 Metc. 428; *Taunton v. Middleborough*, 12 id. 35; *Oakham v. Sutton*, 13 id. 192; *Garland v. Dover*, 19 Me. 441; *Cryden v. Sullivan*, 47 N. H. 179; *Wilmington v. Somerset*, 35 Vt. 232. And the principle which seems to be fairly decided in the case of *Washington v. East Franklin*, 3 Pennyp. 107, is that where a child living with its father became insane in its minority, and after becoming of full age became a charge upon the township where the father then lived, his subsequent removal to another district does not affect the status of the pauper, nor make her chargeable to the township to which her father had removed. It is sought to convict the court below of error, on the authority of *Washington v. Beaver*, 3 W. & S. 548. An examination of the acts of that case and the law as applicable thereto shows that the court below in the case now being heard committed no error.

PER CURIAM. The facts found by the court show that the pauper became emancipated from her father after she arrived at full age at the time she became a charge on Penn's township. She continued to receive support from that township, although they afterward arranged for her support in the borough of Selinsgrove. That her condition continued such that she was incompetent to acquire a settlement in said borough is clearly shown by the opinion of the learned judge. Inasmuch then as she had an unquestioned settlement in Penn's township when she became a charge thereon, it still continues there.

Judgment affirmed.

FISHER v. MOYER.

May 17, 1886.

WRITTEN INSTRUMENTS—CONSTRUCTION OF.

The construction of written instruments is for the court.

Error to the court of common pleas of Schuylkill county.

Miller sold a horse to Moyer; later, Fisher, who averred that he was the true owner of the animal, brought replevin to recover possession of it; on the trial Moyer, the defendant, offered to show a course of dealing between Fisher and Miller in which Fisher had authorized Miller to dispose of certain personal property belonging to him, Fisher; among the rest, the horse for which the action of replevin had been instituted; and further offered in evidence a letter written by Fisher to Miller to show authority to make sale. The common pleas submitted the construction of the letter to the jury. The verdict was for defendant.

H. B. Graeff and *James Ryon*, for plaintiff in error. An ambiguity on the face of a written document is for the judge to explain. *Beatty v. Lycoming Ins. Co.*, 2 Smith, 456. Where it cannot be understood without reference to facts *dehors* the writing, then evidence is allowed to explain the ambiguities. There can be no pretense here that the letter is not plain and free from doubt, and the meaning clear that the subject-matter was Miller's old stock, and not Fisher's horse. *Esser v. Linderman*, 21 Smith, 76; *Welsh v. Edwards*, 3 Binn. 329; *Bryant and Euwer v. Hagerty*, 6 Norr. 256; *McCoy v. Lightner*, 2 Watts, 347.

G. H. Gerber and *Wm. A. Marr*, for defendant in error. All the assignments of error raise but one question, was the letter of October 20, 1883, properly submitted to the jury? The plaintiff alleges that the court should have construed the letter. The question was whether Fisher authorized Miller to sell any thing, and if he did, what it was. In connection with the other evidence this was a question of fact which the jury alone could determine. Where all the facts are fully established, such as facts found by a jury, or contained in a written instrument, it is the duty of the court to determine the legal effect of such facts. 2 Greenl. Ev., § 28 a; *McCoy v. Lightner*, 2 Watts, 347; *Miller v. Fichthorn*, 7 Casey, 252. In *Frame v. William Penn Coal Co.*, 1 Out. 312, the supreme court say: "It was error to exclude the letters referred to in the third and fourth specification. Assuming as we must for the purposes of this case, that the defendant had no knowledge of the agency, they were links in the chain of the defense."

PAXSON, J. We think it was error to submit to the jury the construction of the letter referred to in the first assignment. It is settled law that the construction of written instruments is for the court. *Bryant v. Hagerty*, 87 Penn. St. 256. There was nothing to make this an exception to the rule. The letter does not admit of more than one construction. It was written by the plaintiff to the defendant, and recommends the defendant to get rid of some of this old stock. The exact words are: "I think you had better get rid of some of your old stock." By no proper rule of construction could this be held to be an authority to the defendant to sell the plaintiff's horse. Yet the jury have so found, and probably upon this letter alone, as the learned judge charged them that there was not sufficient evidence of a general authority to make the sale. The case may be fairly said to have turned upon the question of authority to sell; upon the question of the ownership of the horse, the weight of the testimony was so heavily with the plaintiff that the jury could hardly have found that issue in favor of the defendant. The court should have instructed the jury that the letter contained no authority to sell the plaintiff's horse.

This disposes of the first assignment. We are compelled to sustain the remaining assignments for the reason that in each of them the question of the defendant's authority to sell was submitted to the jury. As there was no such authority proved, it was error to submit the question at all.

Judgment reversed and a venire *facias de novo* awarded.

UHLEK ET AL. v. BRUA.

May 17, 1886.

STATUTE OF LIMITATIONS.

Actual and continuous adverse possession of premises for more than twenty-one years bars one able during such period to assert a legal right to the premises and who fails so to do.

Error to the court of common pleas of Lebanon county.

The facts are sufficiently set forth in the opinion of the common pleas, per McPHERSON, A. L. J., of which opinion the following is a copy:

"By the COURT. The deed of Abraham Light to Frederick Boyer, dated June 10, 1847, on the true meaning of which this suit depends, is a deed for the separate use of Rosana Seibert, then the wife of David Seibert. It conveys certain real estate to Boyer, 'to have and to hold the said . . . premises . . . unto the said Frederick Boyer, in trust however to and for the use of Rosana Seibert, *alias* Shroeder, wife of David Seibert, to have, receive and enjoy the possession and income and profit thereof, unto the said Rosana Seibert, for her separate use and benefit, yearly and from time to time during her life or coverture, without the control or interference of her said husband, David Seibert, so that no estate, property or interest be vested in him, or he in any wise be or become entitled to any claim therein; but in case she survives her said husband, David Seibert, then and in that case, the said house and lot of ground shall be considered as her absolute property, to be subject solely to her own management and control; and in case her said husband should survive her, then the said house and lot of ground shall descend to and become the property of all the children of the said Rosana, wife of said David Seibert, in fee-simple, as tenants in common, and to their heirs and assigns forever. To have and to hold the said premises . . . unto the said Frederick Boyer, and his heirs, to the only use and behoof of him, the said Frederick Boyer, his heirs. In trust for the use and benefit of the said Rosana Seibert, the wife of said David Seibert, in the manner above mentioned.'

"What estate did Rosana Seibert take under this deed?

"If her estate had been a legal one, the rule declared in *Lytle v. Lytle*, 10 W. 259, and in *Brown v. Mattocks*, 103 Penn. St. 21, would govern, and the answer would be a life estate, because there are no words of inheritance. But since her estate was equitable, a different rule prevails, which is thus expressed in *Ivory v. Burns*, 56 Penn. St. 304: 'Though equity follows the law and applies the doctrines appertaining to legal estates to trusts, yet a court of equity does not hold itself strictly bound by the technical rules of law, but takes a wider range and more liberal rule in favor of the intention of the parties. Hence, a conveyance in trust will carry a fee without words of limitation, when the intent is manifest.' See, also, *Freyvagle v. Hughes*, 56 Penn. St. 228; *Fisher v. Fields*, 10 Johns. 496; 2 Wash. Real Prop. (4th ed.) 503; 4 Kent, 304; Perry Trusts (3d ed.), § 357; 1 Shars. & B. Real Prop. 55.

"In our opinion the intention of the deed before us was to give Rosana Seibert an equitable estate for life in any event, and also to give her the fee-simple in case she survived her husband, giving the fee to the children only in case her husband survived her. In case of her survival, her children are neither named, nor implied, and if, in that event, there was no intention to enlarge her estate to a fee, it was useless to provide that then 'the said house and lot shall be considered as her absolute property, to be subject solely to her own management and control.' This clause is said to convey only a life estate, but she already had such an estate by the earlier language of the deed, as well as one for coverture, and the use of the word 'but,' which usually marks a new turn of thought, shows even greater clearness, as we think, that the grantor looked upon the estate, which he meant to give her at her husband's death, as different from the life estate for which he had just provided. It was then to become 'absolute,' and to be no longer limited.

"If this is the true construction of the deed, it does not matter what estate, or whether any estate was conveyed by the deed of Boyer to Peter Schott in 1849, for David Seibert died in 1856, and if Rosana was not bound by that deed, or estopped by her action in relation thereto, she then as tenant in fee became able to assert her legal rights; nevertheless, she lived until 1879 without stirring in the matter, and as against her, and those claiming under her by will or by descent, the statute of limitation is a good defense. *Smelie v. Biffle*, 2 Penn. St. 52; *Maus v. Maus*, 80 id. 194.

"The second question submitted must be answered in the affirmative.

"We regret that the children of Rosana Seibert, who appear to be the real defendants, and whose claim alone is urged, decline to come formally upon the record, but, if the view we take is right, the dispute will probably be put at rest without another suit, and we, therefore, conclude to dispose of it now, so that a writ of error can be taken to the present term. We may say, however, that it is hard to see what right they can have under the deed, for no estate is limited to them except upon a contingency which did not happen.

"We direct judgment to be entered in favor of the plaintiff for the sum of \$500."

Grant Weidman and *A. Stanley Ulrich*, for plaintiffs in error. It seems clear that under the terms of that deed, if it is to be interpreted in accordance with the rules of law, the estate which Rosana Seibert took was but a life-time estate. There are no words of inheritance, and the trust is expressly for her life, so far as the deed contains any words descriptive of its nature. That this view is correct is shown by the decisions of this court in *Lytle v. Lytle*, 10 Watts, 259; *Gray v. Packer*, 4 W. & S. 18; *Van Horn v. Harrison*, 1 Dall. 137-139. The rule which prevails in equity is laid down in 2 Wash. Real Prop. (4th ed.) 494. It is accordingly now a settled rule of law, that . . . "if the purposes of the trust cannot by possibility be satisfied without a fee, courts of law will so construe it." See, also, 1 Shars. & Budd's Lead. Cases on Real Prop. 55. But the same author, in vol. II, p.

496 (*187), commenting upon instances of the application of this rule, says: "But, after all, these are merely rules of construction; and if a less estate than a fee is expressly given, courts cannot enlarge it by construction, even though it would be inadequate to effect the trusts, if not considered as a fee." The words contained in the deed are not ambiguous. The deed was evidently written by one who knew the technical meaning of the word "heirs," and the absence of these words is significant. Why should a fee be implied and created by construction? Nor can such an implication be made. The trust created is an express one and cannot be enlarged beyond its words. As is said in 2 Wash. Real Prop. 470 (*171), "it should be borne in mind that the law never implies a trust where there is an express one, such as is declared by word or writing." See, to same effect, *Dennison v. Goehring*, 7 Barr. 175-180; 1 Spence Eq. Jur. 496; Co. Lit. 290, b, note 249, p. 8. If the estate given to Rosana Seibert under the deed was not a fee, then the statute of limitation could not have given the plaintiff a fee-simple, as she died in 1879. This principle is established by *Wolfert et al. v. Morgenthaler*, 10 Norr. 30-46. When the subject of the contract is the land itself, the purchaser has a right to a title clear of all defects and incumbrances, in the absence of any stipulation to the contrary, and hence when called upon for the price, he may defend by showing that the title offered is defective. *Herrod v. Blackburn*, 6 P. F. S. 105. A purchaser is not bound to take a doubtful title. *Gans v. Renshaw*, 2 Barr. 35; *Bomberger v. Clippenger*, 5 W. & S. 311. A court of chancery will never enforce specific performance when the title in question is not marketable, or when it would be contrary to good conscience to do so. *Fretley v. Barnhart*, 1 P. F. S. 279; *Ferguson's Appeal*, 6 id. 487, note; *Lauer v. Lee*, 6 Wr. 171; *Bonner v. Herrick*, 3 Out. 224. Suit was brought to recover the hand-money and compel the execution of a bond and mortgage for the balance of the purchase-money, upon a contract for the sale of real estate. *Held*, that such a suit is a substitute for a bill in equity for specific performance and must be governed by the same principles, and when the title to the land is doubtful, or not marketable, the plaintiff cannot recover. *Herzberg v. Irwin*, 11 Norr. 48.

P. H. Reinhard and *Charles H. Killinger*, for defendant in error. The conveyance of an interest in trust will carry a fee, without words of limitation, when that intention is manifest. 4 Kent, *304; *Ivory v. Burns*, 56 Penn. St. 300, 304. "The word 'heirs' is not always necessary in order to give an equitable estate the character of inheritability, if it requires that such an effect should be given in order to carry out the clear intention of the party creating it." 2 Wash. Real Prop., § 186. The same principle is approved and applied by Chancellor KENT, in *Fisher v. Fields*, 10 Johns. 515; *Freyvogel v. Hughes*, 56 Penn. St. 228. "Absolutely" is not a technical word of limitation, yet it is sometimes used to express the intention of a settlor of a trust, or a deviser of real estate, to create a fee in the beneficiary who is to take the property absolutely. *Oswald v. Kopp*, 26 Penn. St. 516; *Keene's Appeal*, 64 id. 268; *Van Horn v. Harrison*, 1 Dall. 137;

Fisher v. Fields, 10 Johns. 515. From these considerations we conclude that the intention to be gathered from the deed of Abraham Light is that Rosana Seibert was to have upon the death of her husband, which occurred August 27, 1856, a fee-simple in the premises conveyed, and that she having procured a conveyance of the premises, for a valuable consideration, to Peter Schott, March 31, 1849, that thereby she and all claiming under her were estopped from claiming any title in the premises for "the interest, when it accrues, feeds the estoppel." *Doe v. Oliver*, 2 Smith Lead. Cas. *417. The defendant in error and those under whom she claims have held adverse possession of these premises since the conveyance to Schott in 1849, possession adverse both to the trustee and the *cestui que trust*. It was decided in *Smilie v. Biffle*, 2 Barr, 52, that possession taken under a defective title, from one of several trustees, and held for twenty-one years adversely to the trustees in whom the legal estate was vested, and to the *cestui que trust*, life tenant, gave an indefeasible title, not only against them but also against the remaindermen under the trust. And this case was approved in *Maus v. Maus*, 80 Penn. St. 194. The statute commenced to run from the possession taken under the conveyance to Schott of March 31, 1849, against all persons, whether *sui juris* or under disability. The title which vested in Peter Schott under the deed from the trustee, Frederick Boyer, in March 31, 1849, has, therefore, ripened into an indefeasible title, by adverse possession for over thirty-six years. See *Warn v. Brown*, 102 Penn. St. 347.

PER CURIAM. The learned judge correctly held, inasmuch as Rosana lived more than twenty-one years after she became able to assert her legal rights to the property, and took no steps to assert those rights or obtain possession of the property under them, the statute of limitations became a good defense as against her and against all claiming under her. The case stated admits that the plaintiff below and the persons under whom she claims have had actual continuous adverse and hostile possession of the premises in dispute for more than twenty-one years. Judgment was, therefore, correctly entered in favor of the plaintiff below for the sum of \$500.

Judgment affirmed.

SPECK ET AL. v. HETTINGER.

May 17, 1886.

ACTION — JOINT ACTION — PARTIES.

A policy of insurance was assigned to B. and C. jointly; they received the money thereon and executed a joint receipt therefor; later a joint action was brought against them by the person in whose interest the policy was originally issued, for money had and received to his use. *Held*, that it was proper to proceed against B. and C. jointly, as they had received the money jointly.

Error to the court of common pleas of Lebanon county.

The U. B. Mutual Aid Society of Pennsylvania issued a policy for \$2,000 on the life of Catharine Hettinger, payable to her husband, Joseph Hettinger.

The husband afterward, during the life-time of his wife, assigned the

policy to J. H. Speck and D. R. Speck, neither of whom had an insurable interest in her life, by an assignment to them jointly.

After the death of Mrs. Hettinger, J. H. and D. R. Speck executed a joint receipt to the aid society, for the money paid by it to them on the policy; it then issued to them a check for the money payable to their joint order, and this check was by them jointly indorsed, and the money was jointly received by them.

On the implied contract thus resulting from such joint receipt of the money an action for money had and received was brought by Joseph Hettinger against J. H. Speck and D. R. Speck. On the trial the defendants first contended that their interests in the policy were separate and not joint. The court overruled this for the reason that the plaintiff's right of action depended upon the receipt of the money by the defendants, and not upon the manner in which they held the policy.

Their second position was, as to their desire to receive the money severally and not jointly, as expressed in their alleged conversation with the treasurer. The court overruled this by holding that whatever their desire may have been, it does not change the fact that they did receive the money jointly, and as he understood it, the plaintiff's right of action depended upon the fact that they did so receive the money.

Josiah Funck & Son, Grant Weidman and John Benson, for plaintiff in error. That, in a joint action, there can be no recovery unless a joint liability is shown, will hardly be controverted. This is decided in *Shoneman v. Fegley*, 7 Barr, 438, in which the court say, "but the action is founded upon the joint liability of the partners, springing from their joint indorsement . . . the plaintiff must establish a joint obligation resting on the defendants as indorsers, before he can recover under the declaration in this cause. In this his allegations and proofs must agree, and variance is fatal." In *Fawcett et al. v. Fell*, 27 P. F. S. 308, a maker and indorser of a promissory note were sued jointly, and the court held that several defendants could not be joined in an action *ex contractu*, unless their liability is joint, which cannot be if the contract is several. This action is founded upon an implied promise to repay the money received. There is no express contract. It is, therefore, governed by the principle laid down in the case of *Boggs v. Curtin et al.*, 10 S. & R. 218. "An implied promise, being altogether ideal and raised out of the consideration only by intendment of law, follow the nature of the consideration; and as that is joint or several, so will the promise be." For the same principle, see, also, *Meason v. Kaine*, 17 P. F. S. 185; *Irwin's Adm. v. Brown's Ex.*, 11 Casey, 331; *Lea v. Gibbons*, 14 S. & R. 111. In the case *Schnader v. Schnader*, 2 Casey, 384, a contract was made for the performance of certain work by Michael Schnader for William Schnader. The work was afterward done by Michael and one Bear, as partners; Michael afterward sued William on a *quantum meruit*. Held, that having abandoned the contract by going for a *quantum meruit*, he relied upon the implied contract, and that as this can only be implied in favor of those who did the work, he could not sustain his action against William,

but must bring it in the name of himself and Bear who did the work. In 2 Chitty Cont., note to p. 1349, 11th Am. ed., it is said if two joint owners of merchandise consign it to a merchant for sale, and inform him that each one owns one moiety, and give separate and distinct instructions, each for his own moiety, it will be treated as a several contract, and one of the consignors alone may maintain a separate action against the consignee for a violation of his instructions. The mere fact that the defendants each had an interest in the same policy under the assignments did not constitute them partners. This position is sustained, we think, by the following cases: *Adams v. Carroll & Co.*, 5 W. N. C. 2; *Hopkins v. Forsyth*, 2 Harr. 38. The declarations of the parties were part of the *res gestæ*, and all should have been heard and submitted to the jury and its effect determined by them. As it is said in *Steckel et al. v. Desh*, 2 Pennyp. 313, "If the act of a party, or a portion of his words, be proved against him, he may show in rebuttal the words accompanying and relating to said act, or the other words uttered in connection with those already proved, when necessary to arrive at a proper understanding of the transaction." In this case the court admitted the act of the parties, to-wit, the giving of the receipt and the acceptance of the check, but excluded their declarations and the agreement under and in pursuance of which the receipt was given and the check in that form accepted. That these declarations should have been admitted as part of the *res gestæ* is shown by the following authorities: *Devling v. Little*, 2 Casey, 503; *Potts v. Everhart*, id. 493; *Woodwell & Co. v. Brown & Kirkpatrick*, 8 Wr. 121; *York County Bk. v. Carter*, 2 id. 446; *Cattison v. Cattison*, 10 Harr. 277.

Bassler Boyer, for defendant in error.

PER CURIAM. The assignment of the policy of insurance was made to the plaintiffs jointly. Jointly they received the money thereon, and they executed a joint receipt therefor. It matters not that, as between themselves, they held separate interests acquired at different times and from different persons. The right of recovery against them does not depend on the way or manner in which they obtained the assignment of the policy, but on their subsequent receipt of the money.

What they stated or desired at the time they received the money does not change their legal liability consequent of their joint receipt thereof.

Judgment affirmed.

APPEAL OF THOMAS E. HANCOCK.

April 26, 1886; second opinion, May 24, 1886, *sur* reasons for a re-argument.

WILL—CONSTRUCTION OF.

B., a married man, without children, made several bequests on paper to collateral heirs, one of which read as follows: "I, B., 'being of sound mind, and of my own free will, give and bequeath to' C., 'son of my sister,' D., 'only one-sixth of such portion as the law would give to said' D., 'and the remaining five-sixths to be divided among my other sisters and brothers, or their heirs" Later B. died; he made no disposition in any of his bequests of his residuary estate, which was large, nor did he make any provision for his wife, who survived him. *Held*, C. took one-sixth of D.'s portion, as it would have been if she had survived B., and he, B., had died intestate. *Held*, further, C. was entitled to participate in the residuary estate which passed by intestacy.

Appeal from the decree of the orphans' court of Philadelphia county.

Thomas S. Ellis died May 25, 1884, without issue, but leaving a widow, Margaret H. Ellis; a brother, George D. Ellis; a sister, Eliza Shuster; a nephew, Thomas E. Hancock, a son of a deceased sister, Jane Hancock; nephews and nieces, Elizabeth H. Harmer, Rebecca Clifton, Arthur L. Shaw, James W. Shaw and Mary E. Shaw, children of a deceased sister, Lois Shaw; and nephews and nieces, Lizzie D. Ellis, Mary T. Grigg, Samuel S. Ellis, Harriet L. Klosterman, Thomas S. Ellis and Alfred S. Ellis, children of a deceased brother, John D. Ellis.

The decedent left a will, with codicils, proved May 31, 1884. The will was as follows:

"I, Thomas S. Ellis, being of sound mind, and of my own free will, give and bequeath to Thomas Hancock, son of my sister, Jane Hancock, only one-sixth of such portion as the law would give to said Jane Hancock, and the remaining five-sixths to be divided among my other sisters and brothers, or their heirs. I appoint Alfred S. Ellis and the Fidelity Trust and Safe Deposit Company to be my executors.

"PHILADELPHIA, *April* 26, 1884."

"THOMAS S. ELLIS.

Mrs. Hancock died in 1878. The instruments, proved as codicils, but which bore an earlier date than that proved as above, were as follows:

"In case of my death, I, Thomas S. Ellis, bequeath to my sister Eliza Shuster, wife of the late Aaron Shuster, sixty dollars for every month for as long as she shall continue to live, and this bequest to cease with her death.

"Also:

"To my sister, Mary Ellis, one hundred and twenty-five dollars for every three (3) months for as long as she shall continue to live, and this bequest to cease with her death.

"In witness whereof I have hereunto set my hand and seal this nineteenth day of May, eighteen hundred and eighty-three.

"THOMAS S. ELLIS."

"5,000 Market S. R. W. Co.—This \$5,000, and also 100 shares Harrisburgh, Portsmouth & Mount Joy railroad, I direct to be put in trust in the Pennsylvania Company, Lindley Smith, president, the interest to be paid to Alice McCausland during her life, and the same to go to my heirs at her death.

"*January* 25, 1879.

THOMAS S. ELLIS."

"Josephene A. Young dead:

"I make this alteration *June* 11, 1881."

It was contended, on behalf of Thomas S. Hancock, that there should be awarded to him one-sixth of such part of the estate of Thomas Ellis as the law would have given to his mother, Jane Hancock, and one-fifth of the residue of the estate of which, it was contended, Ellis had died intestate. The orphans' court decided that the testator had restricted Thomas E. Hancock to one-sixth of one-fifth of

the estate which would have passed to him under the intestate laws, and that the balance of the estate, undisposed of directly by the will, vested in the other heirs.

Augustus J. Rudderow and F. Carroll Brewster, for appellant. Frank S. Christian, Wendell P. Bowman, A. P. Douglass and M. Hampton Todd, for appellees.

GREEN, J. The testator had a fashion of making short, isolated bequests of portions of his estate to legatees named, on loose slips of paper, saying nothing whatever about the residue of his estate. Thus there was found among his effects a sealed envelope upon which was written :

“ These notes to be given to (my brother G. D. Ellis, and no claim made on him ; in other words I present them to him.

“(Signed) THOS. S. ELLIS.

“ *February 7, 1880.*”

Three judgment notes were inclosed in the envelope, and it was agreed by all parties interested that the paper should be treated as a testamentary gift of the notes. It was not for one moment claimed that the gift of these notes excluded Geo. D. Ellis from his share of the residue of the estate, and in point of fact his proper share of the residuary estate was awarded to him, not as a legatee thereof, but as one of the next of kin under the intestate law.

There was also a legacy, on a loose piece of paper signed by the testator, of certain securities in favor of Alice McCausland during her life, with remainder to testator's heirs after her death. Of course no one imagined or claimed that the gift of the principal of these securities to the heirs after her death, was all of the estate which “ the heirs ” were to have, and it is without question that the shares of the residue which the persons described here as “ heirs ” will take out entirely unaffected by the legacy of these securities.

Another testamentary paper made by the deceased at another time, gave to Mrs. Shuster, a sister, a monthly allowance of \$60 during her life, and to another sister, Mary Ellis, a quarterly allowance of \$125 during *her* life. To this paper the testator set his hand and seal, and recited at the beginning of it, that it was to operate in case of his death, making it a clear testament. It certainly will not be pretended that these two sisters are to be deprived by reason of these legacies of their shares of the residuary estate, though not one word is said in any of the testamentary papers of any residuary estate. On the contrary, their distributive shares therein were awarded to them not as legatees of the residue, but as next of kin under the intestate laws.

By another paper, of an undoubted testamentary character, executed at another time ; Thomas Hancock is a legatee. That paper is in the following words : “ I, Thomas S. Ellis, being of sound mind, and of my own free will, give and bequeath to Thomas Hancock, son of my sister Jane Hancock, only one-sixth of such portion as the law would give to said Jane Hancock, and the remaining five-sixths to be divided among my other sisters and brothers, or their heirs.” In none of these

testamentary papers does the testator make any provision in favor of his wife, who survived him, and in none of them does he make the least disposition of, or any reference to the residue of his estate, which was very large, nearly \$300,000 in amount.

The question arising is, what interest, if any, does Thomas Hancock take in the residuary estate? It is very certain there is no express gift of the residue in this paper to anybody. It is equally certain that in literal terms, the only thing given by this instrument is the portion which the law would give to Jane Hancock, of the testator's estate, if she had survived him. But she was dead, and of the portion she would have had only one-sixth is given to Thomas, her son, and the other five-sixths are given to the testator's other sisters and brothers, or their heirs. Five-sixths of what? Five-sixths of something, of which the other one-sixth is given to Thomas. It is too plain for argument that the fractional parts thus given are parts of the same thing, and not of different things. The words are, "and the *remaining* five-sixths to be divided," etc. These words necessarily import the five-sixths which remain after the previously mentioned one-sixth is deducted.

Now it cannot be that the subject-matter which is thus fractionally divided is any other than one common whole. If by these words, either directly or indirectly, the brothers and sisters take five-sixths of the whole residuary estate, it necessarily follows that Thomas takes one-sixth of the same estate. If on the other hand Thomas takes one-sixth only of his mother's portion, as it would have been if she were alive, then by an equal necessity, it follows that the brothers and sisters take the remaining five-sixths of that portion. And such we are quite clear is the true construction of this paper. By it Thomas takes one-sixth of what would have been his mother's portion, and the brothers and sisters take the remaining five-sixths of that same portion. As to the remainder of his property other than the gifts by the other papers, the testator dies intestate, and it must be distributed according to the intestate law to the next of kin. We regard this as the plain and obvious meaning of the words employed, and in such cases we do not think courts are authorized to impute a different meaning unless required to do so by some technical rule of construction, which is not the case here.

The title of the appellees to the testator's residuary estate is a title not under the will by purchase, but under the intestate law by descent. But if the residue goes by intestacy the appellant is entitled to participate because he is one of the class who take by intestacy. It is argued, however, that he is excluded by implication because he takes one-fifth of Jane's portion, but if that be so, why are not the appellees excluded because they take "the remaining five-sixths" of the same portion? The language which is claimed to be exclusive as to the appellant is the only and the same language which gives title to the appellees. If it excludes the one, it must for the same reason exclude the others. To hold that the appellant takes one-fifth only of Jane's portion, and none of the residue *because* he takes that one-fifth, and that the appellees take five-sixths of Jane's portion and the whole of the residue *because* they take that five-sixths, is an irreconcilable anomaly to us and we are unable to agree to it. In point of fact the residue was awarded to the

appelles by intestacy and the appellant was excluded from it for a reason which if it excludes him necessarily excludes them also, and if it does not exclude them cannot, in our judgment, with any fairness of reasoning, exclude him.

The decree of the orphans' court is reversed and the record is remitted with directions to distribute the residue of the estate in accordance with this opinion, the appellees to pay the costs of this appeal.

OPINION OF MAY 24, 1886; SUR REASONS FOR A RE-ARGUMENT.

GREEN, J. Perhaps we should have expressed with greater precision than we did the exact interpretation we placed upon the testator's will. It would at least have prevented the misconception of our meaning which seems to have resulted. To our minds it is a necessary and an inevitable inference from the words of the will that the testator intended to die intestate as to four-fifths of his residuary estate and to devise only the one-fifth part thereof. There is not a moment's question that such is the *literal* reading of the will. In *Weidman's Appeal*, 42 Leg. Int. 338, we said: TRUNKEY, J. "The question in expounding a will is not what the testator meant, but what is the meaning of his words." Here the testator expressly devises one portion of his estate and he expressly omits to devise any other part or portion of it. It is true he describes it as such portion as the law would give to his sister Jane Hancock. But this mode of description can serve but one possible purpose, and that is to ascertain the aliquot part of his estate which the testator intended to devise. For in very truth there is not and there cannot be any such thing as "Jane's portion" of his estate. Had she survived him and had he died intestate, there would have been a subject-matter corresponding to the description, and even if he had not died intestate but left the will in question, there would be much force in the contention of the appellees that she personally would have been excluded from the estate and the devisees of her portion could have taken only so much of the estate as that portion would represent. But in point of fact Jane was dead before the testator, even before the will was written, and hence the testator knew when he wrote it that she never had and never could have any portion of his estate whatever. If the will is to be literally and strictly construed there is now no subject-matter upon which these words of the will can operate, and hence there would be intestacy, even as to this. But it is very plain to us that the testator did mean to give that proportion of his estate which Jane's portion would have represented if she had survived him and he had died intestate. That portion would necessarily be uncertain because the testator would not know which or how many of his brothers and sisters or their heirs would survive him. Hence he could not specify a distinct aliquot part of his estate in figures to pass by this clause. He could only define a method by which the aliquot part could be ascertained. This he did, and as there were a brother and sister and children of another brother and sister surviving, the number of shares or portions, had Jane survived, would have been five and the part of the estate disposed of by the will is one-fifth. Of this one-fifth he gives one-sixth to the appellant, and the other, or "remaining" five-sixths he

directs to be divided among his "other sisters and brothers or their heirs." We cannot see any mystery, doubt or uncertainty in the language of the will. The testator, though a man of intelligence, was not a lawyer, and he expressed himself concisely, but as we think with sufficient clearness of meaning.

The learned judge of the court below illustrated his reason for changing his mind as to the interpretation of the will in the following manner: It is as if he had said "my estate is to pass to those entitled under the intestate law, but my sister's son shall have one-sixth only of the share which she would have taken if living, the balance of such share going to my brothers and sisters." On the theory that this was a true analogy to the will in question he interpreted the will as though it had been thus written. As a matter of course, if the supposed language were in truth analogous to the language actually used there would be an end of the case and the conclusion reached would be inevitable. But in our view the supposed or illustrative language is in no sense analogous to that of the will and for this reason. The words "my estate is to pass to those entitled under the intestate law" are a direct, positive and absolute devise of the *entire estate* to persons readily ascertained, and in such a case there cannot be any residue or any question as to the legatees. The whole estate would go to the heirs or next of kin, according to the character of the estate, and if there were five shares, four of them would go to the four stocks or their representatives and the other share would be divided into six parts, one of which would go, by the next succeeding words, to the appellant and the remaining five to the other four stocks. To treat this language as of equivalent meaning with the real words of the will and then put the same interpretation upon the real words as must necessarily be put upon the substituted words, is simply begging the whole question. It proves nothing. There are no words in the will which pass the whole estate, and there are none which give or pretend to give the residue or any part of it. The other additional thought contained in the opinion is thus expressed. "Even, however, if it be conceded that no provision is made with regard to the persons who are to take the other four-fifths, it is plain the nephew is not to be one of them." We are altogether unable to see the correctness of this inference. Here are the words of the will. "I, Thomas S. Ellis, being of sound mind, and of my own free will, give and bequeath to Thomas Hancock, son of my sister Jane Hancock, only one-sixth of such portion as the law would give to said Jane Hancock, and the remaining five-sixths to be divided among my other sisters and brothers or their heirs." It is beyond all question that these words bequeath one part of the estate only. That part is to be determined by ascertaining what portion of the estate Jane would have taken if she had lived and the testator had died intestate. As there were five brothers and sisters in all, the portion which the testator manifestly intended to give was one-fifth. Of this one-fifth he gives one-sixth to Thomas and "the remaining five-sixths" to the others and then stops, and making no gift of the residue. To us it seems inevitable that this is the plain, natural, common-sense meaning of the words the testator actually used. But the learned judge convinces himself otherwise in

the following manner: "His exclusion is not limited to an aliquot part of the estate, and to permit him to take one-sixth of one-fifth under the will, and one-fifth of four-fifths under the intestate law would be directly in the teeth of what the will itself declares, viz.: That he shall have but one-sixth of such portion as — that is 'whatever' — the law would give." We fail to see how this result would be "in the teeth of what the will itself declares," when the will makes no kind of declaration about the residue. A plain person would understand that the testator meant just what he said, that Thomas was to have one-sixth of Jane's portion, and the brothers and sisters were to have "the remaining five-sixths" of that same portion. As to all the rest of the estate the will says nothing, and, therefore, it must be distributed as though the testator had died intestate. It is not practicable to say that Thomas was intended to be excluded from the four-fifths which compose the residue, *because* he was given only one-fifth of Jane's portion, unless we are prepared to say that the others are excluded from the same four-fifths for the same reason. For it is *Jane's portion* all the time, the gift of a part of which to the appellant, is claimed to exclude him from the intestate residue. But *Jane's portion* means the same thing when a part of it is given to one legatee as it means when another part of it is given to other legatees. To escape this difficulty counsel contend that the other legatees take the residue by testacy and here is the fallacy in our judgment. The confusion of ideas come from the mixing of the intestate residue with the testate *Jane's portion*. The latter was given by the will and nothing more was given. Because nothing more of the estate than Jane's portion was given them, there was intestacy as to all the rest. This means real intestacy, not an intestacy to fix the shares of the others and at the same time a testacy to exclude the appellant and give the whole of the residue to the appellees. For in intestacy the appellant takes, not as the son of his mother, but as the nephew of the testator. It is the degree of his kinship not the source through which it comes which places him in the same category with the appellees. With the consequences which flow from intestacy we have nothing to do in interpreting the will. They are the result of the palpable and, as we think, intentional omission of the will to dispose of the residue. To make a testacy of this residue we must put words into the will which are not there, words which not only designate a residue but designate also the persons who are to take it. We have no such power nor the slightest disposition to claim it.

It is argued for the appellees that the distribution contended for by the appellant would produce inequality, and, therefore, ought not to be adopted. It would not be a sound argument if it were true, but it is not true. In point of fact, the widow took one-half the estate, but in testing the meaning of the will upon its face, that circumstance need not be regarded, as nothing was given her. The estate distributed amounts to about \$300,000. Of this one-fifth, or *Jane's portion*, is \$60,000, and by the will, the appellant, Jane's only child, gets her \$10,000, while the remaining \$50,000 are given to his aunt, his uncle, and his cousins. His aunt and uncle each gets \$12,500 of his own mother's natural portion, if she had been living, and the testator inte-

tate, and of these amounts the appellant is disinherited by the terms of the will. But the appellees are not satisfied with this, and, therefore, they contend that we ought to declare judicially that, in order to produce equality of distribution, the whole remaining four-fifths, to-wit, \$240,000, should be given to the aunt, the uncle and the cousins. If we do, George D. Ellis, Jane Hancock's brother, who stands in no better or more favored position than she, in natural distribution under the intestate law, would take, if the will were literally carried out. \$60,000, and Eliza Shuster, a sister, the same sum, and Jane Hancock's only child would take nothing. Out of the whole estate this natural representation of one-fifth would get \$10,000, and the other two each \$72,500. Or, if the widow and all the legatees except the appellant and his uncle were dead before the testator, what is called Jane's portion would then have been one-half, and of this the appellant would have taken one-sixth, being \$25,000, and the uncle the remaining five-sixths, being \$125,000. And as, according to the theory contended for, the appellant is excluded from the residue, and the whole of it actually given by the will to the legatees other than the appellant, the uncle would take the whole of it, to-wit, \$150,000. In this event, therefore, the appellant would have received out of the whole estate \$25,000, and the uncle \$275,000. And if, instead of the uncle, the only survivor had been one of the cousins, that one cousin would have taken the \$275,000, and the appellant the \$25,000. If this is equality, we fail to see it. It is scarcely necessary to add that, as the facts are, each one of the cousins would get a share considerably in excess of the appellant under the decree of the court below as it now stands. While even such results must be declared, if the language of the will requires it, it must not be done in the name of equality when there is no such language. The election of the widow to take her share reduces the foregoing figures correspondingly, but the proportion remains the same.

Not a solitary reason can be found in any of the testamentary papers in this case for practically disinheriting the appellant, or for supposing that the testator so desired. To accomplish that result a complicated, not to say sophistical, course of reasoning must be resorted to, in order to prove by argument, not by testamentary words, the presence of an intent in the mind of the testator, which, so far as we can discover, never had the slightest existence. Sufficient inequality is produced to satisfy every demand of the words used by reading them according to their plain and natural meaning. More than this is not required, and, therefore, should not be permitted.

In preparing the opinion in this case we did not review the authorities because it was not necessary.

Not one was cited for the appellees which would in the least degree have justified us in adopting their construction. While many were cited in the elaborate and exhaustive argument for the appellant—notably *Bender v. Dietrich*, 7 W. & S. 234, and *Hitchcock v. Hitchcock*, 11 Casey, 393—which were highly persuasive by reason of their analogy to the case at bar, we thought it unnecessary to discuss them because the plain words of this will afford a sufficient clue to its meaning.

Reargument refused.

THE PENNSYLVANIA RAILROAD CO. v. FLANIGAN.

May 24, 1886.

CONTRACT — QUANTUM MERUIT — SERVICES — TICKET AGENT OF ONE COMPANY SELLING FOR ANOTHER.

A. and B., two railroad companies operating competing lines, entered into an agreement, by which A. was for a specified compensation to give to B. a right of way over a portion of its tracks and also the right to use its station in Wilkesbarre; further, A. was to look after the freight and baggage of B. and sell tickets for B. at that point. C. was the ticket agent of A. at Wilkesbarre. In course of time, leaving that employment, he brought suit against B. claiming compensation for selling its tickets whilst serving A. Held, that without distinct proof of an actual promise by B. to pay, as also satisfactory proof of the consent of A. that C. should receive such payment, there could be no recovery.

Error to the court of common pleas of Luzerne county.

The North and West Branch Railroad Company completed a railroad from Catawissa to South Wilkesbarre in November, 1882. At that point a connection was made with the tracks of the Lehigh Valley railroad, and a business arrangement was consummated for the use of about a mile of their track together with the passenger and freight stations, yard sidings, etc. This arrangement was entered into by the Pennsylvania Railroad Company, who had become the lessees of the North and West Branch Company line. The Pennsylvania Company agreed to pay the Lehigh Valley Company a certain sum per ton for all freight handled by their station agents and five cents per passenger for every one going into or out of their station. These charges were to cover the sale of tickets by the Lehigh Valley agents for the Pennsylvania Company and every other necessary service connected with receiving and handling freight and passengers. The Pennsylvania Company had no possession or control of any part of the terminal facilities and had no agents or employees about the stations. All the work was done by the Lehigh Valley agents, and the compensation was made for all to that company.

The ticket agent at Wilkesbarre from November, 1882, to September 1, 1884, was John Flanigan. At the latter date, he left the employ of the Lehigh Valley Company and for the first time made a claim on the Pennsylvania Railroad Company for compensation as their agent and for selling their tickets at the Lehigh Valley station in Wilkesbarre during that period of time. The company objected to this demand, whereupon he brought suit, claiming \$150 per month for his services.

The verdict was for plaintiff.

George Sanderson and *H. W. Palmer*, for plaintiff in error. *E. P. & J. V. Darling*, for Lehigh Valley Railroad Co. Under the testimony the employment of Flanigan by the Lehigh Valley Company covered his time from eight o'clock in the morning to seven in the evening. They had the right to every minute of it during those hours. He had no right to employ himself in any other business that would occupy a portion of his skill and attention. If he did so employ himself whatever he earned belonged to his employers. The law on the subject is well and compendiously stated in *Story Agency*, §§ 207-211; *Paley Principal and Agent*, 51. "The cases in equity are to the same effect, viz.: that the profits directly or indirectly made in the course of or in connection with his employment by a servant or agent,

without the sanction of the master or principal, belong absolutely to the master or principal." *Morrison v. Thompson*, L. R., 9 Q. B. 484; *Massey v. Davies*, 2 Ves. Jr. 317; *Turnbull v. Gardner*, 38 L. J. Ch. Div. 331-334; *Kimber v. Barber*, L. R., 8 Ch. 56; *Campbell v. Penn. Life Ins. Co.*, 2 Wh. 55. We have the authority of holy writ: "No man can serve two masters; for he will hate the one and love the other, or else he will hold to the one and despise the other." *Everhardt v. Searle*, 71 Penn. St. 259; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 134. "It matters not," it is said, page 210 of *Hare & Wallace Notes*, 1 Lead. Cas. Eq., "that there was no fraud meditated and no injury done, the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." This was said of "any one who acts representatively or whose office is to advise or operate not for himself, but for others."

G. L. Halsey and *E. S. Osborne*, for defendant in error. But again, can the Pennsylvania Railroad Company, the plaintiff in error, at this late day deny our relation to them in this contention? Are they not estopped? Let us see. They say they had certain arrangements with the Lehigh Valley Railroad Company for handling their Wilkesbarre business. They paid a gross sum for all their terminal facilities. In other words, the Lehigh Valley Railroad Company was their Wilkesbarre ticket agent, and they have compensated them for the service. This arrangement existed during the time we served them, and for which we claim compensation in this case. They never made this fact known to us. With this knowledge they asked us (1) to become their Wilkesbarre agent; (2) they, by circular in due form appointed us their Wilkesbarre agent, and sent us the property of the office; (3) we accounted to them as their Wilkesbarre agent; (4) they required us to give bond, which we did as their Wilkesbarre agent, and we were asked to renew the bond at the end of the first year as their Wilkesbarre agent, which we did; (5) they time and again promised to compensate us as their Wilkesbarre agent; (6) they finally settled with us as their late agent at Wilkesbarre. During all the time of our service with them they never made known to us that they had an arrangement with the Lehigh Valley Railroad Company, whereby to all intents and purposes, they were their Wilkesbarre ticket agent. Can this defense, under these undisputed facts, be maintained at this late day? Are they not under the law estopped from making this defense? We believe they are and cite to the court *Bigelow Estoppel*, 473. "Estoppel by conduct. That by which a party and those in privity with him are estopped to deny the truth of representations made to and acted upon by another. That is, if a representation is made to another who deals upon the faith of it, the former shall make the misrepresentation good if he knew it were false." *Commonwealth v. Moetz*, 10 Barr, 530; *Sergeant's Executors v. Ewing*, 6 Casey, 81.

GREEN, J. After a most careful reading of all the testimony in this case, we are obliged to say there is no evidence whatever of an express contract for the payment of wages or salary by the defendant to the plaintiff. The plaintiff himself, being examined at great length, does

not state that the defendant, or any of its officers, ever agreed to pay him any stipulated compensation for the service he rendered. It was undoubtedly true that he did sell tickets for the defendant, and was duly appointed passenger agent at Wilkesbarre by authority of the company. It is also true that he performed the service to which he was appointed, and it is not questioned that his performance was entirely faithful throughout. If there were nothing else in the case he would be entitled to compensation adequate to the service rendered upon the principle of a *quantum meruit*. But there are other material facts in evidence. During all the time of the service for which the present claim is made the plaintiff was in the employment of the Lehigh Valley Railroad Company as ticket agent at Wilkesbarre station. For that service he was paid a fixed monthly compensation with privilege to sell tickets upon commission for certain western railroad companies. Being thus engaged the Lehigh Valley Railroad Company, by contract with the Pennsylvania Railroad Company, agreed that the latter company might use the terminal facilities of the former at Wilkesbarre, including the passenger and freight stations, for the purposes of the North and West Branch Railroad Company, extending from South Wilkesbarre to Catawissa. This last-named company was in the control of the Pennsylvania Railroad Company, and the terms of the arrangement with the Lehigh Valley Company included the sale of tickets over the North and West Branch and to points beyond, and the arrival and departure of passengers, and the landing and shipment of freight from the Wilkesbarre station of the Lehigh Valley Company. In consideration of these privileges the Pennsylvania Railroad Company agreed to pay the Lehigh Valley Company five cents for every passenger coming into or going out of the station and a sum per ton for all freight handled. All the service was performed by the agents of the Lehigh Valley Company for the Pennsylvania Company. It was, therefore, undoubtedly the fact that the compensation for the service was to be paid by the Pennsylvania Company to the Lehigh Valley Company. The Lehigh Valley Company directed their passenger agent, the plaintiff, to sell tickets for the Pennsylvania Company and he did so. For selling tickets for the latter company compensation is claimed, which being refused, the present action is brought to recover it. There being no proof of an express contract to pay a specific compensation, the case was tried upon the theory of a *quantum meruit*, and evidence was given of the value of the service. The court left the case to the jury upon some testimony of the plaintiff that an agent of the defendant had promised him he should be paid for his service. Can a recovery be had in such circumstances? There is no doubt that the Pennsylvania Company did appoint the plaintiff as their agent to sell tickets for them at this station, and that in pursuance of that appointment he acted for them and gave the usual bond given by passenger ticket agents. It must also be conceded that the Lehigh Valley Company knew of this agency and assented to it, in fact directed the plaintiff to perform the service. Thus far the facts are without controversy, and if these facts alone constituted a right of recovery the verdict and judgment should stand.

But it is denied by the defendant that these facts alone confer a right to recover. The denial is based upon an allegation that the defendant contracted with the Lehigh Valley Company for the service of the plaintiff and paid that company for the service, that they never agreed with the plaintiff to pay him any compensation, that the Lehigh Valley Company never consented to the payment of compensation by the defendant to the plaintiff, and that it is against the policy of the law to allow the servant of one master to recover compensation for service rendered during the continuance of his employment, to another master.

The proof that the service in question was contracted for between the two companies is direct, positive, clear, and entirely uncontradicted, and the compensation for the service was to be paid by the Pennsylvania Company to the Lehigh Valley Company. There is not a particle of evidence proving or tending to prove that the Lehigh Valley Company agreed that their agent, the plaintiff, should or might receive compensation for the service in question from the defendant or that they had any knowledge that such compensation was to be paid. The only evidence tending to show that the defendant agreed to pay compensation to the plaintiff is found in the testimony of the plaintiff. Alfred Walter was the superintendent of the North and West Branch Company. The plaintiff testified to a conversation with him and was asked: "Q. What was said? A. Mr. Walter promised on several occasions to pay me a salary. Q. Mr. Walter promised on several occasions to pay you a salary? A. Yes, sir. Q. When did you meet him again after this time, about the first of December? A. I saw Mr. Walter probably on an average of once a month. Q. Covering what period? A. From the 1st of December, 1882, up to — well, I seen him all the time during the time I was in their service; in regard to paying my salary the last time I talked with him in regard to that was probably in April or May, 1884. Q. What did he say at these conversations? A. He had always held out to me that I would be paid a salary for the services performed."

With the exception of a repetition of the last answer on cross-examination, the foregoing is the whole and the only evidence of a contract by the defendant company to pay compensation to the plaintiff for his services. It will be seen at once that this is but the expression of a conclusion or opinion of the witness as to the effect of the words used in the conversation stated. The words themselves are not given nor the substance of them. Whether they amounted to a "promise" would be for the jury to judge if they only knew what they were, but the plaintiff did not give them, so when he said that Mr. Walter "held out" to him that he would be paid, he states nothing more than a conclusion of his own. The jury could not tell whether Mr. Walter really "held out" such an idea, because they did not know the words he used.

This kind of evidence is altogether insufficient to prove an express promise to pay by the defendant. The circumstances and relations of the parties were such that nothing but distinct and clear words of an agreement or contract to pay can suffice to create such an obligation. No doubt if there was distinct proof of an actual promise to pay by

the defendant, and satisfactory proof of the consent of the Lehigh Valley Company that their agent should receive such pay, the defendant would be legally bound to pay. But, in our opinion, nothing short of this will suffice.

The plaintiff being in the constant employment of the Lehigh Valley Company, and paid by them for his entire service, could not lawfully contract to render service during the same time to another company, especially a competing company, as this one was for compensation, without clear proof of the knowledge and consent of the Lehigh Valley Company, both to the employment by the defendant and the payment of compensation. In *Everhart v. Searle*, 71 Penn. St. 256, we said, THOMPSON, Ch. J.: "The case before us is rather novel. It involves a question whether the same person may be an agent in a private transaction for both parties without the consent of both so as to entitle him to compensation from both or either. We have the authority of holy writ for saying that 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.' All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence."

In the same opinion it was further said: "There was plausibility and seeming force in the argument that as Flagg, the plaintiff's principal in the sale, was not injured by the arrangement with the defendant, there was nothing wrong in making that arrangement. This is specious but not sound. The transaction is to be regarded as against the policy of the law, and not binding upon a party who has a right to object to it." This was said of one who had been appointed agent of one person to sell, and of another person to buy, the same property. He had made a positive agreement with the purchaser for an expressed consideration for making the purchase, but it was held he could not recover even upon his undoubted and absolute contract, because he was also the agent of the seller under promise of compensation to sell the same property. The contract for payment of compensation by the purchaser was declared void as against the policy of the law. In *Story Agency*, § 211, it is said: "Indeed it may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profit and advantages made by him in the business beyond his ordinary compensation are for the benefit of his employers." These principles are perfectly familiar, and are illustrated by a vast number of reported cases applied to many different relations of life. It seems very clear to us that they are entirely applicable to the present case. The plaintiff, by his own testimony, proved that he could sell tickets to competitive and distant points by either company's road. He was, therefore, subject to a divergent duty of fidelity to both if employed by both. Whether he would be more faithful to the interests of one than of the other might depend upon a secret disproportion of compensation received from one as against the other. But it is enough to know that absolute fidelity to one was inconsistent with the same fidelity to the other. In such a situation nothing less than clear proof of the consent of both employers

not merely to the double service but to the double compensation would suffice to validate an express contract with the second employer, much more would it be requisite to support an implied contract. As there was not the slightest evidence of the consent of the Lehigh Valley Company to their own paid servant becoming the paid servant of the defendant, the plaintiff's claim for compensation from the latter is fatally defective.

Judgment reversed.

APPEAL OF WILLIAM L. LANCE, JR.

May 24, 1886.

DEED — PAROL TO SHOW MORTGAGE — TRUST.

To convert a deed absolute on its face into a mortgage by parol testimony, such testimony must be clear and specific, of a character such as will leave in the mind of a chancellor no hesitation or doubt, and failing this, the effort to impeach the legal character of the deed must be regarded as abortive.*

A mortgage is essentially a pledge or security, and is distinguishable from a trust in this only, that the property described in it is to revert to the mortgagor on the discharge of the obligation for the performance of which it was pledged.

Appeal from the decree of the court of common pleas, No. 1, of Philadelphia county.

This was a suit in equity brought by William L. Lance, Jr., as plaintiff, against the Lehigh and Wilkesbarre Coal Company, its receivers, and Samuel Bonnell, Jr.

The hearing before the master was upon bill, answer and proofs.

The bill alleged:

"I. That the plaintiff has received permission from the circuit court of the United States, for the western district of Pennsylvania, to bring this suit against the receivers of the Lehigh and Wilkesbarre Coal Company.

"II. That by virtue of divers conveyances the plaintiff was seized, in his demesne as of fee, of a valuable tract of coal land in Plymouth township, Luzerne county, Pennsylvania, describing it by metes and bounds.

"III. That for the purpose of obtaining the large capital necessary to develop the land and to sink shafts, erect a breaker and machinery and buildings, and for the purpose of mining coal, the plaintiff conveyed the land to Payne Pettibone under an agreement that Pettibone should make the advances, hold the title to the land as security for repayment, and upon repayment that Pettibone should reconvey to the plaintiff, his heirs and assigns.

"IV. That Pettibone did make advances, and that disputes having arisen between Pettibone and plaintiff, it was agreed between Pettibone, the defendant Bonnell, Jr., and the plaintiff to compromise their differences, as follows:

"V. Defendant, Samuel Bonnell, Jr., was a friend of plaintiff and of his father, and had been selling coal on commission for the plaintiff.

"VI. That in December, A. D. 1870, it was agreed between Pettibone, Samuel Bonnell, Jr., and the plaintiff,

"That Pettibone should have the property sold at sheriff's sale and buy it in.

* See 12 Eng. Rep. 246.

"That Samuel Bonnell, Jr., would pay Payne Pettibone one hundred and sixty-two thousand dollars (\$162,000) claimed by Pettibone to be due him, and for which he held the land as security, and that upon such payment Payne Pettibone would convey the tract of land to Samuel Bonnell, Jr.

"And that it was further agreed between Bonnell, Jr., and the plaintiff, that he, said Bonnell, Jr., should accept drafts to be drawn upon him which the plaintiff agreed to get discounted and renewed from time to time, until by sale of the breaker, or the property itself, said drafts should be paid, the proceeds to be applied to pay the claim of Pettibone, and that in the meantime Bonnell should hold the land as security for the money he should advance to pay Pettibone, or to further develop the property, . . . and that Bonnell agreed to reconvey the land, upon repayment of the moneys advanced, to the plaintiff, his heirs or assigns.

"VII. That the agreement was consummated.

"That a sheriff's sale was made, and on January 11, 1871, the sheriff conveyed to Payne Pettibone, who, on January 20, 1871, conveyed the land to Samuel Bonnell, Jr.

"VIII. That on June 22, 1870, the plaintiff purchased of Aaron Brown an interest in the same land belonging to Brown.

"That Bonnell took a conveyance of the land as security for money to be advanced, and that the money so advanced has been fully repaid.

"IX. And the plaintiff avers that the title to the land on January 20, 1871, vested in the defendant, Samuel Bonnell, Jr., as mortgagee and as collateral security, for the repayment to him by the plaintiff, or out of the rents, issues and profits of the sums of money which he had advanced, or became responsible for, or might so advance for the redemption of the land from the claim of Payne Pettibone, and its further development, and upon such repayment to immediately reconvey the same to the plaintiff, his heirs or assigns.

"X. That the advances made by Bonnell were inconsiderable, but the larger part of the money was raised by plaintiff upon acceptances by defendant of drafts of William L. Lance, negotiated by plaintiff, against which plaintiff shipped coal mined from the land.

"Subsequently on July 1, 1871, plaintiff negotiated a sale to the Wilkesbarre Coal and Iron Company, of the breaker, improvements and personal property for \$157,000, and after this there was due to Samuel Bonnell, Jr., but a comparatively small sum of money.

"XI. The coal under the land was leased by Bonnell, Jr., and plaintiff to the Wilkesbarre Coal and Iron Company.

"That the plaintiff delivered possession of the coal, but still retains possession of the surface of the land.

"XII. That the Wilkesbarre Coal and Iron Company, on January 20, 1874, was merged with the Honeybrook Coal Company, under the name of the Lehigh and Wilkesbarre Coal Company.

"XIII. That the said Wilkesbarre Coal and Iron Company, and the defendant, the Lehigh and Wilkesbarre Coal Company, had at all times full notice and knowledge of the fact that said defendant, Samuel Bonnell, Jr., held the premises, as mortgagee, as collateral security, merely

for money advanced, under agreement to reconvey to the plaintiff, his heirs or assigns, upon repayment thereof.

"XIV. That Samuel Bonnell, Jr., on February 29, A. D. 1876, in fraud of the rights of the plaintiff, conveyed the land to the Lehigh and Wilkesbarre Coal Company.

"XV. The plaintiff avers that the defendant has been fully paid with interest.

"The plaintiff prays:

"I. That the account be stated of all the moneys received by the defendant Bonnell, from the plaintiff, together with the rents, issues and profits arising from said tract of land and received by him, as well as of the several sums of money advanced by him to the plaintiff, or paid by him for his account, and that it be ordered and decreed that the balance due shall be paid by one to the other.

"II. That it be ordered and decided, upon payment by the plaintiff to the defendant Bonnell, Jr., of the balance, if any, which may appear to be due by said plaintiff to said defendant, or if no such balance appears, then immediately that said defendant, the Lehigh and Wilkesbarre Coal Company, and the receivers thereof, if said receivers shall remain in possession, shall by good and sufficient deed or other assurance convey to said plaintiff, his heirs or assigns, in fee-simple all and singular premises and tract of land in the second section of the bill in equity fully described."

The master and the court below found:

That W. L. Lance, Jr., had no title, legal or equitable, in the tract at the time of the sheriff's sale of January 7, 1871.

That the purchase by Bonnell was absolute and clear of any trust.

That upon their own theory the Lances understood that Bonnell was to be held out to the world as the legal owner, and expected that he would sell the property, and even their bill alleges that this was the agreement; and

That the Lehigh and Wilkesbarre Coal Company, in buying the reversion from its own landlord, after having been allowed to pay rent for five years without question, was a purchaser, *bona fide*, for value, without notice, and entitled to hold the property without regard to the merits of the dispute between the Lances and Bonnell.

Silas W. Pettit, David C. Harrington and F. Carroll Brewster, for appellant. "The law does not regard the intention, however, further than to inquire if the conveyance was meant as a security for the payment of money. This original intent being established, the conveyance becomes a mortgage, and the parties cannot by special agreement alter the rules of law governing such contracts. The question there was not so much whether the conveyance was specially intended as a mortgage, but whether it was intended as a security for money; if the latter fact be found, the law infers the former." *Bispham Equity*, 154. This is cited and approved by Mr. Justice CLARK, who also affirms the rule that once a mortgage, is always a mortgage, in *Houcker v. Merkey*, 6 Out. 426. It is sufficient if the debtor, and he who claims to occupy the position of mortgagor with the right of

redemption, nas an interest, legal or equitable, in the premises, and that the grantee of the legal estate had and acquired such title by the act and assent of the debtor, and as security for his debt." Thomas Mort. 11; Jones Mort., § 241; Butler and Hargrave Notes, 1 Coke Inst. 205, Book 3, Note 96. It is also perfectly plain that the rule, being one of public policy, the intention of the parties to violate it has no weight whatever. *Harper's Appeal*, 14 P. F. S. 322; *Spering's Appeal*, 10 id. 210; *Maffitt's Adm'r v. Rynd*, 19 S. 387; *Houser v. Lamont*, 5 id. 317. That the price at which the property was knocked down at the sheriff's sale was wholly inadequate is a circumstance tending to show that the transaction was a mortgage, and not a sale. *Davis v. Stonestreet*, 4 Ind. 101; Jones Mort., §§ 275 and 329; *Sweetzer's Appeal*, 21 P. F. S. 274. The conveyance by Pettibone to Bonnell was certainly "through the efforts of the debtor and as security for his debt," which makes the transaction one of mortgage. *Weed v. Stevenson*, Clark (N. Y.) Ch. 166; *Stoddard v. Whiting*, 46 N. Y. 627. The "clear, precise and satisfactory" proof, or "full, satisfactory and indubitable" evidence required to prove a deed a mortgage, does not mean that absolute certainty is required, or that the evidence should lead to a certain conclusion, for absolute certainty is out of the question where facts are to be found from oral testimony and circumstances. The law does not require proof so convincing as to leave no doubt, or that the evidence should be uncontradicted; it is enough if it satisfy an unprejudiced mind beyond reasonable doubt. *Spencer v. Colt*, 8 N. Y. 314; *Ott v. Oyer*, 10 Out. 6-17; *Hartley's Appeal*, 7 id. 23.

R. C. Dals and *Samuel Dickson*, for the L. & W. Coal Co. We do not deny that it is well settled that even a sheriff's sale may be shown to have been used as the machinery of creating a mortgage. But in order to show that a title thus acquired at sheriff's sale is defeasible, the alleged mortgagor must show, in addition to a promise on the part of the purchaser to hold the title, a promise on his own part to pay the money to the purchaser within some definite time. This element exists in all the cases in which the courts have permitted the apparent title to be turned into a defeasible title. Upon this point see *Harper's Appeal*, 14 Sm. 315; *Todd v. Campbell*, 8 Casey, 250; *DeFrance v. DeFrance*, 10 id. 385. A record title cannot be destroyed by any aggregation of inconclusive circumstances. *Buchanan v. Streeper*, 11 W. N. C. 434; *Stewart's Appeal*, 2 Out. 377. The proof of the alleged agreement to reconvey does not come up to the measure of proof required by the cases. *Plumer v. Guthrie*, 26 Sm. 441; *McGarritty v. McGarritty*, 13 id. 38; *Nixon's Appeal*, id. 279; *Lingenfelder v. Richey*, 12 id. 123; *Kistler's Appeal*, 23 id. 393; *Salter v. Bird*, 7 Out. 436; *Hollinshead's Appeal*, id. 158; *Hartley's Appeal*, id. 23; *Logue's Appeal*, 8 id. 136; *Dyer's Appeal*, 11 id. 446. A promise to reconvey to a defendant in an execution is insufficient to establish a trust in his favor. *Rhymer v. Baird*, 5 Wr. 256; *Barnet v. Dougherty*, 8 Casey, 371; *Kellum v. Smith*, 9 id. 158; *Kistler's Appeal*, 23 Sm. 393; *Welford v. Herrington*, 5 N. Y. 39; *O'Harra v. Dilworth*, 22 Sm. 397; *Williard v. Willard*, 6 id. 117. Bonnell cannot be held to be the mortgagee of a tract and W. L. Lance,

Jr., the mortgagor, unless W. L. Lance, Jr., agreed to pay to Bonnell the amount advanced by him within some specified time; an agreement to pay within a fixed time is essential. *Harper's Appeal*, 14 Sm. 315. This distinguishes the case before the court from *Heath's Appeal*, 11 W. N. C. 317, where there was an obligation to redeem the land in ninety days. The obligation upon the part of the alleged mortgagor to redeem must be a continuing obligation. *Todd v. Campbell*, 8 Casey, 250; *De France v. De France*, 10 id. 385. See, also, *R. R. Co. v. Casey*, 29 Sm. 84; *Spering's Appeal*, 10 id. 210; *Carhart's Appeal*, 28 id. 100. The notice which charges must be clear, precise and detailed. *Peebles v. Reading*, 8 S. & R. 484; *Kerns v. Swope*, 2 Watts, 78; *Ripple v. Ripple*, 1 Rawle, 386; *Boggs v. Varner*, 6 W. & S. 469. Even if Charles Parrish should be regarded as having notice, the Lehigh and Wilkesbarre Coal Company is only bound by such knowledge as he acquired in the course of his agency. *Houseman v. Building Assn.*, 31 Sm. 256; *Hood v. Fahnestock*, 8 Watts, 489; *Bracken v. Miller*, 4 W. & S. 110; *Martin v. Jackson*, 8 Casey, 508; *Wilson v. McCullough*, 11 Harr. 440; Notes to *Le Neve v. Le Neve*, 2 L. C. in Eq. 169; *McCormick v. Wheeler*, 36 Ill. 114.

GORDON, J. We agree with the master and the court below that the attempt to change the *prima facie* character of the deed of Pettibone to Bonnell and by oral testimony convert it into a mortgage, has not been successful. It may be admitted that there are many things apparent on a critical examination of the evidence which would seem to favor the contention of the appellant, but when the whole body thereof is considered together, such a conclusion is seen to be illusory. To convert a deed absolute on its face into a mortgage, by parol testimony, such testimony must be clear and specific; of a character such as will leave in the mind of a chancellor no hesitation or doubt, and failing this, the effort to impeach the legal character of the deed must be regarded as abortive. A mortgage is essentially a pledge or security, and it is distinguishable from a trust in this only that the property described in it is to revert to the mortgagor on the discharge of the obligation for the performance of which it was pledged. *Allegheny Railroad & Coal Co. v. Casey*, 79 Penn. St. 84. So we have it said on *Danzeizen's Appeal*, 73 Penn. St. 65, that where the intent is merely to pass the property as a pledge for the payment of a debt, the transaction may be regarded as a mortgage, but not so when the grantee has the power to sell the premises, though the proceeds are to be applied on the indebtedness of the grantor. In this, of course, we say nothing as to the various methods which may be adopted for the purpose of foreclosure, or extinguishment of the mortgagor's equity of redemption. This may be accomplished by a bill in equity, by a *scire facias*, or by agreement of the parties, as that the mortgagee have the power to sell on default of payment, or performance of the obligation, whatever that may be, which the mortgage was given to secure.

This, however, affects not the character of the instrument itself, for if it be not a vadium or pledge, whether living or dead, it is not a mortgage. It must be accompanied with a defeasance otherwise it is a deed

absolute or in trust. If, therefore, the alleged oral defeasance has not been proved; if it appears that Bonnell was not merely to hold the land conveyed as a pledge, but to have the power to sell it for the purpose of paying the indebtedness of Lance to him, and the liens against the property, it is clear that the *prima facie* character of the deed is unaffected, and the trust, if any, attaches to the proceeds. It would also follow, that if Bonnell had thus in himself the power to sell, his vendee, the Lehigh and Wilkesbarre Coal Company, must be regarded as vested with an absolute estate, and cannot be obliged to account. But that he had such power the evidence clearly demonstrates. The letter from Bonnell to Lance, previous to the conveyance from Pettibone, setting forth his, Pettibone's, proposition, and inquiring whether, in case of his purchase of the property, he could sell it for a sum not less than \$3,000, of itself shows what Bonnell's intention was in the acquisition of the land in controversy, and this same intention is also expressed in his letter to Mr. McClintock. But that the decision of all the parties was that Bonnell should carry the property on his own credit until he could dispose of it by an advantageous sale, is clear from their subsequent conduct. The proposition to the president of the Wilkesbarre Coal and Iron Company, as contained in the letter of Bonnell and Lance dated June 23, 1871, and the consummation of that proposition by the conveyance to the said company of the breaker, houses, improvements, and personal property, together with a lease of the coal, executed by Bonnell and witnessed by W. W. and W. L. Lance, can be explained on no other hypothesis than that above stated. Beside this, we have from the testimony of W. W. Lance the fact that the deeds for the surface lots sold by him were sent to Bonnell for execution, so that, without reference to the disposition of the money derived from such sales, it is obvious that he was regarded as the owner of the fee, and as the only one who had power to convey it. Moreover, his power to mortgage the property to Pettibone for the purchase-money has not been questioned; on the other hand it seems to have been recognized by all the parties as the exercise of a legitimate power on part of Bonnell; and if so, he must have been regarded as something more than a mere mortgagee. If, then, this man had the power to sell the improvements, lease the coal, the equivalent of a sale, to execute deeds for the surface land, and to mortgage the estate, we cannot understand by what process of reasoning he could be deprived of the power to sell the reversion. Under such circumstances as these the question of notice is of no importance, for if the power to convey was vested in Bonnell, notice to his vendee would not revoke that power, and if, indeed, it be admitted that this vendee had notice prior to its purchase of every act in the transaction between its vendor and the Lances, it would nevertheless have no other knowledge than that upon which it acted, that is, that he had the right to sell and convey the property which it was about to buy. It may be, and we are inclined to that opinion, that after payment of his own claims, and the debts which were a charge against the property, Bonnell held the balance of the money raised from the sale, if any such balance there was, as trustee for the Lances, but for this he ought to account and not his vendee. We also agree with the master

that the bill before us is fatally defective for the want of proper parties. The evidence clearly reveals the fact that William L. Lance, Sr., and Walter W. Lance were interested in the property with the appellant, hence, the defendants, if liable to account at all, were so liable to the three jointly, and not to either severally. *Cloninger v. Hazard*, 42 Penn. St. 389.

The decree of the court of common pleas is affirmed at the costs of the appellant.

SCOFIELD v. BLACKMARR.

May 24, 1886.

CONTRACT—GAMBLING CONTRACTS—"BUYER'S OPTION"—EVIDENCE—CUSTOM.

A. entered into a written contract whereby he sold to B. a quantity of oil at a fixed price "to be delivered at buyer's option" within a specified time. The price of oil declined and B. refused to accept and pay. In a suit by A. against B. to recover damages, *held*, that it was not error to refuse to admit evidence to prove that at the date of the contract the price of oil was lower than that mentioned in the contract, nor evidence to prove that the custom in contracts to deliver oil at a future day was not to deliver the oil but to settle the differences.

Error to the court of common pleas of McKean county.

The following are the facts of the case as set forth by the court in the charge:

"This is an action brought by the plaintiff to recover damages which he alleges he sustained by reason of the breach by the defendant of a contract entered into between the parties. The contract purported to be a contract by the terms of which the plaintiff agreed to sell and the defendant agreed to buy twenty-five thousand barrels of oil at \$1.25 per barrel. The contract as written and signed and given in evidence on the trial of the case is as follows:

"'BRADFORD, PENNSYLVANIA, Dec. 8, 1882.

"'Sold to C. W. Scofield for account of H. L. Blackmarr 25,000 of crude petroleum at \$1.25 per barrel of 42 gallons in bulk to be delivered at buyer's option at any time from the 8th day of December, 1882, to the 6th day of February, 1883, in accepted United Pipe Line receipts, etc. . . . Should no notice be given delivery shall be made on the 6th day of February, 1883. Place of delivery, Bradford, Pennsylvania.'

"The defense made was that the transaction was a wagering contract and not enforceable. That the parties did not contemplate the sale and purchase of oil, to be actually delivered and paid for, but that they understood at the time the contract was made that at the end of sixty days it was to be settled by the payment of differences.

"As part of the proof to show that the contract was a wager upon the future price of oil, the defendant below offered to prove that the market price of oil at the time the contract was executed was \$1.12, thirteen cents per barrel less than Scofield agreed to pay by the terms of the contract.

"Defendant also, for the same purpose, offered to prove that by a custom recognized by the oil trade generally at the place where the con-

tract was executed, a sale of oil to be delivered in the future at a price in advance of the market price at the time the contract is executed is to be settled by the payment of differences, and that it is not contemplated that the oil named in the contract shall be delivered to the purchaser, and that the parties were aware of this custom at the time they executed the contract in controversy. The court rejected these offers, and they are the errors assigned here.

"The court charged the jury *inter alia* as follows:

"Now, gentlemen, it is for you to find from this evidence and from circumstances surrounding the case as proved by the witnesses, whether this contract was for the actual sale and delivery of twenty-five thousand barrels of oil, or whether it was a contract to be adjusted at the end by the settlement merely of differences. Was it a *bona fide* deal in the article itself, or was it practically a wager upon the question of whether it would rise or fall, as it would be if the parties contemplated when they entered into it that it should be fulfilled by a mere settlement of differences in the prices. . . . You are not to hasten to the conclusion without being first satisfied from the evidence that this was a wagering contract, and therefore void, but you are to carefully weigh the evidence, and if from it you find that the contract was intended by the parties to it to be a *bona fide* sale of oil and purchase of oil, then the plaintiff would be entitled to recover. No point seems to have been made by the defendant against the method adopted by the plaintiff to ascertain the damages. And hence we say to you if you find for the plaintiff your verdict will be for the amount as shown by the evidence of the plaintiff. But if, on the contrary, you find that this contract was intended by the parties to be a wagering contract to be settled by an adjustment of differences at the expiration of the time, then your verdict will be for the defendant, for such a contract would be utterly void and unenforceable in the courts. That is the question that is left for you, and as you find upon it your verdict will be.

"The verdict was for the plaintiff for \$5,125."

G. L. Roberts, D. H. Jack and M. F. Elliott, for plaintiff in error. We think the court erred in rejecting this offer to prove that by universal custom at the place where the contract in controversy was signed, similar contracts were always treated by persons buying and selling oil as agreements to be settled by the payment of differences, and that the delivery of oil to the nominal purchaser was never contemplated. *Irwin v. Williar*, 110 U. S. 499; *Adams v. Pittsburgh Ins. Co.*, 14 Norr. 356; *McMaster v. Penna. R. R. Co.*, 19 Sm. 474; *Carter v. Phila. Coal Co.*, 27 id. 286.

F. L. Blackmarr and B. D. Hamlin, for defendant in error. As to the custom that defendant below offered to prove to contradict the express terms of the contract. It is clearly inadmissible. *Coze v. Heisley*, 7 Harr. 247. This case overrules, upon this point, *Snowden v. Warder*, 3 Rawle, 101. Usage cannot be introduced either to give to a dispositive writing a meaning different from that which it bears on its face, or to interpret any of the terms used in such writing in a sense conflicting with that attached by law. 2 Whart. Law of Ev., § 958. It

does not follow because a usage exists as to the object of a contract, that the contract is meant by the parties to incorporate the usage. It is within the power of parties to override by consent any usage, no matter how settled.

PER CURIAM. The judges who heard the argument of this case are equally divided in opinion, and, therefore, the judgment is affirmed by a divided court.

EBERTS v. THOMPSON.

May 24, 1886.

PRACTICE—AMENDING VERDICT AFTER JUDGMENT WHERE NO POINT OF LAW RESERVED—ARTICLES OF AGREEMENT CONSTRUED.

Where the action is ejectment, and no question of law is reserved, it is not in the power of the court to hold, after verdict, that it was wrong to have submitted the case to the jury and then alter the judgment.

A. entered into articles of agreement with B. whereby he was to sell B. his one undivided half of a grist-mill and two hundred acres of land connected therewith, for a certain sum. B. was to let A. have all the timber on the land down to twelve inches at the stump. *Held*, that under this agreement A. was only entitled to B.'s undivided half of the timber, and that B. was not obliged to procure the timber for A. from the owner of the other undivided half.

Error to the court of common pleas of Clearfield county.

This was an ejectment by Thompson against Eberts for an undivided half of a grist-mill and about two hundred acres of land connected therewith.

Plaintiff showed title in himself and then rested.

Defendant put in evidence an article of agreement as follows:

"Article of agreement made this 9th day of November, 1880, between Simon Thompson of the one part and John W. Eberts of the other part, viz.: said Thompson agrees to sell to said Eberts the one undivided half of grist-mill situated on Morgan's run Boggs, and the 200 acres of land connected therewith, for the sum of \$1,200, in manner following: \$150 on or before the 1st day of April, 1881, and \$150 on or before the 1st day of April, 1882, and to let said Thompson have all the timber on said land down to twelve inches at the stump for the other \$900. Said Eberts to have possession on the 1st of April, 1881.

(Signed)

"SIMON THOMPSON,
"JOHN W. EBERTS."

And also the fact that he had taken possession under these articles, had tendered the cash purchase-money, and that Thompson had cut and removed his share of the timber.

Thompson claimed that under the agreement he was entitled to all the timber on the land, and that it was the duty of Eberts to secure this from the owner of the other half of the land for him. The court instructed the jury, *inter alia*, as follows:

"To recapitulate the contract as we construe it is, that Mr. Thompson is entitled to have all of the timber upon the land, and not the half part of it. That the question for you to determine is: Did they agree, or was the agreement that they intended to make, that Mr.

Thompson was to have the half part of the timber, and change this contract—give it a different construction from the one we put upon it?

“The jury must be satisfied, as we have said repeatedly, by clear, precise, and indubitable proof, that that was their meaning, and not as it is written on the face of the paper. If the jury are so satisfied you would word your verdict in this way:

“‘We find for the plaintiff the premises described in the writ to be released on the payment of — dollars.’”

The verdict was for plaintiff for the premises described in the writ, to be released on the payment of \$363 and costs. Subsequently the court filed an opinion directing that the verdict of the jury be so amended as to strike out all that part thereof as conditional so as to make it read “we find for the plaintiff the premises described in the writ,” and we further order and direct judgment to be entered on the verdict as amended.

Murray & Gordon, for plaintiff in error. However general the terms of a contract may be, it only comprehends those things in respect to which it appears the parties proposed to contract. *Case v. Crushman*, 3 S. & R. 544; *Morris' Appeal*, 7 Norr. 382; *Coze v. Freeley*, 9 Casey, 124; *Merrill v. Gove*, 29 Me. 346; *Lacy v. Green*, 3 Norr. 514. “Every exception or reservation is the act of the grantor, and shall, therefore, be construed most strongly against him, and most beneficially for the grantee.” 2 Saund. 166–368; 10 Coke, 106; *Case v. Haight*, 3 Wend. 635; *Whittaker v. Brown*, 10 Wr. 199. The rule that a grant is to be taken most strongly against the grantor is of a special application to a reservation or exception whereby there is a withholding of something from the grant. *Klaer v. Ridgway*, 5 Norr. 534; *Grubb v. Grubb*, 5 Out. 16. “Delivery of possession of land in pursuance of a parol contract, amounts to part performance, and the vendee as well as the vendor may insist on specific execution of the contract.” *Pugh v. Good*, 3 W. & S. 56, 63; *Reed v. Reed*, 2 Jones, 117, 121; *Pomeroy's Eq. Jur.*, § 1409, note 2.

McEnally & McCurdy, for defendant in error.

GREEN, J. We are of opinion that the learned court below was in error in the interpretation of the agreement in question in this case. Had its meaning been dependent upon extrinsic facts requiring the verdict of a jury to determine it, the construction contended for by the defendant should have prevailed because the jury after a very careful charge found in the defendant's favor. Upon that aspect of the case the merits of the controversy must be considered as having been determined against the plaintiff and against his theory that he was entitled to have more timber than was to be found on the land sold. But the learned court, holding after the verdict that a mistake was made in submitting the case to the jury at all, struck off the conditional part of the verdict and entered an absolute judgment for the plaintiff. We do not think this was in the power of the court, the action being ejectment and no question of law reserved, but we differ with the court upon a more radical question and prefer to dispose of the cause upon our view of that sub-

ject. The agreement upon which the suit was founded stipulated for the sale of "the one undivided half of grist-mill situated on Morgan run Boggs with the two hundred acres of land connected therewith for the sum of \$1,200," etc. Undoubtedly, the subject of the sale was "the undivided half of the mill and two hundred acres." This was all the plaintiff sold and it was all the defendant bought. No other land could pass to the defendant under this agreement than the undivided half of the premises described. Had the agreement stopped there it could not have been questioned that the defendant took only the undivided half of the mill and land, and of course he could only take the timber that stood upon that half. Certainly, the defendant would have had no right to take the timber belonging to the other half-owner, Smith, under his contract with Thompson. When, therefore, the agreement further provided that Eberts, the purchaser, was "to let said Thompson have all the timber on said land," he surely did not agree "to let" Thompson have the timber on Smith's half of the land. The words "to let" clearly mean "to allow," "to permit," that is that Eberts, the purchaser, would permit Thompson to have the timber upon the land sold because that was something which Eberts *could* permit. No mere permission of his could possibly authorize Thompson to take the timber from Smith's half of the land, and there are no words in the agreement by which Eberts contracts that he will buy the timber on Smith's half, so that Thompson may take that also. The expression "said land" necessarily refers to the subject-matter previously described which was the undivided half of certain land, and according to our view of the instrument it means that Thompson, the vendor, thereby had permission from Eberts, the vendee, to take from the land sold the timber growing upon it down to a certain size. This was all that Eberts *could* give and, therefore, it was all that Thompson could take under this contract. If it was intended that the timber that was owned by Smith should be included so as to pass to Thompson the instrument should, and necessarily would, have contained some words expressive of the further obligation which then would have rested upon Eberts to acquire the right to Smith's timber and to give that also to Thompson. In the absence of any words expressing such a meaning, we find it quite impossible to impute such an intent to the parties or to place such a construction upon the language actually employed. If Thompson had himself been the sole owner of the entire property and had made the identical agreement with Eberts which he did make, it would seem absurd to contend that the timber upon the unsold half of the land was divested from Thompson and vested in Eberts by any thing contained in this paper. If it did have such a meaning, Eberts would yet have to acquire from Thompson the right to the remaining half of the timber for no other purpose than to give it back to him. If it did not have such a meaning as to Thompson's ownership it could not have as to Smith's. While parties might make so remarkable a contract as that it cannot be done by implication.

These views dispose of the whole case and render unnecessary any discussion of the various matters outside the mere words of the instrument as emissive of the intention of the parties. The question of

interest becomes unimportant in view of the verdict of the jury which cannot be changed.

The judgment of the court below is reversed and it appearing by the record that after verdict and before the time fixed for the payment of the purchase-money the same together with interest thereon, in all \$363, was paid into court by the defendant, judgment is now entered in favor of the defendant with leave to the plaintiff to take the said sum of \$363 out of court upon his filing with the prothonotary a deed in fee-simple to be approved by the court, to the defendant for the premises described in the agreement of November 9, 1880.

COUNTY OF CUMBERLAND v. BOYD ET AL.

May 24, 1886.

STATUTES — INTERPRETATION OF — DECLARATIONS AT THE TIME OF PASSAGE —
RECORDS OF JUSTICES OF THE PEACE — WHEN NOT TO BE QUESTIONED.

The verbal opinions of members of the legislature made at the time of the passage of an act can have no effect in interpreting it.

The act of May 8, 1876, entitled "An act to define and suppress vagrancy," is not repealed by the act of April 30, 1879, entitled "An act to define and punish tramps."

Where a justice of the peace has jurisdiction of the subject-matter, and of the parties, and no party to the record makes any objection, the regularity of his judgment cannot be questioned in a collateral proceeding.

Error to the court of common pleas of Cumberland county.

Debt by the county of Cumberland against Hugh Boyd *et al.*, commissioners of said county, to recover certain moneys alleged to have been unlawfully paid by the defendants to justices of the peace.

The facts are stated in the charge of the court as follows:

"We charge you generally that the defendants were the duly elected commissioners of Cumberland county, for the year 1884. There were presented to them for payment certain bills by Justices GREEN, MARTIN and RAMSEY, for costs which said justices claimed had accrued to them by reason of the conviction and commitment of vagrants to the county jail. Orders were drawn for their payment upon the county treasurer, who paid the same, and in January, 1885, when the county auditors examined the accounts of the county commissioners for the previous year, they refused to allow them credit for these payments, amounting in the aggregate to \$229, and charged the same against the commissioners in their report. This finding and determination of the auditors was appealed from, and the matter is now being anew inquired into by you.

"The second section of the act of 8th May, 1876, makes provision for the punishment of vagrants, and enacts that if any person shall be found offending he may be taken before a justice of the peace, who shall examine such person, and shall commit him, being thereof legally convicted before him on his own view, or by the confession of such offenders, or by the oath or affirmation of one or more creditable witnesses, to labor upon any county farm, or to the county jail for a term of not less than thirty days. The said justice of the peace or committing magistrate, in every case of conviction, shall make up and sign a record

of conviction, annexing thereto the names and record of the different witnesses examined before him, and shall by warrant under hand commit such person as aforesaid."

The records kept by the justices, which were very informal, showed that the parties against whom the charges were made had been convicted and sentenced as vagrants; except a portion of the record of Justice GREEN, which simply read as follows:

January 1, 1884, vag., Susan Downs. Bautz, thirty days.

(And so on down the paper.)

It was contended by the plaintiff:

1. That the act of assembly of 8th May, 1876, entitled "An act to define and suppress vagrancy," was repealed by the act of 30th April, 1879, entitled "An act to define and punish tramps," and that, therefore, there was no authority in law for the justices to convict and commit the persons to jail for thirty days as vagrants, and consequently no liability on the part of the county to pay the fees for so doing.

2. That the act of assembly of 21st April, 1866, entitled "An act relating to the fees and dues of constables and justices of the peace in the county of Cumberland," is in force. This act prohibits the commissioners from granting any orders for the payment of any fees for the commitment of vagrants in Cumberland county, and, therefore, the granting of the orders by the defendants to pay the fees of the justices in these vagrancy cases was unauthorized by law.

3. That the bills presented by the justices, and the records made up and kept up by them in these cases were not such as to render the county liable for the payment of the fees, and that their payment by the defendants was improper.

The court charged the jury that the act of 1876 was not repealed by the act of 1879; that the act of 1866 had been repealed by the act of 1876, and that the provisions in the act of 1876, in regard to the form of the record, were merely directory, and except in the commitments of Justice GREEN above mentioned, the jury could determine from the records and from the evidence in the case, whether the persons named had been duly committed under the act.

Verdict for plaintiff, \$48 being the amount allowed by the commissioners, upon the irregular record of Justice GREEN.

Plaintiff appealed.

Edward B. Watts, for plaintiff in error. "When a new statute covers the whole subject-matter of an old one, and adds offenses and prescribes different penalties from those enumerated in the old law, it is, by necessary implication, a repeal of the former statute." *Potter's Dwar. Stats.* 157, note; *Norris v. Croker*, 13 How. 429. But the new statute in this case repeals in express terms "all acts or parts of acts inconsistent herewith." If the intention of the legislature be sought, it will appear that it meant to repeal the old law. Senator Wolverton, on page 1246 of the Legislative Record of 1879, part 2, says, in discussing the tramp law then under consideration: "If for no other purpose, I would vote for this bill, it has a repealing clause in the sixth section, which repeals this iniquitous stone pounding act" — meaning the act of 1876. Senator Hall, on page 1249: "We repeal

the act of 1876, whether we pass the act with the amendment of the senator from Chester or whether we pass it without. In either case we repeal the act of 1876." The local law of 1866 prohibited the commissioners of Cumberland county from granting orders on the treasurer for payment of fees for committing vagrants. This was not repealed in terms by the act of 1876. The law does not favor repeal by implication, particularly of local laws. *Sigfred v. Commonwealth*, 12 W. N. C. 380; *Brown v. Comm'rs*, 9 Harr. 37; *Bounty Accounts*, 20 Sm. 92; *City of Harrisburg v. Sheck*, 14 W. N. C. 280; *Kilgore v. Commonwealth*, 9 id. 184.

H. S. Stuart, M. C. Herman and A. B. Sharpe, for defendants in error. The act to define and punish vagrancy was not repealed by the subsequent act to define and punish tramps, and it is an erroneous conclusion that a vagrant and a tramp are in reality the same creature, and that the definition of one defines the other. This view of the subject was taken by BARNETT, J., in the case of *Eyster v. The County of Cumberland*, before whom the same point was made, elaborately argued and carefully considered, and he ruled as follows: "But as we have said, the act of the 8th of May, 1876, gives justices of the peace jurisdiction in cases of vagrancy. We are of opinion that this act is not repealed by the act to define and punish tramps. It is not so repealed in express terms. An examination of the two acts will show that certain classes of criminals — for illustration, a pauper who shall unlawfully return to a district, whence he has been legally removed, without a certificate of settlement in the district from which he returns — is not included in the class of offenders defined as tramps. All vagrants are not tramps; and all tramps are not vagrants. The act of 21st of April, 1866, is clearly repealed by that of the 8th of May, 1876, first because their provisions are inconsistent in relation to the fees of the justices and constables and, second, because the last act contains a repealing clause. No legislator contemplates a record, such as kept by a master in chancery, when he enacts that "the said justice of the peace, in every case of conviction, shall make up and sign a record of conviction annexing thereto the names and records of the different witnesses examined before him, and shall by warrant under hand commit such person as aforesaid." The accuracy of the construction given by the court to that section of the act is sustained by the case of *Bladen v. Philadelphia*, 60 Penn. St. 464, when it is held that "words of a statute which are affirmative and relate to the manner in which power or jurisdiction rested in a public officer or body is to be exercised and not to the power itself, may be considered directory." "Negative words which go to the power or jurisdiction are not construed to be directory." "A clause is directory when the provisions contain mere matter of direction and no more; but not so when they are followed by words of positive prohibition." TAUNTON, J., in *Pearse v. Morrice*, 2 Ad. & El. 96. The judgment of every court pronounced on a subject wherein its jurisdiction is conclusive is binding on all other courts, except these before which it comes by appeal, *certiorari* or writ of error. *Tarbox v. Hays*, 6 Watts, 398; *Harris' Appeal*, 5 W. & S. 473; *Sloan v.*

McKinstry, 6 Harr. 120; *Billings & May v. Russell*, 23 Penn. St. 189. **MERCUR**, J., delivering the opinion of the court in *McDonald v. Simcox*, 98 Penn. St. 623.

PER CURIAM. There is no error in this record to give the plaintiff just cause of complaint. In giving construction to a statute we cannot be controlled by the views expressed by a few members of the legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than one hundred members who gave no such expression. The declarations of some and the assumed acquiescence of others therein cannot be adopted as a true interpretation of the statute. Keeping in mind the previous law, the supposed evil and the remedy desired, we must consider the language of the statute, and the fair and reasonable import thereof. Thus examining the act of 1879 we do not think it repealed the act of 1876. The records of the justices of the peace were very irregularly and imperfectly kept; yet they had jurisdiction of the parties and of the subject-matter, and no party to the record made any objection thereto. The regularity of a judgment rendered by a justice of the peace in a matter over which he has undoubted jurisdiction cannot be questioned in a collateral proceeding. *McDonald v. Simcox*, 98 Penn. St. 619. In the absence of fraud a record cannot be impeached and contradicted by parol evidence.

Judgment affirmed.

CESSNA v. NIMICK & Co.

May 24, 1886.

SALE — CHATTELS — VALID DELIVERY AS TO THIRD PERSONS.

A failure to deliver possession cannot be declared, as a matter of law, sufficient to prevent the passage of the title to chattels, where the purchase has been in good faith and for valuable consideration, and the vendee has assumed such control of the property as to reasonably indicate a change of ownership.

Error to the court of common pleas of Bedford county.

"Feigned issue wherein Nimick & Company were plaintiffs and Cessna defendant, under section 9 of the act of April 10, 1848, and section 1 of the act of March 1, 1858, to determine whether the plaintiffs were the lawful owners of seventeen hundred tons, more or less, of pig iron levied upon by the sheriff of Bedford county as the property of the Kemble Coal and Iron Company by virtue of a writ of *fi. fa.*, and whether, as such owners, plaintiffs were entitled to keep and retain the same against said writ.

Plaintiffs claimed the iron in dispute by virtue of an alleged sale made by Rezin A. Wight, secretary and treasurer of the Kemble Coal and Iron Company, to John S. Slagle, a member of the firm of Nimick & Company, on the 23d day of July, 1884, said Wright having present with him at the time Wm. Lauder and Wm. Kelly, general superintendent and general manager of the company.

The sale was made under the following circumstances: The Kimble Coal and Iron Company having become indebted to Nimick & Company by reason of advances made, the secretary and treasurer of the company,

R. A. Wight, to whom the directors had given the management of the sales of iron, met Slagle, of the firm of Nimick & Company and agreed to turn over to that firm all the iron slacked on docks at Riddlesburg. After this sale there was still a large balance due Nimick & Company for which sum they subsequently recovered judgment and levied upon all the other property of the company. Subsequently Cessna obtained judgment against the company and levied on this iron, and hence this feigned issue.

Upon the trial of the case the defendant requested the court to charge the jury that under all the evidence produced the transaction was a legal fraud and that the private sale was void as to creditors. This request was refused by the court. The question of actual fraud was left to the jury by the court. The verdict was for plaintiff.

Wm. M. Hall and John Stewart, for plaintiff in error. A retention of possession by the vendor, when the property is susceptible of actual delivery, is not simply a badge of fraud but it is fraud in law. *Clow et al. v. Woods*, 5 S. & R. 275; *Streeper v. Eckert et al.*, 2 Whart. 302; *Stark v. Ward*, 3 Barr, 328; *Cadbury v. Nolan*, 5 id. 320; *Billingsby v. White*, 59 Penn. St. 464; *Dewart v. Clement*, 48 id. 413; *Steel-wagon v. Jeffries*, 44 id. 407; *McKibben v. Martin*, 64 id. 352; *Trunick v. Smith*, id. 63; *Chase v. Ralston*, 30 id. 539; *Garman v. Cooper*, 72 id. 32.

J. F. Slagle and J. M. Reynolds, for defendants in error. The retention of possession is a fraud in law whenever the subject of the transfer was capable of delivery, and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession, is the doctrine of this court in *McKibben v. Martin*, 64 Penn. St. 352. In this case a formal delivery was impossible, but there was a consideration and a bill of sale delivered which was all that was necessary to complete the sale and pass title. *Adams v. Lyons*, 7 W. N. C. 421; *Hugus v. Robinson* 12 Harr. 13; *Crawford v. Davis*, 3 Out. 578; *Barr v. Ritz*, 3 P. F. S. 256; *Chase v. Garrett*, 2 East. Rep'r, 613. A reasonable time after sale is allowed for delivery, and a sale may be good against a levy even without delivery where such reasonable time has not expired. *Hughes v. Robinson*, 12 Harr. 12; *Barr v. Reitz*, 3 Sm. 256; *Smith v. Stearn*, 5 Harr. 360; *Carpenter v. Meyer*, 5 W. 483. Where the transfer of possession corresponds with the sale and the nature of the property sold and the relation of the parties, the sale will be valid unless fraudulent in fact. *Dunlap v. Brownsville*, 2 Casey, 72.

PER CURIAM. The question as to what acts are necessary on the sale of a chattel, to constitute a valid delivery as against third persons, has been frequently considered. It is now well settled that a change of the location of the property is not in all cases essentially necessary. Due regard must be had to the character of the property, the nature of the transaction, the position of the parties and the intended use of the property. If the purchase be in good faith and for a valuable consideration, followed by acts intended to transfer the possession as well as the title, and the vendee assumes such control of the property as to

reasonably indicate a change of ownership, the delivery of possession, as matter of law, cannot be declared insufficient. *Haynes v. Hunsicker*, 26 Penn. St. 58; *Chase v. Ralston*, 30 id. 539; *Billingsley v. White*, 59 id. 464. No such change of possession as will defeat the fair and honest purpose of the parties is required. *Crawford v. Davis*, 99 Penn. St. 576.

Applying this rule of law to the facts of the case, it is clear the learned judge correctly held the sale was not fraudulent in law. The quantity of iron, the intended market therefor, and the practical manner of shipping the same, the promptness with which it was commenced, as well as the marking of the initial of the purchaser's name thereon, are sufficient to bring the case within the rule stated. The transaction was open and public. All questions relating to whether there was any fraud in fact were well submitted to the jury. We see no error to correct.

Judgment affirmed.

BORCKMAN'S APPEAL.

May 24, 1886.

MARRIAGE—DEED OF SEPARATION—WHEN NOT SET ASIDE.

A husband found that his wife's affections had been alienated, and a deed of separation was drawn up and executed. Afterward the wife filed a bill in equity against the husband, alleging that she had been unfairly treated as to the amount of money settled upon her by the deed of separation, and praying for a decree that the deed be declared void and delivered up to her to be destroyed. *Held*, that the court had committed no error in refusing the relief prayed, as by her misconduct the wife had forfeited all right to consideration at the hands of her husband.

Appeal from the decree of the court of common pleas of McKean county. Eliza B. Borckman and Robert B. Borckman were married and lived together for several years, three children being born to them. In May, 1883, the husband went to Europe, leaving his wife at Hamilton, Canada. On his return in September, 1883, he found that her affections had been alienated by one Dr. Carleton of Hamilton. After keeping up the appearance of conjugal fidelity for a few weeks, she refused absolutely to observe her marital obligations any longer, and proposed a separation, declaring that her feelings were so changed toward her husband that she could live with him no longer, and that her affection for the Hamilton physician was such that she could not live away from him.

A deed of separation was accordingly executed by them, containing *inter alia* the following provisions: "And Eliza Baily Borckman agrees that she will not at any time sue or prosecute the said Robert F. Borckman for alimony, nor shall he be sued by her nor by any one in her behalf, or by any person whomsoever, for any debts contracted by her, or for any trespass which she may happen to commit or be charged with; and she will not claim any right or title which she may have to any jointure dower or third out of his estate, real, personal or mixed, of which he is seized or possessed, or may hereafter become seized or possessed, but he may sell the same free from her claim, and she will

indemnify him against all such claim. And said Robert F. Borckman shall at all times, from and during the said separation, have and exercise full and exclusive control, custody, charge and possession of the children of said Robert F. Borckman and Eliza B. Borckman, to-wit, etc., he agreeing to sufficiently educate, maintain and provide for them."

The consideration of this deed was \$1,200 paid by Borckman to his wife.

Borckman was worth, at the date of the deed of separation, about \$75,000. But his wife had no knowledge of the value of his property or the extent of his income. In course of time the wife filed a bill praying for a decree compelling the husband to surrender the agreement to be destroyed, and enjoining him from setting it up in bar of her rights as his wife.

The master appointed by the court reported *inter alia* as follows: "The articles of separation in question were entered into without the intervention of a trustee for the plaintiff. Such a contract is void in law, but will be enforced in equity, where the contract has been consummated, and the arrangement made is a fair and conscientious one. *Hutton v. Duey*, 3 Barr, 100; *Lehr v. Beaver*, 8 W. & S. 103; *McKenna v. Phillips*, 6 Whart. 571; Story Eq. Jur. 1380.

But the plaintiff claims that the articles of separation are unfair, unjust and unequal, because they do not make sufficient provisions for her maintenance, and further that she was, when she signed the articles, ignorant of the value of the defendant's estate, and that no disclosure of the value of the same was made to her by the defendant or his agent. There is no evidence in the case going to prove that the plaintiff had knowledge of the value of the defendant's estate at the time this contract was signed; nor is there evidence that the defendant disclosed to her its value at any time.

Clearly, if the plaintiff did nothing to forfeit it, it was her right to have a full disclosure of the husband's property and income at the time the terms of the contract of separation were agreed upon, and just as clearly if she did nothing to forfeit her right thereto, she was entitled to have provisions made for her maintenance suitable to the defendant's income and estate.

In the case under consideration there is nothing to show that the plaintiff had just cause to separate herself from her husband. There is abundant evidence that the cause of such separation was her affection for Carleton. Her conduct in her relations with Carleton were such as to justify the defendant in believing that she had done all that was required to make a cuckold of him and to warrant him in dealing with her as a stranger and an enemy.

The master believing that no useful and just purpose would be served in this case by following the legal fiction of the unity of person created by marriage; believing that no principle of natural justice demands that the parties to the contract in question should be treated otherwise than contracting parties not so related; believing, in other words, the contract in question to be, under the circumstances which preceded and attended the making of it, a fair and conscientious one, recommends:

1. That the articles of separation executed by the plaintiff and defendant at Buffalo, on October 16, 1883, be given full force and effect according to their terms.

2. That the prayer of the plaintiff, as contained in the bill of complaint in this case, be refused and the said bill be dismissed at plaintiff's cost."

Exceptions filed by plaintiff to the report of the master were dismissed and a decree entered accordingly.

David Sterrett, Robert H. Ross and M. A. K. Weidner, for appellant. It is beyond doubt, that contracts of married women are void unless preserved by some statutory provision. *McQueen Husband and Wife*, 66 Law Lib. 271, 273, 281 *et seq.*; *Reeves Dom. Rel.* 45 *et seq.*; *Glidden v. Strupler*, 2 P. F. S. 400; *Walters v. Caldwell*, 6 Harr. 79; *Brunner's Appeal*, 11 Wright, 67; *Kreiser's Appeal*, 19 P. F. S. 194; *Campbell's Appeal*, 30 id. 306. So long as the marriage relation continues, the utmost good faith is required. *Darlington's Appeal*, 5 Norr. 512; *Kline v. Kline*, 7 P. F. S. 120. Although, after a separation by private arrangement of the parties, a husband and wife may be relieved from the necessity of cohabitation, they still retain their relative position; the husband will, consequently, be liable to his wife's debts, unless he provide for her maintenance by an adequate allowance and it is regularly paid. 2 Lead. Cases in Equity, 1700. So earnest, indeed, are courts to promote the reconciliation of parties living in a state of separation, that they will, on no occasion whatever, enforce articles of separation by decreeing a continuance of the separation. Story Eq., § 1427.

R. Brown, M. F. Elliott, R. B. Stone and A. Leo. Weil, for appellee. Is such an agreement valid and will the courts enforce it? Says Mr. Justice READ in *Hitner's Appeal*, 4 P. F. S. 110: "In *Wilson v. Wilson*, 5 House of Lords Cases, 59, Lord St. LEONARDS said: 'As regards the point of law I think there ought to be no doubt now entertained as to how that stands. It is perfectly and clearly settled, and now only to be reversed by act of parliament, that deeds of separation may, and must if they are properly framed, be carried into execution by the courts of this country. There is no question at all about that. After explaining a misapprehension as to some expressions used by Lord COTTENHAM, he said: 'I only mention it in consequence of what has fallen from my noble and learned friend who has preceded me, because it must not be doubted that the law of this country is, that deeds of separation are valid and will be carried into execution.' The same doctrine is distinctly stated in a former hearing of the same case by Lord COTTENHAM, 1 id. 572, citing *Jones v. Waite*, 9 Clark & Finnelly, 109, and the language of Lord Chief Justice TINDAL in delivering the opinion of the judges in that case. In Pennsylvania this rule has been adopted in its fullest extent. In *Hutton v. Hutton's Adm'rs*, 3 Barr, 100, Judge ROGERS said: 'Deeds for the separation of husband and wife are valid and effectual, both at law and in equity, provided their object be actual and immediate, and not a contingent or future separation.' And in *Dillinger's Appeal*, 11 Casey, 357, the same doctrine is

maintained and carried out, excluding the widow from all dower and interest in the real and personal estate of her husband agreeably to the deed of separation."

PER CURIAM. The learned judge committed no error in refusing the relief prayed for by the plaintiffs, nor in decreeing that the bill be dismissed at the costs of the plaintiff therein. In the absence of any cross-bill asking therefor, the portion of the decree as to the force and effect to be given to the articles of separation is unauthorized, and to the extent of striking out that part of the decree it is amended.

Thus modified the decree is affirmed and the appeal dismissed at the costs of the appellant.

STEVENS v. BROWN ET AL.

May 24, 1886.

EJECTMENT — FRAUD, ACTUAL AND CONSTRUCTIVE.

Judgment creditors pressing the owner of an equitable title—part of the purchase-money being paid—he confessed a judgment to the legal owner in an amicable action of ejectment, and the latter obtained possession under an *habere facias*. The equitable owner's interest was sold and bought in by his judgment creditor, who brought ejectment, alleging that the confession was fraudulent and void as to him.

Held, that there being no actual fraud in the case, fraud would not be presumed from the above circumstances.

Error to the common pleas of Potter county.

Ejectment by J. W. Stevens against Wm. M. Brown, A. F. Dodge and Samuel Metcalf, for eighty-three acres of land in Potter county.

The following are the facts of the case:

In 1861 Samuel Metcalf went into possession of fifty-eight acres of land in Harrison township, Potter county, Pennsylvania, under a contract with Fox & Ross. On May 27, 1879, he purchased twenty-five acres more from Fox & Ross, and took a new contract for eighty-three acres, the contract price for the whole being \$986, due in six equal annual payments from that date. Subsequent to this contract, judgments were entered by revival and new judgments against Metcalf in favor of J. W. Stevens, the plaintiff, amounting to \$550, and in favor of other judgment creditors, amounting to \$250, making a total of \$800. In April, 1882, Samuel Metcalf conveyed the land in dispute by quit-claim deed to A. F. Dodge, one of the defendants, upon an understanding that Dodge was to pay the liens against the land, and let Metcalf have a chance to redeem it. A few days afterward, Dodge and Metcalf went to Condersport to make arrangement with the land office, and upon examination of the records, Dodge declined carrying out the arrangement, saying that the land was not worth any more than the amount due the office and the amount of the judgments against it. On April 17, 1882, Fox & Ross brought ejectment against Metcalf to enforce specific performance of contract, three payments being due and unpaid, which was returned served on Metcalf.

June thirteenth, the defendant appeared by attorney and plead "not guilty."

On June 14, 1882, J. W. Stevens, learning that an ejectment had

been brought against Metcalf, went to the office of Fox & Ross and informed their agent that he was a judgment creditor of Metcalf's, and asked him what he should do to protect himself. He was told that he could pay the purchase-money. He then asked the agent when it must be paid, and was told that nothing more would be done in the matter until September term. Stevens issued upon his judgments June 21, 1882, and levied upon the land in dispute. Three days afterward A. F. Dodge procured Metcalf to sign a confession of judgment in ejectment for the land, to be released upon the payment of \$1,173.34 in ten days, in default of which *habere facias* was to issue without leave of court. *Habere facias* was issued July 27, 1882. Metcalf was put out of possession, and possession of the land was delivered to Dodge. Metcalf at once went back into possession of the land. Wm. M. Brown, Dodge's partner, was present at the delivery of possession by the sheriff, and the next day went to Coudersport and took a contract for the land, the consideration being the amount due from Metcalf and costs, with about \$6 added, making \$1,200. Stevens proceeded with his writ against Metcalf, purchased the land at the sale by the sheriff, and brings this suit to recover possession from the defendants, claiming the confession of judgment in ejectment by Metcalf was given for the purpose of cutting off the judgments, and was a fraud upon him as creditor, and void.

The land was all Metcalf owned in the world. The referee finds as matter of fact that it was worth \$800 over and above the amount due at the office. That Dodge had a conveyance of the land from Metcalf prior to the confession of judgment; that he afterward returned it to Metcalf, saying the land was not worth more than its purchase-money and judgments; that he procured Metcalf to sign the confession of judgment in ejectment three days after Stevens levied upon the land; that Dodge took possession of the land from the sheriff; that Metcalf immediately went back into possession under Dodge as agent for Fox & Ross; that Brown was a partner of Dodge and was present at the time, and went the next day to Coudersport to take a contract for the land at the price due from Metcalf; that Metcalf signed the confession of judgment agreeing to be set out in ten days, when he knew he could not pay the \$1,173.34, but finds that there is no evidence of fraud; and that these facts taken together do not amount to constructive fraud.

The following is the finding of law by the referee:

The referee was requested by the plaintiffs' counsel to find, first: "That the confession of judgment in ejectment was a constructive fraud upon the judgment creditors of Samuel Metcalf, and is void as against said creditors." This request raises what the referee regards as the principal question in this case. In support of this proposition the plaintiffs' counsel cited several authorities, but relied chiefly upon the case of *Forester v. Hanaway*, 1 Norr. 218. The referee is of the opinion that there is a marked difference in the facts between the above-cited and this issue. By the terms of the contract under which Metcalf held the land, the plaintiffs in ejectment have the right to make void the contract and to possess the land clear of the agreement. Metcalf,

by his failure to pay, had given Fox & Ross that right years before that action was commenced. The value of the liens against Metcalf, defendant, upon his estate under the terms of this contract, and Fox & Ross, rights themselves; and "they survive or perish with it." This action of ejectment was commenced by summons, in the usual way, and of this action Mr. Stevens had knowledge, but he made no offers to the owners of the legal title, who pursuing a legal right given them by an act of assembly, procured the confession of judgment mentioned in the finding of facts in this case. They afterward made a *bona fide* sale of the land to Wm. M. Brown, for what was then considered a fair price, and Brown in good faith has been paying for the land. In all this the referee fails to find either actual, constructive, legal or intended fraud.

The cases of *Damon v. Bache*, 5 P. F. S. 67, and *Price's Appeal*, "Common Pleas Reports," page 84, decided since the hearing in this case, we believe, rule the case at bar, and being of this opinion, the referee refuses to find, as requested in either of the plaintiff's points, and affirms the requests as to finding of law submitted by the defendant's counsel.

That as to Samuel Metcalf the tender of judgment referred to in the pleadings was all the plaintiff could legally ask of him; he makes no pretense of title, and in order to avoid further costs, entered his disclaims of record sufficiently early to warn the plaintiff before trial. This is sufficient. *Stennents v. Logan*, 3 Watts, 160.

The defendant, A. F. Dodge, never having been in the actual possession of the land, and never claimed title to it. A recovery could not be had against him in this action. *Lane v. Nemlel*, 5 P. F. S. 319.

The referee, therefore, finds in favor of the defendants and against the plaintiff for costs of suit.

Assignments of error.

Because the referee found as a matter of law :

First. That the confession of judgment or ejectment by Metcalf was not a constructive fraud upon Stevens and other judgment creditors of Metcalf.

Second. In not finding as matter of law that the confession of judgment in ejectment by Metcalf, after he had conveyed the land to A. F. Dodge, was inoperative and void.

Mann & Ormerod, for plaintiff in error. The conclusion [that there was a combination for a purpose, from the facts so found by him, is irresistible, and there could be no other purpose than to cut off the liens of the judgments. The least concert or collusion between the parties to an illegal transaction makes the act of one the act of all. *Confers v. McNeal*, 24 P. F. S. 112. Fraud may be inferred from facts clearly proven leading to that conclusion. *Jackson v. Somerville*, 1 Harr. 359; *Kane v. Weigley*, 10 id. 179. The referee erred in finding as matter of law, that the facts found by him do not amount to a constructive fraud upon the judgment creditors of Samuel Metcalf. In determining this question the referee relies upon the cases of *Damon v. Bache*, 5 P. F. S. 67, and *Price and Pancast's Appeal*, 42 Leg. Int. 415, as authority for his ruling. An examination of these cases will at once demonstrate that there is no similarity in this case to either

Damon v. Bache or Price and Pancast's Appeal, except the fact that there were confessions of judgment in ejectment in each case; and that the case at bar is identical with *Forrester v. Hanaway*, 1 Norr. 218. The referee erred in not finding as matter of law "that the confession of judgment in ejectment by Metcalf after he had conveyed to Dodge was inoperative and void." The delivery back of the deed did not reinvest Metcalf with the title to the land. Statute of Frauds and Perjuries, *Purd. Dig.*, vol. 1, p. 724, § 2; 4 Kent's Com. 412; *Wiley v. Christ*, 4 Watts, 199; *Cravener v. Bowser*, 4 Barr, 262. Dodge would have been able to avoid the judgment, and if Dodge could as a fraud upon him, Metcalf's creditors can.

Larrabee & Lewis, for defendants in error. There can be no constructive fraud where a party is acting in good faith and pursuing a legal remedy in the usual way. "It would indeed be intolerable if a vendor, before he could take a confession in ejectment for the purpose of recovering his purchase-money, must first search the dockets to learn whether or not there was a judgment creditor who might be affected thereby. Such judgment creditors must take care of themselves. If they desire to protect their judgments against the holders of the legal estate they may pay the purchase-money and thus control the title." *Price's Appeal*, 42 Leg. Int. 415; *Damon v. Bache*, 5 Sm. 67; *Maxon's Appeal*, 25 id. 176.

PER CURIAM. It is found as a fact that there was not any actual constructive, legal or intended fraud in the confession of judgment. Such being the case, its validity cannot be impeached in this contention. It is wholly unlike *Forrester v. Hanaway*, 82 Penn. St. 318, in which we held the fact there proved constituted a fraud on other creditors. *Price's Appeal*, 42 Leg. Int. 415, is similar to the present case, and the validity of the judgment was there affirmed.

Judgment affirmed.

TIBBINS v. JONES ET AL.

May 24, 1886.

MARRIAGE — SEPARATE ESTATE OF WIFE — FRAUD.

A. carried on business, became insolvent, and was sold out by the sheriff. B., his wife, then continued the business in the same shop and with his name still on the sign. She gave him a sum of money out of her separate estate with which he bought a horse to be used in the business. C., a constable, levied on and sold the horse as the property of A. in pursuance of an execution against him. In an action for damages by B. against C., *held*, that B.'s method of conducting her business did not constitute a legal fraud and that she was entitled to recover.

Error to the court of common pleas of Perry county.

E. S. Jones, the husband of Mary A. Jones, had a meat shop in the borough of Newport and a wagon which he used in conducting the business. Over the shop door was the sign "E. S. Jones." He was sold out under an execution, in January, 1884, and his wife then carried on the business in her own right, the shop and sign remaining as before, and the same wagon being used. She had some money of her own, and in February, 1884, gave her husband \$35 with which to buy a

horse to be used in the business. He borrowed \$20 more on her credit which she afterward repaid, and bought a horse. Tibbins, a constable, in pursuance of a judgment and execution against Jones, the husband, entered on a note given by Jones to one Stambaugh, before Jones' failure, levied on and sold the horse. The wife sued Tibbins in trespass and recovered before a magistrate; Tibbins appealed, and on the trial requested the court to instruct the jury, *inter alia*, as follows:

"The testimony of the plaintiff shows that she conducted her business of butchering in the old stand previously occupied by her husband E. S. Jones, when in the same business for himself, having painted over the place of business 'E. S. Jones' and nothing more; that this sign was not changed when the plaintiff set up in the same business; that the horse in controversy was used to haul round the meat to customers; came to and left the said stand with meat, and was driven by her husband.

This was a legal fraud, and subjected the horse to levy and sale on an execution against the husband. A married woman cannot place her separate property, used in a public business under a sign, in the name of her husband, and then when execution creditors of the husband appear, claim the property as her own. This horse being used to conduct the business, was as much covered by the sign 'E. S. Jones,' as if stabled under the sign itself."

Answer. "The credit in this case was given by the execution creditor to E. S. Jones and M. B. Stambaugh, his surety, and their note taken some length of time before E. S. Jones was sold out by the sheriff, and the business of butchering was succeeded in by his wife. The business of butchering was conducted principally by hauling around the meat and distributing to the customers at their respective residences and not by the customers coming to the shop and making their purchases at the counter. The butcher's sign is not, therefore, a very material thing, and in this instance there was simply the name of 'E. S. Jones' painted on the building, with nothing to indicate that any business was carried on at all. Because, therefore, this execution creditor's debt was created some time before Mrs. Jones began the business, we decline to affirm this point as applicable to the facts in this case."

The court instructed the jury, *inter alia*, as follows: "It is settled law that when a married woman has a separate estate and buys property on the credit thereof she may hold the property thus bought, against the creditors of the husband. It is equally as well settled that when she has no separate estate and buys property on her own personal credit she cannot so hold it." *Stober v. Standart*, 42 Leg. Int. 454. The wife has a separate estate and the horse was not bought on credit. It was paid for in cash. It is true that \$20 was borrowed by the wife from Mr. Stambaugh, as stated in the evidence. But he refused to lend to Mr. Jones, and, although it does not appear affirmatively that he had loaned on the credit of Mrs. Jones' separate estate, yet we know nothing, to prevent him from trusting to the ability and willingness of Mrs. Jones to pay voluntarily; and she testifies that she repaid the loan out of her separate estate to the extent of \$24 in money and the remainder in meat furnished in the due course of her business. She

testifies that she carried on the butchering business, buying the cattle through her husband as agent and paying for them out of her own separate funds. Her husband testifies that he had shortly before been sold out by the sheriff and had neither property nor money, and that the business of butchering was carried on by his wife, through him as her agent; and he had no money to put into the business, and money of his wife was paid for the horse. The verdict was for plaintiff.

Lewis Potter, W. N. Seibert and B. F. Junkin, for plaintiff in error. The question is, can a wife, even having an undisputed separate estate, carry on business under the sign exhibiting the name of her husband, without indicating the character in which he acts, especially where, for a long time, both stand and sign had immediately before been used by the husband in carrying on the same business for himself. A husband does a butchering business in a shop, with his own name over as a sign; he fails, is sold out, and immediately the same business is resumed, apparently conducted by the same man and husband, in the same place and shop, and under the same sign, with nothing to indicate that he is the agent of his wife. What could be more misleading? Surely this does not avoid the appearance of evil. *Ward v. Biddle*, 12 Phila. 538. And again, we conceived that it was imperative upon the wife, Mary Jones, to show affirmatively that Stambaugh made the loan to her husband as her agent upon the faith and credit of her separate estate, which necessarily involves the idea that she must also show affirmatively that Stambaugh knew she had a separate estate. *Siabee v. Bowen*, 10 Norr. 149; *Lochman v. Brobst*, 6 Out. 481.

W. H. Spousler, for defendant in error, submitted no paper book.

PER CURIAM. Notwithstanding the able and zealous argument of the counsel for the plaintiff in error, we discover no error to correct. No fact was shown which is sufficient to constitute legal fraud. The manner in which the wife used her property and carried on her business indicates honesty of purpose. No person should have been deceived or misled thereby.

Judgment affirmed.

SCOTT v. HART, TO USE OF FASSETT.

May 24, 1886

EVIDENCE — RELEVANCY OF DEPOSITION.

A. purchased property from B. upon his representation that it was clear of incumbrances, giving him therefor a series of judgment notes; subsequently A. had to pay off a lien against this property. After B. assigned several of these notes to C., who in turn assigned the one in suit to D. In a suit by D. against A., *held*, that the deposition of a witness who was present at a conversation between A. and C. at the time C. bought two of the notes but not the one in suit, to the effect that he had no defense against these notes, was properly admitted in evidence.

Error to the court of common pleas of McKean county.

Judgment entered on a judgment note for \$2,000. Subsequently a rule was made absolute to open the judgment as to \$1,700, and defendant was permitted to make defense.

The facts of the case, as stated in the charge of OLMSTED, P. J., are as follows:

"It would appear from this case that Scott, the defendant, bought of Hart an oil property in this county, for the sum of \$10,000; a series of notes were given for this \$10,000, secured by a mortgage back upon the property, and the note in controversy is the last one of that batch of notes, and the larger one. This was a note commonly called a judgment note, containing a warrant of attorney authorizing the prothonotary to enter judgment upon it, and a judgment was entered upon this one in favor of Hart, who was the payee, for the use of Corey, and further for the use of N. Fassett, who is the use plaintiff on the record as the issue is made up at this time. The defendant, Scott, after the entry of the judgment upon this note, came into court and got this judgment opened, alleging that he had a defense, and an issue was formed by the court to determine whether he had a sufficient defense to defeat the plaintiff's right to collect this note, there being disputed questions of the fact in the case such as the court thought was properly the province of a jury to determine and not the court."

Scott, the defendant, alleged that Hart had induced him to purchase said property by representing that it was free from incumbrances except as to a mortgage of \$2,500, and that this had been fully paid, and would be discharged of record without delay; that said mortgage had not been paid, but judgment was entered thereon, and he, Scott, was obliged to pay it to save his property; that, in addition to the sum paid on this mortgage, he had paid \$8,300 on account of his purchase, and that the \$1,700 claimed by the plaintiff was the balance due on the last note in this transaction.

On behalf of plaintiff, Corey who purchased several of the notes from Hart, and who assigned the one in dispute to Fassett, the present use plaintiff, claimed to have had a conversation with Scott, before he purchased the two first notes, in which, he alleges, Scott said he had no defense to the notes. This was denied by Scott.

Plaintiff further offered deposition of W. T. Coleman, who was present at the conversation referred to by Corey, which deposition confirmed Corey's story about the two notes.

The testimony was objected to by defendant because the conversation was not as to the note in suit. Objection overruled; exception.

The court let the case go to the jury on the question of whether or not Mr. Scott said to Mr. Corey that there was no defense to these notes, saying *inter alia*: "It would be unjust and inequitable that Scott should be allowed to set a trap in which Corey might fall, and then come in here after Corey had placed himself in that position on the strength of it, and avail himself of the defense that existed prior to Corey's purchase."

Verdict for the plaintiff in the sum of \$2,159.64.

W. B. Chapman and *Jno. B. Chapman*, for plaintiff in error. The court erred in charging the jury, as it not only assumes the fact to be that Corey had the alleged conversation with Scott, and also intimating to the jury that Scott was acting dishonestly in making this defense.

The deposition of Coleman was irrelevant to this issue, and should not have been admitted. The objection to it is based upon the fact that the conversation testified to by Coleman was two months after the alleged conversation of Corey and Scott, and was not in reference to it, and was not as to the note in suit, but to a separate transaction, and was but a declaration in the presence of Corey, and not to him. *Young v. Com.*, 4 Casey, 501; *Duval v. Darby*, 2 Wr. 56; *Grimes v. Bunnell*, 28 Sm. 15; *Mecough v. Loughery*, 35 Leg. Int. 222.

N. B. Smiley and *T. A. Morrison*, for defendant in error. There is no force in the argument of the learned counsel that this was about two months subsequent to the statement by Scott to Corey; nor in the point that Scott's statement was not made to Corey, but to Coleman in Corey's presence. *McMullen v. Wenner*, 16 S. & R. 18; *Snyder v. O'Connell*, 1 W. N. C. 84.

PER CURIAM. It was not error to admit the deposition of Coleman. It certainly tended to corroborate the evidence of Corey. The other specifications of error relate to the charge of the court. While some portions thereof may be open to criticism, yet taken as a whole it presents the case fairly to the jury. We do not think it is either misleading in its effect, nor partial in its character.

Judgment affirmed.

MCINTIRE v. WING ET AL.

May 24, 1886.

EJECTMENT — NONSUIT — POSSESSION IN DEFENDANT MUST BE SHOWN.

It is proper to nonsuit a plaintiff in an action of ejectment, who, on the trial, fails to show the defendant in possession.

PRACTICE — EFFECT OF APPEARANCE AND PLEA.

An appearance and plea may lead to a verdict and judgment against defendants, yet in the trial of an action of ejectment, it is necessary to prove that the defendants were in possession of the premises.

Error to the court of common pleas of McKean county. Ejectment by C. E. McIntire against J. A. Wing *et al.* The facts were substantially as follows:

About the 6th of March, 1878, J. C. Prescott, D. C. McIntire, J. H. Harmon and G. A. Lackey visited the office of Lewis Emery, Jr., in Bradford city and made a verbal contract with him, in which he, acting on behalf of the Quintuple Oil Company, and as its manager, agreed to make, execute and deliver to them a written lease for oil purposes, subject to a royalty reservation of one-fourth of the oil obtained, for the period of twenty years, of two certain adjoining pieces of land, known as subdivision lots Nos. 236 and 237 in warrant No. 2287, Bradford township, McKean county, Pennsylvania; while they as a condition precedent, agreed to drill and complete, or procure to be drilled and completed, an oil well thereon, within a reasonable time stipulated.

The agreement among the four persons named as lessees at the start was, that each should own an undivided one-fourth interest as joint owners in the lease and well; but by virtue of certain assignments D.

C. McIntire became entitled to five-eighths and J. C. Prescott to three-eighths thereof as co-owners or tenants in common.

The assignments above referred to were, however, made prior to the execution of any lease.

An oil well was drilled and completed on the lots mentioned, about the early part of August, 1878, with funds, a portion of which were the separate property of D. C. McIntire, and the remainder thereof being taken out of the assets of the "McIntire Torpedo Company." Shortly afterward, the Quintuple Oil Company made, executed, and delivered, in pursuance of the parol agreement aforesaid, a written lease for the lots, for a period or term of twenty years, subject to one-fourth royalty; but at the request of J. C. Prescott the lease was executed and delivered in the name of J. C. Prescott & Company, D. C. McIntire not being present or assenting thereto.

About the 1st of September, 1878, Prescott executed a written bill of sale in the name of "Prescott & Company," to one F. M. Cozad, for the lease and property. McIntire did not sign the bill of sale or ratify the transaction in any way.

At the time of the application for the lease, above referred to, and until about the 26th of September, 1878, J. C. Prescott and D. C. McIntire were partners engaged in the business of manufacturing nitroglycerine, and exploding the same in oil wells, under the firm name of "The McIntire Torpedo Company," their business being transacted mostly in the vicinity of Bradford, in McKean county.

On the 26th of September, 1878, J. C. Prescott executed another bill of sale, in which he signed the name of F. M. Cozad as attorney in fact, transferring the property in dispute to J. A. Wing, one of the defendants. D. C. McIntire did not join in this conveyance, or assent thereto.

Within a few days after the purchase from Cozad, J. A. Wing went into possession of the lease and excluded D. C. McIntire from all participation therein.

On the 17th of October, 1878, D. C. McIntire, by an instrument in writing, which specified his interest as an undivided five-eighths, transferred his rights in the disputed property to C. E. McIntire, the plaintiff. This action of ejectment was commenced on the 31st of March, 1880, to recover the plaintiff's five-eighths interest in the lease and property described in the writ of ejectment.

The writ was served May 22, 1880, upon I. G. Howe and John Eaton as terre-tenants. The return of the sheriff showed that J. A. Wing and A. R. Sellw, the defendants named in the precipe, were not found in his bailiwick when the action was begun, and that at that time they were not in possession of the premises at all, but that the premises were in possession of other and different parties.

The defendants, Wing and Sellw, were only brought upon the record by an appearance entered through mistake for them by W. W. Brown, attorney, which appearance was afterward withdrawn by leave of court.

At the close of plaintiff's evidence, counsel for defendant moved for a compulsory nonsuit for the following reasons:

1. As to the defendant, A. R. Sellew, plaintiffs have shown no such title to the land in dispute as would entitle them to recover against him.

2. The plaintiffs have failed to show that the defendants, Wing and Sellew, were in possession of the land described in the writ at the time the same was issued, and the return of the sheriff shows affirmatively that they were not in possession.

The nonsuit was granted by the court.

E. Crossman, McSweeney & Byles and R. Brown, for plaintiff in error. Prescott and McIntire entered on the land in dispute under the lease and completed an oil well thereon; and that they remained in the peaceable and uninterrupted possession of this land until about the 26th of September, 1878, at which time, J. A. Wing, one of the defendants, entered into possession and excluded D. C. McIntire therefrom. Between March 6, 1878, and September 26, 1878, A. R. Sellew was not in possession according to the undisputed evidence. If he entered subsequently into possession of the land as a trespasser, or under Wing, or indeed under any other claim of title, the plaintiff is entitled to recover upon proof of his prior possession, in the absence of evidence of a superior and better title. A naked possession is a good title against one who can show none better. *Woods v. Lane*, 2 S. & R. 52; *Shumway v. Phillips*, 10 Harr. 151; *Lair v. Hunsicker*, 4 C. 115; *Hoey v. Furman*, 1 B. 295. "Possession of land is sufficient to protect the possessor against all but the owner of the legal title. A trespasser cannot gainsay such right of possession." *Shumway v. Phillips*, 10 Harr. 151. "A naked possession is sufficient to recover on in ejectment against one who entered afterward without title." *Shumway v. Phillips*, 10 Harr. 151. See, also, *Turner v. Reynold*, 23 Penn. St. 199; *Kline v. Johnson*, 24 id. 72. Prior possession, short of twenty-one years, is *prima facie* evidence of sufficient right to recover on against a subsequent possession. *Smith v. Dorillard*, 10 Johns. 339.

N. B. Smiley, M. F. Elliott and G. L. Roberts, for defendants in error. "Parol evidence is admissible of what passed at the time of the execution of deeds, and to show fraud, mistake, or trust, or matters not inconsistent with the deed, but not to prove conversations between the parties the day before the execution thereof in order to vary their engagements." *Cozens v. Stephenson*, 5 S. & R. 421; *Ellmaker's Ex'rs v. Franklin Ins. Co.*, 5 Penn. St. 183. "A written instrument under seal and free from ambiguity cannot be affected by the conversation of the parties thereto which occurred nearly two months prior to its execution." *Caley v. Hoopes*, 86 Penn. St. 493. The fundamental principle of the action of ejectment is that it is an action for the recovery of the possession, and the plaintiff must recover on the strength of his own title, and this must be a good title. "A long term of years of very great value is not such an interest in land as is subject to the lien of a judgment; it is a chattel, subject to seizure and sale by a constable on an execution issued by a justice of the peace." *Bismark Building and Loan Association v. Bolster et al.*, 92 Penn. St. 123. "The land — owned by the firm — was personal property to be applied according to the equities between the partners, in payment of the part-

nership debts in the first instance." *Modervell v. Mullison*, 21 Penn. St. 257. "When real estate purchased by the partners, paid for with partnership funds, and conveyed to them as partners, and the deed duly put on record, is sold under a mortgage executed by them as partners, under the firm name, which has been duly recorded, the proceeds of such sale are payable under the mortgage to the exclusion of the previous judgment obtained against one of the partners." *Lancaster Bank v. Myley*, 13 Penn. St. 543. "The purchaser of a partner's interest, whether at private or judicial sale, acquires merely the right to demand an account from the other partners and to receive a certain share of the balance remaining after the payment of the partnership debts, and the adjustment of the partnership equities." *Wallace's Appeal*, 104 Penn. St. 559. "Where land is conveyed to a firm to be held by them as partnership property according to the interests which they respectively have in the partnership, and the deed is duly recorded, a subsequent purchaser of an interest in this land from a member of the firm before a settlement of the partnership accounts, takes it as personalty, and ejectment will not lie by such purchaser against his own vendee to enforce payment of the purchase-money." *DuBree, Administratrix, v. Albert et al.*, 100 Penn. St. 483.

PER CURIAM. There is no error in the refusal of the court to take off the compulsory nonsuit. The evidence wholly failed to show that the defendants were in possession of the land in question. They were not served with the writ by the sheriff. The presumption of possession created by the statute when the sheriff makes return under oath that he has duly served the writ on the defendants does not exist. While an appearance and plea by counsel may lead to a verdict and judgment against the defendants, yet on the trial, it is necessary to prove that they were in possession of the premises. Failing in this, the nonsuit was properly entered. This view makes it unnecessary to consider the other questions.

Judgment affirmed.

BAUM'S APPEAL.

May 28, 1886.

CONTRACT — EFFECT OF ENLARGING THE TIME OF PERFORMANCE BY VENDOR.

A deed for a tract of oil land was left on May ninth with a third party as an escrow, with an agreement that it should be delivered to the purchaser upon his payment of \$500 within ten days; subsequently the vendor agreed to several postponements, and on May twenty-eighth when the purchaser gave reasons for his failure to pay, said "let it rest a few days, and if I need the money I will come and see you." *Held*, that under the above circumstances the condition was well performed by a tender on June second, and on failure to get the deed the purchaser's remedy was by a bill in equity.

Appeal from the decree of the court of common pleas of McKean county.

Bill in equity by B. W. Baum against R. W. Evans and G. A. Berry, to compel the delivery of a deed, in pursuance of a contract for the sale of real estate.

The following are the facts of the case as appearing from the master's report :

"The master finds from the bill and answer, and from the evidence certified by the examiner, the following facts :

"That the defendant Evans is, and at the time of the filing of the bill was in the exclusive possession of the ten acres of land described in the first paragraph of the bill, claiming title and the right of possession thereto, and denying the existence of any fact or facts which could give the plaintiff any legal or equitable title to the land, or to its use and occupation.

"On, or a short time before, the 9th day of May, 1877, the plaintiff negotiated with defendant Evans for the purchase of the ten acres of land described in the first paragraph of the bill. The terms agreed upon were that upon the execution of the deed the plaintiff should pay the sum of \$500, cash in hand, and the further sum of \$500 to be secured by the judgment note of the plaintiff, payable in six months. Pursuant to this arrangement, which was in parol, Evans and wife executed a deed of the land, the plaintiff being the grantee therein, and the deed bearing date May 9, 1877. When the deed was ready for delivery, the plaintiff was not prepared to pay the \$500, hand payment, but proposed instead to give his promissory note of \$500, payable in ten days. Evans declined to take the note, whereupon it was agreed that the ten-day note, the six months' judgment note, and the deed — all of which bore date May 9, 1877 — should be left with defendant Berry as the representative of the parties, with the agreement that should the plaintiff pay the \$500 within the ten days, Berry should deliver the deed to plaintiff and the six months' judgment note to Evans. The plaintiff did not pay the \$500 within the ten days, nor yet at the maturity of the ten-day note, allowing the days of grace thereon, but on the twenty-third day of May the plaintiff, informing Evans that he was required to be at Franklin on important business, and would not return to Bradford, the place of business of defendants, until the evening of Friday, May twenty-fifth, and obtained the consent of Evans to wait for the payment until that time. Being detained at Franklin longer than he anticipated, Baum arranged with Evans by telegraph to wait one day longer, viz. : until the evening of Saturday, May twenty-sixth. Plaintiff returned to Bradford from Franklin on the evening of May twenty-sixth, but did not see Evans and did not pay, and did not offer to pay, the ten-day note. On Monday, May twenty-eighth, plaintiff saw Evans, explained the reason of the delay, and why he would like still further time, but proposed to raise the money and pay then if Evans so required, to which Evans said, 'let it rest a few days, Baum, and if I need the money I will come and see you.' On Saturday, June second, plaintiff tendered to Berry the amount of the ten-day note, with the trifle of accrued interest, and demanded the delivery of the deed. Berry declined to receive the money as payment to Evans and declined to deliver the deed for the reason that Evans, some time between May twenty-eighth and June second, had so notified him. Thereupon plaintiff left the money with Berry as a formal tender of compliance with the terms of his agree-

ment with Evans, and announced to Berry his purpose to assert his right to the land and his right to the deed.

"From a consideration of the evidence the master finds as a fact that the making of the ten-day note by plaintiff and the depositing the same with Berry was no part of the consideration or inducement moving Evans to deposit the deed with Berry. At the most, it was an authority to Evans to receive the note instead of the cash. But he never received it and never agreed to receive it for any purpose. Under all the evidence the master regards the deposit by Evans of the deed with Berry as a proposition from Evans to the plaintiff, and revocable by Evans at any time before acceptance of and compliance with the terms of the proposition, and the deposit of the two notes by plaintiff as a proposition from plaintiff to Evans, revocable by plaintiff at any time before Evans accepted the same as payment."

The master accordingly reported that the bill should be dismissed. Exceptions filed by the plaintiff were overruled, the report of the master was sustained by the court, and a decree entered dismissing the plaintiff's bill with costs, from which decree the plaintiff appealed.

R. Brown and J. H. Osmer, for appellant. The plaintiff submits that the contract was not avoided by the delay in the payment of the note, under the evidence in this case. Time was not of the essence of the contract. When time admits of compensation, as it, perhaps, always does where lapse of it arises from the non-payment of money at a particular day, it is never an essential part of an agreement. *De Camp v. Fay*, 5 S. & R. 323; *Wells v. Wells*, 3 Ired. Ch. 596; *Seaton v. Slade*, 7 Ves. Jr. 273; *Vorhees v. De Myer*, 2 Barb. 37. The defendant Evans, having granted indulgence and extended the time of payment of the note, could not — without regard to the question as to whether time was or was not essential — suddenly and without notice rescind the contract. *Hatton v. Johnson*, 83 Penn. St. 219; *Irwin v. Bleakley*, 67 id. 24; *Forsyth v. N. A. Oil Co.*, 53 id. 168; *Fry Spec. Perf. Cont.*, § 724; *Laird v. Smith*, 44 N. Y. 618; *Hull v. Noble*, 40 Me. 473; *Benedict v. Lynch*, 1 Johns. Ch. 370.

David Sierrett and Robert H. Rose, for appellees. The learned master held that Mr. Baum, not having paid the money within the ten days, nor yet at the maturity of the ten-day note allowing the days of grace thereon, there was nothing in the evidence of what took place afterward that would estop Evans in law or equity from countermanding the delivery of the deed. In this respect the appellant is seeking performance in equity alone. He failed to comply with the condition, and he has no case to move the conscience of a chancellor in his favor. But we insist that the court could not decree the delivery of the deed for the third reason stated by the master. The plaintiff was clearly an adverse claimant of the legal title with every material fact upon which his title rested in dispute. It was not a bill for discovery as now claimed. The right to the possession of the deed involved the right to have the title and possession of the land. The bill was, therefore, an ejectment bill.

TRUNKY, J. However much the parties may differ as to the terms of the parol contract made prior to May 9, 1877, on that day, as averred

in the answer, Evans executed the deed, and by agreement it was put into the hands of Berry as an escrow; and the notes for the purchase-money were also placed in the hands of said Berry, with the understanding that if the note first due should be paid, at the expiration of ten days the deed should be delivered to Baum. This averment accords not only with the facts alleged in the bill respecting the final agreement, but with those found by the master. Among the facts stated in the report is, that the deed and notes, "all of which bore date May 9, 1877, should be left with defendant Berry as the representative of the parties, with the agreement that should the plaintiff pay the \$500 within the ten days, Berry should deliver the deed to the plaintiff and the six months' judgment note to Evans."

"The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then be delivered to him to whom the deed is made to take effect as his deed. And no man may deliver a deed, and such delivery is good." Generally, an escrow takes effect from the second delivery, the title not being perfected in the grantee until the happening of the condition. But the grantor, when the deed has been placed in the hands of a third party as an escrow, cannot after the happening of the act on which delivery is conditioned prevent delivery taking effect by getting possession of the deed. 2 Whart. on Cont., par. 679; *Regan v. Howe*, 121 Mass. 424.

Upon payment of the promissory note in ten days, the deed was to be delivered to Baum by Berry. All parties admit that was the sole condition. It was not expressed that time was of the essence of the contract. The land was oil territory, and so situated as to be liable to sudden increase or decrease in value. In the negotiations the vendor insisted on immediate payment of half the purchase-money, and delivered the deed on condition that it should be paid in ten days. He promised to extend the time, as will be hereafter noted. The nature of nearly all mining contracts is such as to render time essential, and in several cases it has been held of the essence in contracts for the sale of mines and works. Fry Spec. Perf., par. 716. This principle ought to be applied to the stipulation in the condition respecting the deed, subject only to the enlarging of the time for performance by the vendor.

The master finds that on the twenty-third of May, Evans agreed to wait for the payment until the evening of the twenty-fifth, that he again agreed to wait until the evening of Saturday, May twenty-sixth, and that on the following Monday, Baum "saw Evans, explained the reason of the delay, and why he would like still further time, but proposed to raise the money and pay then if Evans so required, to which Evans said, let it rest a few days, Baum, and if I need the money I will come and see you. On Saturday, June second, Baum tendered to Berry the amount of the ten-day note with the trifle of accrued interest and demanded the delivery of the deed. Berry declined to receive the money as payment to Evans and declined to deliver the deed, for the reason that Evans, sometime between May twenty-eighth and June second, had so notified him."

No complaint is made by defendants of the findings of fact. Indeed it might well have been found that when the contract was made Evans promised that if the note was not paid at maturity it would make no difference for a few days, and on the faith of that promise Baum signed the note as it was written. This explains why Evans was so willing to repeatedly extend the time, and why he made the agreement on the twenty-eighth of May to see Baum if he should want the money.

It appears in the testimony that soon after the agreement made on the twenty-eighth, Coddington, who claimed some interest in the land, induced Evans to attempt to annul the contract, and to that end the notice was given to Berry not to deliver the deed. But Evans gave no notice to Baum that he wanted the money or that he considered default had been made in performance of the condition. Baum could rely on the promise of Evans to give him notice, for a reasonable time, not receiving the notice, he promptly tendered the money and demanded the deed. Conceding that Evans had the right to require performance of the condition within the ten days, and within any time thereafter, he did not; on the contrary, from the making of the contract until after he gave the notice to Berry, in every interview with Baum he agreed to postponement of the payment. His conduct was calculated to throw Baum off his guard, to induce him to believe that time was not of the essence of the condition, and under the circumstances the condition was well performed within five days after the last postponement.

We are unable to agree with some of the master's inferences from the actual facts. It is admitted in the answer that the deed was delivered as an escrow. The evidence shows this admission was correct, not a mistake; at the same time the notes were put into Berry's hand. Baum was obligated to pay the notes. Evans had no right to withdraw the deed, unless Baum failed to perform the condition. It was error to rule that the parties had done no more than to make propositions to each other, which either was at liberty to withdraw, even before the expiration of ten days.

Nor was the promise made by Evans on the twenty-eighth of May void. It must be viewed in the light of what had preceded respecting the giving of time. Both Baum and Evans acted as if Baum had the right to pay the money on that day; he did not, on the faith of Evans' promise. True, there had been no express promise to extend the time beyond the evening of the twenty-sixth, but it is obvious the parties understood the right to perform the condition existed on the twenty-eighth, a rational inference from their previous conduct.

Nor is the proceeding premature. It is a familiar principle that the remedial justice of a court of equity is often most beneficially applied in favor of persons entitled to the custody and possession of deeds. "And a case where a deed has been delivered in escrow upon a condition which has been fulfilled would seem to be one which especially justifies and calls for the exercise of this jurisdiction, since the withholding of the deed interferes with, and probably prevents, the vesting of the legal title." *Stanton v. Miller*, 65 Barb. 58.* This principle ought to apply where the grantee has done all in his power to fulfill the

* Reversed in 58 N. Y. 192.

condition, and the fulfilling was prevented by the sole act of the grantor. This is not the case where the plaintiff claims to recover possession of land under an adverse title distinct from the defendant's grant. The plaintiff claims the land by purchase, and that the deed was delivered in escrow by the vendor. His bill is to compel the handing over of that deed. Unless the right to the deed is clear, he has no case at law or in equity. If clear, it is peculiarly within the province of a court of equity to give him the specific relief to which he is entitled.

And now it is considered and decreed that the decree of the court below be and is reversed.

2. That the defendants, R. W. Evans and George A. Berry, deliver unto the plaintiff, B. W. Baum, the deed described in the bill, within ten days after notice of this decree.

3. That R. W. Evans, appellee, pay all costs, including costs of this appeal.

4. That the record be remitted for enforcement of this decree.

McDEVITT'S APPEAL.

May 31, 1886.

WILL — VESTING OF DEVISE — ACT OF APRIL 8, 1833 — TRUSTS.

A testator devised property to his son A. to hold in trust for his son B. during the natural life of B., and further provided as follows: "I direct the interest thereof to be annually paid to B., and, after his death, his share to be equally divided among his children, if he should have any, or to their issue; the issue in all cases taking the share which their parent would have taken." B. afterward died intestate, unmarried and without issue. In a contest for the fund between B.'s administrator and the representatives of the testator, *held*, that the testator did not intend to vest in B. the *corpus* of the estate, but only the right to receive the interest annually during his life.*

Appeal of Eliza L. McDevitt from a decree of the orphans' court of Lancaster county, distributing the balance of a fund appearing by the account of the trustee under the will of Richard Derrick, deceased.

The auditor found the following facts: The will of Richard Derrick was admitted to probate on the 5th day of June, A. D. 1863, and provided, *inter alia*, as follows:

"And the share of my property which my son, Eli T. Derrick, is or will be entitled to under the foregoing provisions of this will, I direct to be retained by my son, George W. Derrick, as trustee for the said Eli during the natural life of said Eli; and I direct the interest thereof to be annually paid to Eli, and, after his death, his share to be equally divided among his children, if he should have any, or to their issue, the issue in all cases taking the share which their parent would have taken."

George W. Derrick having died, Samuel Truscott succeeded him as trustee, and, after filing his account, was discharged. Wm. B. Given was then appointed by the court to succeed Truscott.

* Eli T. Derrick died on the 31st day of July, 1884, intestate, and leaving neither widow, children, nor descendants of children. He left no estate.

The fund was claimed by the administrator of Eli T. Derrick, deceased, and by the administrator *de bonis non cum testamento annexo* of Richard Derrick, deceased.

* See 31 Eng. Rep. 323.

The auditor awarded the fund to the administrator of the estate of Eli T. Derrick. Exceptions to this award were filed and dismissed by the court.

Whereupon Eliza L. McDevitt, one of the heirs of Richard Derrick, deceased, appealed.

William B. Given and *Eugene G. Smith*, for appellant. This legacy was never vested in Eli T. Derrick. It is evident from the will that the testator never intended that it should so vest. The enjoyment of it by Eli was restricted to the term of his natural life and there was a bequest over. A bequest of income will not carry an absolute estate in the principal where the plain intent of the testator is otherwise, and in arriving at that intent the words of the will must be permitted to have their proper force. *Bently v. Kaufman*, 86 Penn. St. 99. The intention of the testator is unmistakable. There was no direction or power given to any one to pay over the principal or *corpus* of this fund, or any part of it, to Eli T. Derrick at any time, or upon the happening of any contingency. The fund was placed by the very terms of the bequest into the hands of a trustee "during the life of Eli," with direction that "the interest thereof be annually paid to Eli," and with the provision immediately following that "after his—Eli's—death his share to be equally divided among his children, if he shall have any, or to their issue." Thus the testator clearly distinguished, by apt expression, between the limited use given to his son, Eli T. Derrick, and the entirety which was to go to the children of Eli, or their issue. It was a gift only of the income of the fund with a limitation as to time, and therefore the *corpus* of the fund never vested in Eli T. Derrick. *Millard's Appeal*, 6 Norr. 457. Eli T. Derrick had nothing in this fund that was the subject of gift, sale or attachment. The estate was vested in the trustee to support the contingent remainder, charged with the burden of paying income during his life-time to Eli T. Derrick. *Huber's Appeal*, 30 P. F. S. 348. The trust for Eli was an active one. *Earp's Appeal*, 25 id. 123; *Ash's Appeal*, 2 W. N. C. 360, consequently the legal estate for life was in the trustee to perform the duties imposed by the donor, and could not, therefore, coalesce with any subsequent estate. *Dobson v. Ball*, 10 P. F. S. 492. The construction of testamentary words must always depend in some measure on the special facts. *Huber's Appeal*, 30 id. 348.

MERCUR, Ch. J. Section 9 of the act of 8th April, 1833, declares "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over or by words of limitation or otherwise, in the will, that the testator intended to devise a less estate."

The present contention is, whether Eli T. Derrick took a fee in the real estate of his father, Richard Derrick, under the will of the latter? The clause under which it is claimed Eli took a fee contains no words of inheritance. It is, therefore, by implication only that it can be claimed he took a fee. *France's Estate*, 75 Penn. St. 220.

In arriving at the intent of the testator we must seek to give effect to every part of the will and give harmony to the whole instrument.

Turning then to the language of the testator, he declares all the share of his property which his son Eli will be entitled to under the provisions of the will shall "be retained by my son George as trustee for said Eli, during the natural life of the said Eli, and I direct that the interest thereof be annually paid to Eli, and after his death his share to be equally divided among his children, if he should have any, or to their issue, the issue in all cases taking the share which their parent would have taken."

Eli died intestate, unmarried and without leaving children or any descendants. The court decreed the fund to the administrator of Eli. In this we think it erred. The legacy was not vested in Eli. A trust was created and George was made the trustee of the whole fund. The *corpus* thereof was never to be paid to Eli nor to any person to be designated by him. His whole right under the devise was limited to the receipt of the interest thereon. This he was to receive from the hand of the trustee. It, therefore, clearly appears that the testator, by words of limitation in the will, intended to devise to Eli an estate less than one of inheritance.

Decree reversed at the costs of the appellee, and record remanded with instructions to make distribution to the heirs and devisees of Richard Derrick, entitled to the fund.

BUSH v. BENDER.

May 31, 1886.

REPLEVIN—TENDER—PAYMENT—NOTES.

A., who held promissory notes against B., employed C. to go to B. and purchase three horses from him, which he did, paying to B. a small amount down in cash and telling him to take the horses at an appointed time to a certain place and he would pay for them; at the time and place fixed B. was present with the horses, which were tied, whilst B. and C. entered into a hotel to settle; there, C. tendered to B. in part payment the notes held by A. against B.; these B.—who had at no time been informed of the agency of C.—refused to accept; in the meanwhile the horses were taken away by one in the employ of A., whereupon B. brought replevin to recover them. *Held*, that B. could recover as A., was not entitled to the possession of the horses until he had paid for them, and his tender of the notes under the circumstances would not be sanctioned in law as equivalent to a payment.

Error to the court of common pleas of Lancaster county.

This was an action of replevin brought by George D. Bender against Matthias Bush to recover possession of three horses valued at \$355. Bush was employed by Edward A. Ransing, a horse dealer in the city of Lancaster, to buy horses for him. On February 3, 1883, Bush went to Bender's place of business, near New Holland, and bought three horses for the sum of \$355. After agreeing upon the price Bush paid Bender \$10 in cash and ordered the horses to be delivered on the following Monday at the Black Horse Hotel, in the city of Lancaster, and he would pay for them. The horses were purchased for Ransing, although that fact was not disclosed by Bush to Bender.

On February 5, 1883, Bender took the horses to the Black Horse Hotel, where he was met by Bush; the horses were tied in the yard and the parties repaired to the bar-room, where Rush, the partner of Bush,

tendered Bender in payment of the horses two notes, the one given by Bender to Ransing, on November 22, 1882, for \$152.20, payable in sixty days after date, and the other, also given by Bender to Ransing, on September 18, 1882, for \$150, payable in sixty days after date, and some cash, which with the \$10 already paid made up the price to be paid for the horses. Bender refused to accept this tender and started immediately to the yard for his horses, but when he arrived there they were gone — Bush having had some person or persons take them away. The same day Bender issued a writ of replevin for the horses, whereupon Bush entered bond with the sheriff and claimed property. On the trial in court, Bush offered the two notes referred to in evidence and tried to have the damages reduced to the extent of the amount of the same with interest, which was refused.

B. F. Eshleman, J. A. Coyle and W. W. Franklin, for plaintiff in error. No language can be stronger, clearer, or more convincing, in support of the position taken by the defendant below, that a tender of the \$10 paid on account of the horses must have been made before suit brought, than that used in *Pearsoll v. Chapin*, 44 Penn. St. 9. As is there said by LOWRIE, Ch. J.: "There is hardly a discordant thought in the reports," that an essential element of a rescission, and an action founded upon it in cases of fraud, whether it relate to real or personal estate, is to first put the parties in the condition in which they were before the contract. See, also, *Turnpike Co. v. Commonwealth*, 2 Watts, 433; *Roth v. Caissey et al.*, 30 Penn. St. 145; *Staines v. Shire*, 16 id. 200, opinion on p. 204; and *Leaming et al. v. Wise et al.*, 23 id. 123. In Benjamin on Sales—fourth American edition—volume 1, section 606, page 530, note 2, it is said: "No principle is better settled than that a party cannot rescind a contract, and at the same time retain possession of the consideration in whole or in part which he has received under it," and in support of this statement a large number of cases are cited. The fact that the value of the property not returned is trifling ought not to make any difference in the application of this principle. See *Morse v. Brackett*, 98 Mass. 209, and *Bassett v. Bram*, 105 id. 551, 558. It is true the court told the jury that they would not say to them that there was actual fraud in this case, but in the same breath the court did instruct them that if they believed the testimony—reciting the facts in both parties' testimony—then there was actual fraud, such as permitted the plaintiff to rescind. We submit that there was no such fraud in this case, and if there was any evidence of it, it was such as should have been left to the jury. "Fraud without damage or damage without fraud gives no cause of action." The payment of plaintiff's own debt—in this case admitted by Bender at the time of delivery, to be valid—was no damage. 1 Benj. Sales (4th Am. ed.) 639, p. 557 and notes. There is a vast difference between this case and others decided in reference to the kind of fraud which will permit a vendor to rescind and replevy, even between it and that of *Harner v. Fisher*, 58 Penn. St. 453. Bush was innocent of all artifice and misrepresentation; Bender had heard that his notes were to be offered to him, yet he comes to the place of settlement and brings the horses to

the place of delivery and left them. If he had not been willing to accept his notes he never would have left his horses alone in the hotel yard.

B. F. Davis and *H. M. Houser*, for defendant in error. "Where no time is fixed, the law implies that the terms are cash on delivery." 1 Benj. Sales, § 335. In *Welsh v. Bell*, 32 Penn. St., STRONG, J., said: "It is a condition precedent of a sale for cash, in order to pass the property to the vendee, that payment should be made, clearly so, unless there has been delivery." Geo. Fogel, in his testimony, says: "Well, when I came to the yard, they wanted to take the horses out; they wanted to take the horses away; Mr. Bender said they should hold up; we could tie these horses here; they should settle for the horses before they were taken away." Under this state of facts, the property in the horses in dispute remained in Bender. 1 Benj. Sales, § 336; *Lester v. McDowell*, 18 Penn. St. 91; *Henderson v. Lauck*, 21 id. 359. Nor would the payment of the \$10 earnest money have any effect in changing the title of the property. "Whatever may have been thought of some old writers respecting the effect in the transmission of property, of giving and receiving earnest money, it is now considered of no importance, or of the smallest importance," says Judge STRONG in the *Elgee Cotton Cases*, 22 Wall. 180-195. To the same point, and also to show that the contract was merely executory, *Nesbit v. Burry*, 25 Penn. St. 208. The plaintiff in error seems to rely mainly upon the first and second assignments, to the effect that the \$10 should have been paid before suit brought, and to sustain their position cite *Pearson v. Chapin*, 44 Penn. St. 9. The ruling in that case only applies to executed contracts and where the fraud is discovered after the contract is executed. In this suit the contract was merely executory, and the fraud discovered before it was executed. Besides, the grievance complained of was corrected on the trial and by the verdict, which specially sets forth, "in favor of plaintiff for \$355 less \$10," etc. This is in accordance with the principle enunciated in *Babcock v. Case*, 61 Penn. St. 431, where it is said: "If equity requires a reconveyance to precede suit, it will be so administered; if it can be protected on the trial, as it may be in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded." In *Burns v. McCabe*, 72 Penn. St. 314, following *Babcock v. Case*, it is said: "A reconveyance or return of the property is only required in order to prevent the party from holding the thing paid for and recovering the price." Same point, *McCabe v. Burns et al.*, 66 Penn. St. 356; *Spalding v. Hedges*, 2 id. 243; *George v. Braden*, 70 id. 56; *Hamilton v. Wheeler*, 14 Pitts. L. J. 423. In *Bleakley's Appeal*, 66 Penn. St. 187, it is held that one attempting to defraud another by payment cannot ask re-payment from him attempted to be defrauded. *Harner v. Fisher*, 58 Penn. St. 453, is a case very similar in its facts to the one in controversy. In *Allen v. Hartfield*, 76 Ill. 358, the seller refused to receive his own note in payment of horses and maintained an action of trover for their value.

PER CURIAM. This was an attempt of the defendant below to get

possession of the horses contrary to the manifest intent and spirit of the contract. He was not entitled to the possession until he paid for them. The ingenious device to which he resorted to compel the application of the notes which he held against the other party cannot receive the sanction of law. Having given bond in this action of replevin and retained the horses, on the right being found against him, the further finding was an assessment of damages. In fixing on this amount it was proper for the jury to take into consideration the \$10 which he had paid. They are presumed to have done so, and to have returned a verdict for the residue of the damages.

Judgment affirmed.

APPEAL OF STATE LINE RAILROAD COMPANY.

May 31, 1886.

RAILROAD COMPANY — BONDS — MORTGAGE — PROCEEDINGS OF FORECLOSURE — TERRITORIAL EFFECT — TITLE — CONSTITUTION.

Bonds were issued and a mortgage executed by a railroad company operating a line of road located partly in New York and partly in Pennsylvania. The issuing of the bonds and execution of the mortgage were in contravention of the policy of Pennsylvania as declared in her Constitution and laws. *Held*, the property of the company situate in Pennsylvania was not bound by the mortgage.

Proceedings were instituted in a New York court to foreclose the mortgage. *Held*, they were local and without extra-territorial effect, and that a sale thereunder did not pass title to the property of the company situate in Pennsylvania.*

Appeal from the decree of the court of common pleas of Elk county. This was an appeal from a decretal order of the court below awarding an injunction and appointing a receiver *pendente lite*.

The bill was filed by plaintiffs as stockholders of the Rochester and Pittsburgh Railroad Company, suing in the right of that corporation.

The Rochester and Pittsburgh Railroad Company on February 1, 1884, made and executed in the State of New York bonds and mortgage for \$4,000,000. A part of these bonds were issued to take up pre-existing bonds amounting to \$600,000, and a mortgage securing the same, of the validity of which pre-existing bonds and mortgage no question exists or is made. A part were issued for other pre-existing indebtedness. A part of the remainder was sold, making in all about \$2,000,000.

The company was unable to sell all of the bonds, and it soon became evident that it could not pay its interest, and that a reorganization pursuant to foreclosure was inevitable.

On the 1st of August, 1884, the company defaulted on its then due interest on these bonds. As the default had been foreseen, a foreclosure suit was begun by the Union Trust Company of New York the next day in the New York supreme court, and a short time thereafter in Jefferson county common pleas, in this State.

The complaint in the New York suit set out that the mortgage was made on the whole line of road in New York and in Pennsylvania, and prayed a foreclosure and sale of the whole road in both States.

This case was brought to trial; and the result was an interlocutory judgment of foreclosure, with a reference to determine the amount due.

* See *Union Trust Co. v. Rochester R. Co. (N. Y.)*, 6 East. Rep'r, 171.

On this reference the amount due to any one in any way connected with the railroad company as officer or director was limited to the amount he had actually paid to the railroad company. Stockholders, who had bought bonds at seventy-five per cent thereof, were allowed the face of their bonds and interest.

On the report of the referee final judgment was entered directing a sale by a referee of the whole road, the part in Pennsylvania as well as that in New York, the execution of a deed to the purchaser, and that possession be given to the purchaser, and barring and foreclosing the defendants from all right, title and estate in the premises.

The Union Trust Company then applied for a decree in the Jefferson county common pleas in Pennsylvania.

An interlocutory decree was granted, and it was referred to a master to ascertain the amount due, and to report the form of a decree.

The master reported the New York judgment, and that the amount therein stated to be due was due, and a form of decree directing sale in the same manner as directed in the New York decree, and by the same person as referee or master.

On the filing of this report, the court held that no decree for the plaintiff could be thereon entered; that the cause of action was merged in the New York judgment, and that the sale of the whole road in Pennsylvania and New York must be made under that decree and dismissed that bill.

Thereupon the plaintiff proceeded to sell under the New York decree. Adrian Iselin became the purchaser. The referee executed to Iselin a deed of all the mortgaged property, including the railroad in question in Pennsylvania.

On production of this deed the Rochester and Pittsburgh Railroad Company, pursuant to the directions of the judgment, yielded to Iselin the possession of the mortgaged premises, including the road in question in Pennsylvania. Iselin took possession and operated the road. He then organized two corporations; first, the Buffalo, Rochester and Pittsburgh Railroad Company, in and under the laws of New York, to which corporation he conveyed all the mortgaged property purchased by him except the road in question in Pennsylvania; second, the Pittsburgh and State Line Railroad Company, in and under the laws of Pennsylvania, to which corporation he conveyed the road in question.

Each of said corporations took possession of, and was operating its respective properties, operating them together as one line by means of a traffic agreement.

The directors of these two corporations then entered into an agreement of consolidation under the laws of Pennsylvania and New York.

The day for the stockholders of each corporation to meet and pass upon such agreement had nearly arrived when this suit was commenced.

The plaintiffs in this suit prayed, and the court below granted an injunction restraining such consolidation.

The following is a copy of the opinion of the common pleas, per **MAYER, P. J.:**

"The defendant, the Rochester and Pittsburgh Railroad Company,

is a consolidated corporation created under the laws of the States of New York and Pennsylvania, in pursuance of articles of consolidation and merger bearing date September 28, 1881, and duly filed in the offices of the secretary of State of the States of New York and Pennsylvania.

"The railroad corporations out of which said consolidated company was formed were the Rochester and Pittsburgh Railroad Company, the Buffalo, Rochester and Pittsburgh Railroad Company, the Rochester and Charlotte Railroad Company and the Great Valley and Bradford Railroad Company, corporations organized under the laws of the State of New York; and the Bradford and State Line Railroad Company, and the Pittsburgh and New York Railroad Company, corporations created by and existing under the laws of the State of Pennsylvania. The aggregate capital stock of these six consolidating companies, as authorized by their respective charters, was the sum of \$6,310,000. The articles of consolidation and merger provided for an issue by the consolidated company of shares of stock to the amount of \$10,000,000, in exchange for the shares of the capital stock of the consolidated companies in certain proportions as set out in said articles of consolidation. The act of assembly of the State of Pennsylvania, approved March 24, 1865, under which the consolidation of these various companies was effected, provides in section 3, as follows:

"'Upon making and perfecting the agreement and act of consolidation as provided in the preceding section, and filing the same or a copy with the secretary of the Commonwealth as aforesaid, the several corporations parties thereto shall be deemed and taken to be one corporation by the name provided in said agreement and act, possessing within this Commonwealth all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated.'

"The New York statute provides in section 3, that upon consolidation, 'the said corporations parties thereto shall be deemed and taken to be one corporation. . . . But said act of consolidation shall not release such new corporation from any of the restrictions, disabilities or duties of the several corporations so consolidated.'

"The line of railway of the consolidated company extended from the city of Rochester, New York, to Punxsutawney, Jefferson county, Pennsylvania.

"The Constitution of the State of Pennsylvania in article 16, section 7, provides that 'no corporation shall issue stock or bonds except for money, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice given in pursuance of law.'

"To carry into effect this constitutional provision an act of assembly was passed and approved April 18, 1874, providing for the manner of increasing the capital stock and indebtedness of corporations. *Vide* P. Laws of Pennsylvania, of 1874, p. 61. After said consolidation

was effected, the capital stock of the Rochester and Pittsburgh Railroad Company was increased from \$10,000,000 to \$20,000,000, which was largely in excess of the aggregate capital stock of the corporations merged and consolidated.

"On the 1st day of February, 1884, the said Rochester and Pittsburgh Railroad Company executed a mortgage to the Union Trust Company of New York, as trustee, to secure an issue of bonds not exceeding in amount the sum of \$4,000,000, with interest thereupon, payable semi-annually on the first days of February and August in each year, at the rate of six per cent per annum. This mortgage included the entire line of railway of the Rochester and Pittsburgh Railroad Company in the States of New York and Pennsylvania, as well as thirty-nine thousand six hundred shares of the capital stock of the Rochester and Pittsburgh Coal and Iron Company. The mortgage was recorded in the several counties of New York and Pennsylvania through which the line of railway passes. The semi-annual installments of interest became due and were not paid, whereby, by the terms of the mortgage, it was provided that where default was made in the payment of interest, and such default continued for sixty days, the principal sum of said mortgage debt became due and payable. After the expiration of the sixty days the Union Trust Company, the trustee in the mortgage, on the 2d day of October, 1884, filed a bill of foreclosure in the supreme court of Monroe county, New York, and on the 30th day of May, 1885, a decree was entered in the foreclosure proceedings had upon said mortgage, and John M. Davy was appointed by the court referee to sell at public auction at the front door of the court-house in Rochester, New York, after giving public notice of the time and place of sale, the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, which by the report of the referee, confirmed by the court, was ascertained to be the sum of \$2,056,292.11. The sale by the referee included the entire line of railway both in the State of New York and the State of Pennsylvania, and on the 16th day of October, 1885, the referee executed and delivered to Adrian Iselin, the purchaser of the mortgaged premises, a deed for the same, under and in pursuance of said decree, for the consideration of \$1,110,000, the amount bid at the sale.

"The decree of the Monroe county court contains, *inter alia*, the following: 'And it is further ordered, adjudged and decreed that the defendants in this action and each and all of them, and all persons claiming under them, or any or either of them after the filing of such notices of pendency of this action, be and are hereby barred and foreclosed of all right, claim, title, lien, interest and equity of redemption in the said mortgaged premises, and each and every of them.'

"It appears in the record of said proceedings that prior to the making of this decree, an affidavit was made on behalf of the plaintiffs and filed in the case, setting forth 'that due notice of the pendency of this action, a copy of which is annexed, was duly filed in the offices of the several clerks of the several counties through which the said railroad runs, to-wit: The counties of Monroe, Wyoming, Allegany, Cattaraugus, Livingston, Erie and Genesee, on the 2d day of October, 1884.'

"This notice was filed in conformity with the provisions of section 1631 of the New York Code of Civil Procedure, *vide postea*.

"The plaintiffs are stockholders of the Rochester and Pittsburgh Railroad Company and have filed their bill in which they aver: That no lawful or valid consolidation or merger was effected between the six corporations out of which the consolidated company was formed. That the articles of merger and consolidation, under which it is claimed such consolidation was consummated, were not drawn in accordance with the laws of the States of New York and Pennsylvania, but on the contrary, in direct violation of the laws of said States, for the reason that the issue of shares of stock of the consolidation company was in excess of the aggregate capital stock of the consolidation companies.

"Conceding that the increase of the capital stock of the consolidated company was in excess of the amount authorized by the consolidating acts of the States of New York and Pennsylvania, and consequently illegal, it does not follow that the consolidated company has no valid or legal existence, or that the validity of such consolidation can be assailed in this collateral proceeding. Its legality can only be questioned by the State, and then only in a direct proceeding instituted for the purpose. 'Where a corporation has abused its powers or committed acts which are unlawful, it nevertheless continues to exist as a corporate body, until the State or government which created it shall, by a proper proceeding, procure an adjudication and enforce a forfeiture of the charter. But all such proceedings are at the instance and on behalf of the State or government.' *Ormsby v. Vermont Copper Company*, 65 Barb. 360.

"The invalidity of a charter cannot be inquired into collaterally, and least of all by a member who has enjoyed the benefits of its privileges. *Dyer & Co. v. Welker*, 4 Wr. 157; *H. J. & S. R. R. Co. v. Halderman*, 1 Norr. 36.

"When a charter has actually been granted to certain persons to act as a corporation, and they are actually in the possession and enjoyment of the corporate rights granted, such possession and enjoyment will be held against one who has dealt with them in their corporate character. *Angel & Ames Corp.*, § 80.

"He cannot be permitted to prove, in a collateral proceeding, that a condition precedent to its full corporate existence has not been complied with. When there is a *de facto* corporation, and the State does not interfere, its corporate existence and its ability to contract cannot be questioned. *Spahn v. Farmers' Bank*, 13 Penn. St. 434; *Commissioners v. Bolles*, 94 U. S. 104.

"The bill further charges, that the bonds issued by the consolidated company, and the mortgage securing the payment of the same, executed and delivered to the Union Trust Company of New York, and upon which the foreclosure proceedings were had in the supreme court of Monroe county, New York, were illegal and void so far as they affected the property of the corporation in the State of Pennsylvania. That the bonds were issued in disregard of article 16, section 7 of the Constitution of Pennsylvania, and of the act of assembly of April 18, 1874, passed to enforce the provisions of said constitutional

article. That the issuing of said bonds and the creation of said mortgage, by reason of the violation of the Constitution and the laws of the State of Pennsylvania, became no lien upon the corporate property in this State. That bonds and mortgages of a corporation are within the term 'indebtedness,' as declared in the Constitution, will hardly be controverted. 'There surely cannot be higher or more dangerous debts as applied to corporations,' and they come within the meaning and intention of the law. The manifest purpose of the constitutional provision and the act of April 18, 1874, was that the owners of corporate property should be able to exercise some control and supervision over their property and the agents who manage it, and that stockholders should be afforded an opportunity to pass upon the question of mortgaging their property. Thus by the adoption of this constitutional provision, the State of Pennsylvania has declared a fundamental policy in regard to the increase of 'the indebtedness' of corporations, and prescribed under what restrictions and regulations such indebtedness shall be created. It was not claimed on the argument that the requirements of the Constitution of Pennsylvania and the act of 1874 had been complied with, in the issuing of the bonds and the creation of the mortgage, but it was insisted that although the Rochester and Pittsburgh Railroad Company had increased its indebtedness and had issued its bonds and executed the mortgage so as to conflict with the Constitution and laws of Pennsylvania, that they do not apply to the acts of the corporation when acting in New York, and that the corporation having authorized there the issuing of the bonds, and being valid by the laws of that State, they are valid in Pennsylvania.

"I do not assent to the correctness of this position. Although by the terms of the consolidating acts of the two States, the consolidating corporations are 'deemed and taken to be one corporation,' yet it has no legal existence in either State, except by the laws of that State, and the consolidated company, so far as the regulation and control of its corporate property is concerned, must necessarily be subject to the Constitution and laws of such State, unless such control and supervision have been surrendered. So that when the consolidating corporations became one corporation by the co-operating legislation of the two States, it was subject to all the provisions of the Constitution and laws of Pennsylvania, and 'all the restrictions, disabilities and duties of each of such consolidating corporations.' *Vide* Consolidation Act of Pennsylvania of 1865. 'The *status* of a company acting under charters from two States is that of an association incorporated in and by each of the States, and when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting, and that only — the legislation of the other State having no operation beyond its territorial limits.' *Racine R. R. Co. v. Farmers' Trust Co.*, 49 Ill. 331. 'The new company stands in the same relation to each State as the original company in that State.' *Delaware R. R. Tax* case, 18 Wall. 106.

"In *Graham v. R. R. Co.*, 14 Fed. Rep'r, 757, in speaking of the consolidation of several railroad companies into one company, under the laws of several States, the court, in its opinion, says: 'In such cases

the corporation has a common stock, the same shareholders and officers, the same property and a single organization, and is for most purposes one corporation. But it is a separate corporation in each State so far that it is governed by the laws of each State within its own territory.' Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; in the latter case the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. Story Conf. Law, §§ 242-280. If valid where made, it is by the general law of nations, *jure gentium*, held valid everywhere by tacit or implied consent of the parties. *Id.*, § 252.

"But there is an exception to the rule as to the universal validity of contracts, which is, that no State will recognize or enforce a contract which would be repugnant to its policy or injurious to the rights, the interests or the convenience of such State or its citizens. Story Conf. Laws, § 244. This exception results from the consideration that the authority of the acts and contract done in other States as well as the laws by which they are regulated are not *proprio vigore* of any efficacy beyond the territorial limits of that State; and whatever effect is attributed to them elsewhere is from comity, and not of strict right.

"'Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.' *Bank of Augusta v. Earle*, 12 Pet. 287.

"'No State is bound to recognize and enforce contracts injurious to its own interests or those of its subjects, although valid by the law of the place where made.' 36 Am. Dec. 571; 31 *id.* 307; 16 *id.* 212; 20 *id.* 286.

"That the recognition and enforcement of the contract made in New York, for the issuing of the bonds and the creation of the mortgage, whereby the rights of stockholders in the corporate property of the company in Pennsylvania would be seriously affected and impaired, is contrary to the policy and interests of this State, is evidenced by the fact that the State has incorporated into its organic law a prohibition against the making of such contracts, unless by complying with the requirements of her constitutional provision and the laws passed to carry it into effect. The corporation, although acting in New York and according to laws of that State and having issued the bonds which are valid there, could not create a debt which would bind the corporate property in Pennsylvania, in violation of her Constitution and laws. It would be in contravention of the policy of this State, as declared in her fundamental law, and such a contract cannot be recognized or enforced here.

"Consequently, the bonds and mortgage are invalid and void, and the rights of the stockholders in the corporate property and franchises of the company in Pennsylvania are unaffected, unless by the foreclosure proceedings had in the supreme court of Monroe county, New York, these rights have been extinguished by the decree and sale.

"This brings us to the consideration of the legal effect of the decree in that court, and the sale made under it. The supreme court of Mon-

roe county, New York, has a general jurisdiction, both at law and in equity, and by the Revised Statutes of that State, it is enacted that 'the powers and jurisdiction of the court of chancery are co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State.'

"Article 4, section 1626 of the Code of Civil Procedure provides that 'in an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action.'

"Section 1631 provides 'that the plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this act, which must specify, in addition to the particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of securing it.'

"Section 1632 provides that 'a conveyance upon a sale made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from or under a party by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section.'

"That this section only defines the effect of the deed cannot be controverted. It is apparent that the entire proceedings in the court of Monroe county were based upon the statutes of said State, were local in their character, and not intended to have any extra-territorial effect, unless, as it is claimed, that portion of the decree which bars the equity of redemption of the mortgagor has that effect. But it will be noticed that it was only 'after filing of notices of the pendency of the action' that the defendant's equity of redemption was barred and foreclosed, and the record shows that this notice was only filed in the counties of the State of New York through which the railroad runs and where the mortgage is recorded, thus indicating that the decree was to have no further force and effect than to bar and foreclose the equity of redemption of the mortgagor in the mortgaged premises in the State of New York. But, aside from this, is the decree of the New York court effective to pass the entire title of the mortgaged premises both in New York and Pennsylvania to the purchaser, and is it conclusive upon the rights of the plaintiffs?

"It is clear that the decree of sale, and the deed made in pursuance of it, are ineffective to pass the title of the property in Pennsylvania. In speaking of sales made under a decree of a court of equity in proceedings to foreclose a mortgage, the author of Jones on Mortgages, vol. II,

§ 1608, says: 'A sale under a decree of courts is in contemplation of law the act of the court. It is made through the instrumentality of some officer designated by statute or appointed by the court. Whatever name be given to this officer, whether master in chancery, referee, trustee, commissioner or sheriff, in making the sale he acts as the agent of the court.' *Vide Heyer v. Deaves*, 2 Johns. (N. Y.) Ch. 154; *Mayer v. Wicks*, 15 Ohio St. 548.

"'Though a person having the legal title to land in one State may be decreed by a court of equity in another State to convey the land, yet neither the decree nor any conveyance by virtue of it, by one not having the title, can operate beyond the jurisdiction of the court.' *Watkins v. Holman*, 16 Pet. 175.

"'A court of chancery, having jurisdiction over the person who has the legal title to lands in another State, may, by a decree, force him to convey to the holder of the equitable title for whom he stands as trustee; but it cannot, by its decree, or through a deed of a commissioner, pass that title.' *Watts v. Waddle*, 6 id. 164.

"It is claimed, that under the provisions of the Constitution of the United States, the decree of the New York court barring the equity of redemption of the mortgage in the mortgaged premises is an adjudication of the validity of the bonds and mortgage, conclusive upon the rights of the plaintiffs, and a bar to any proceedings in this State.

"Assuming that the decree was not local in its character and effect, is it conclusive upon these plaintiffs?

"It is established that the decree and judgment of a court of competent jurisdiction of a sister State has the same credit, validity and effect in the courts of another State which it had in the State where it was rendered. But it is as well settled that the inquiry is always open whether the court by which a judgment was rendered had jurisdiction of the person or thing. 'Upon principle,' says Chief Justice MARSHALL, 'it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined.' *Rose v. Hinely*, 4 Cranch, 269. Justice STORY, in his commentaries on the Constitution, after stating the general doctrine established with regard to the conclusive effect of judgments of one State in every other State, says: 'But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer — upon the States — a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' § 1313

"'Want of jurisdiction may be shown either as to the subject-matter or the person, or in proceedings *in rem*, as to the thing.' *Thompson v. Whitman*, 18 Wall. 457.

"These authorities fully sustain the position that want of jurisdiction of a court over the subject-matter may be shown at any time, and a judgment rendered in the absence of jurisdiction is inoperative and void. The following propositions have been established by repeated

decisions. Where the subject-matter of the suit is strictly local, the jurisdiction of the court depends upon such locality, and can only be exercised in the State where the subject-matter is located. In other words, where the subject-matter is local, and the suit is brought for the purpose of directly affecting or acting upon the subject-matter, and the decree, when rendered, and the relief, when granted, would operate directly upon such subject-matter, and not merely upon the person of the defendant, then the situation of the subject-matter determines the proper place for the exercise of the jurisdiction; the jurisdiction can only be exercised in the State where such subject-matter is located. 1 Pom. Eq. Jur., § 298; *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485; *Massie v. Watts*, 6 Cranch, 148.

"On the other hand, although the subject-matter may be local, as for example a tract of land, still if the object of the suit is to directly deal with and affect the person of the defendant party, and not the subject-matter itself, and the decree, when rendered, and the relief, when granted, would in fact directly affect and operate upon the person of the defendant only, and would not directly operate upon the subject-matter, then the suit may be maintained in any State where the court obtains jurisdiction of the person of the defendant, although the subject-matter of the controversy referred to and described in the decree, and ultimately but indirectly affected by the relief granted, may be situated in another State. 1 Pom. Eq. Jur. 332. Under these rules, it cannot be successfully contended that the decree of the New York court barring the equity of redemption can have the effect of transferring any title, nor does it determine the validity of the mortgage as to the property of the corporation in this State. To hold a contrary doctrine would be conferring jurisdiction upon the courts of one State to determine in what mode real estate may be disposed of in another State.

"No principle is better established than that the disposition of real estate, whether by deed, descent, or by another mode, must be governed by the laws of the State where the land is situated.' *Watkins v. Holman*, 6 Pet. 180.

"Thus Judge STORY declares, that 'not only lands, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates, are deemed to be, in the sense of the law, immovables, and governed by the *lex rei sitæ*. The only process by which title can be made to such liens, or the only way by which such liens can be enforced, is that of the *situs*.' Whart. Conf. Laws, § 291. 'So, the validity of a mortgage, as a lien on land, is to be determined by the law of the place where the land is situate, although both the parties reside in another State.' *Goddard v. Sawyer*, 9 Allen (Mass.), 78. In this case both parties resided in the State of New Hampshire, the mortgage was executed there and would have been valid in that State.

"It is true, however, that the law is modified when the mortgage of land is merely collateral and subsidiary to a personal contract of loan. In such case, while the mortgage or pledge cannot be enforced, or the land touched, except in the court having jurisdiction, it is otherwise with regard to the contract, which is governed by the law of the place in which such contract has its proper seat. Whart. Conf. Laws, § 292.

But in such case proceedings must be instituted upon the principal indebtedness or personal contract, and not upon the collateral.

"It remains to consider the question raised as to the right of these plaintiffs to maintain this bill.

"That one shareholder could maintain the bill is clear.

"It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or prevent any misapplication of their capital or profits, which might result in lessening the dividend of stockholders or the value of their shares.' 18 How. 290.

"A shareholder in a railroad corporation may enjoin the performance of an illegal contract.' *Morrell v. Boston & Maine R. R.*, 55 N. H. 531; *Sanford v. Railroad Co.*, 24 Penn. St. 378; *Cumberland Valley R. R. Co.'s Appeal*, 62 id. 218.

"But if such shareholder is chargeable with any acts or omissions by which his rights can be held waived or forfeited, he would not be in a position to maintain such a bill. It is alleged in the affidavits presented by the defendants, and not denied in the counter affidavits, that W. H. Olmsted, one of the plaintiffs, accepted one of the bonds and disposed of it, thereby ratifying the act of the corporation in the issuing of the bonds.

"While this might preclude him from questioning the validity of the bonds and mortgage, it would not bar his right as a stockholder to assert a want of title in the purchase of the corporate property under the foreclosure proceedings in the State of New York, and maintain a bill for the protection of his interest as a stockholder in the corporate property in Pennsylvania. What has been said in regard to the validity of the charter of the Rochester and Pittsburgh Railroad Company will apply as well to the charter of the Pittsburgh and State Line Railroad Company. The plaintiffs cannot assail its legality in this proceeding. My conclusions upon the whole case are:

"*First.* That this bill can be maintained by the present plaintiffs, who are stockholders of the Rochester and Pittsburgh Railroad Company.

"*Second.* That the issuing of the bonds and the creation of the mortgage were in contravention of the policy of this State, as declared in her Constitution and the laws passed to enforce it, and are, therefore, illegal and void, and the lien of the mortgage did not bind the property of the corporation in Pennsylvania.

"*Third.* That the proceedings had in the supreme court of Monroe county, New York, for the foreclosure of the mortgage, were local in their character and can have no extra-territorial effect.

"*Fourth.* That the decree of sale and the deed made in pursuance of it are ineffective to pass the title of the corporate property in Pennsylvania to Adrian Iselin, the purchaser, or his vendees, the Pittsburgh and State Line Railroad Company.

"*Fifth.* That the decree of foreclosing the equity of redemption of

the mortgagor had only the effect of foreclosing its equity of redemption in the mortgaged premises in the State of New York.

"*Sixth.* That such decree is not conclusive upon the rights of the plaintiffs, as the courts of the State of New York had no jurisdiction to pass upon the validity of the mortgage as to the property of the corporation in Pennsylvania.

"*Seventh.* That, although the issuing of the bonds by the corporation while acting in the State of New York was a valid corporate act in that State, and could be enforced there, yet such contract being repugnant to the policy of this State in regard to the increase of 'indebtedness' of corporations, cannot be recognized or enforced by the courts of this State, and that the adjudication by the courts of New York State upon the validity of the bonds would not be binding and conclusive upon the courts of this State.

"These conclusions are not in conflict with the principles decided in the cases of *Muller v. Dows*, 94 U. S. 444, or *McElvath v. Pittsburgh & S. R. Co.*, 55 Penn. St. 189. In neither of these cases was the question raised as to the validity of the mortgage, or the power of the corporation to create it. The corporation having the power to create the mortgage, the title of the property would pass, subject to the equity of redemption of the mortgagor, which could be barred and foreclosed by proper proceedings. But where the power to create a mortgage is wanting, the title would not pass, and there would be no equity of redemption which could be barred or foreclosed."

" DECREE.

"And now, March 22, 1886, the above-entitled cause having come on for hearing, upon a motion to continue the injunction heretofore granted in the cause, and having been argued by counsel for the complainants and defendants, upon consideration the court do order:

"*First.* That, pending the final hearing in the cause, Tatlow Jackson be appointed receiver of all the property of the Rochester and Pittsburgh Railroad Company in the State of Pennsylvania, including particularly a line of railway beginning at a point on the boundary line between the States of Pennsylvania and New York, and extending thence through the counties of McKean, Elk, Clearfield and Jefferson for a distance of about one hundred miles to a point in the neighborhood of Punxsatwny, in said Jefferson county, and also of the stations, depots, yards and other property appurtenant to and used in connection with said line of railway.

"*Second.* That said receiver shall proceed to operate or make such arrangements for the operation of said line of railway as may be determined to be for the interest of the Rochester and Pittsburgh Railroad Company, and maintain it as a highway for the transportation of passengers and freight.

"*Third.* That the defendant, the Pittsburgh and State Line Railroad Company, its officers, agents and employees, be enjoined, first, until final hearing of the cause, from taking the earnings, income and tolls of the line of railroad hereinbefore mentioned, formerly operated by the Rochester and Pittsburgh Railroad Company, or from in any

manner interfering with Tatlow Jackson, the receiver hereinbefore mentioned, in taking possession, operating and taking the earnings, income and tolls of the said line of railway.

"*Fourth.* That Adrian Iselin and all other persons or corporations claiming under him are enjoined, until final hearing of the cause, from making any claim of right to the possession of or title in said line of railway by virtue of the proceedings taken by the Union Trust Company of New York, for Monroe county, and the sale directed in said proceedings made at Rochester by John H. Davy, referee, on the 16th day of October, 1885.

"*Fifth.* That the Pittsburgh and State Line Railroad Company be enjoined until the final hearing of the cause, from entering into or ratifying and confirming any agreement with the Buffalo, Rochester and Pittsburgh Railroad Company, for the consolidation and merger of the property, rights and franchises of said companies.

"*Sixth.* That all orders heretofore made in the cause be confirmed except so far as modified by the decree now entered.

"*Seventh.* That before entering upon the duties of his appointment the said receiver shall give bond in the sum of \$50,000, with sureties to be approved by the president judge of the court."

Wheeler H. Peckham, Thos. F. Wentworth, E. Grenough Platt, Hall & McCauley and John G. Johnson, for appellant. The New York supreme court of Monroe county had jurisdiction of the proceedings for the foreclosure and sale of the mortgaged premises both in Pennsylvania and New York, and properly exercised it. *Penn v. Lord Baltimore*, 1 Ves. 444; 2 Lead. Cases in Equity, 1806 (4th Am. ed.); *Toller v. Carteret*, 2 Vern. 495; *Pittsburgh & Steubenville R. R. Co.*, 5 S. 189; *Muller v. Dows*, 94 U. S. 444. The action was for the foreclosure and sale of the railroad property of the mortgagor, the Rochester and Pittsburgh Railroad Company, situate within the State of New York and Pennsylvania, as covered by the mortgage of February 1, 1884. This railroad extended from Buffalo in the State of New York to Brockaway in the State of Pennsylvania. The bill as filed alleged the default in the payment of interest for over sixty days, by which the whole principal sum became due, and prayed the court for a decree for the payment of the money, and in default of that, the foreclosure and sale of the said property, so covered by the mortgage. The defendants, having intervened, filed answers, and every thing which either was or could have been set up as a defense to the suit is conclusively presumed to have been so done in the proceedings. *Pray v. Hegeman*, 98 N. Y. 353; *Revere Co. v. Demock*, 90 id. 33; *Pringle v. Wooldourth*, 85 id. 427; *Graham v. R. R. Co.*, 14 Fed. Rep'r, 753; *Cest v. Taylor*, 16 S. & R. 282; *White v. Reynolds*, 3 Penn. 97. A defendant who fails to plead or prove that a bond was procured by fraud will be precluded by the judgment from relying on the fraud in a suit on the bond. *Lewis v. Neuzell*, 2 Wr. 222. And in *Burke v. Miller*, 4 Gray, 114, a recovery on a note was held conclusive that it was due in a suit on a mortgage given as security for its payment. *Cest v. Taylor* and *White v. Reynolds*, *supra*, are to a similar effect. And see

generally as to the conclusive effect of a judgment of a foreign tribunal, note to *Duchess of Kingston's* case, 2 Sm. L. C. 761 (7th Am. ed.). As the rule is stated by the learned editor (p. 762): "When, however, it is made to appear that a transaction has undergone a judicial investigation, the presumption that the judgment covers the whole is irrefragable and cannot be overcome by the clearest proof, that no evidence was given on part of the plaintiff or that the defendant failed to take advantage of a defense that might have been made available;" citing *Kilheffer v. Horr*, 17 S. & R. 319; *Bellows v. Forsyth*, 24 How. 183, and other cases. This is an attempt to assert a title for the property in possession of the appellant, and in such cases equity will not interfere. *Schlecht's Appeal*, 10 S. 172. The pendency of the present suit is notice to all parties, and neither the complainants nor the Rochester and Pittsburgh Railroad Company could be injured, as parties dealing with the appellant would take with full notice of the *lis pendens*. *Osborn v. Taylor*, 5 Paige Ch. 515. The issue of bonds was lawful under the Constitution and laws of Pennsylvania, and is not governed or controlled by the prohibition in article 16, section 7 of the Constitution. There is nothing in the provisions of article 16, section 7 of the new Constitution, nor in those of the act of 18th April, 1874, which renders invalid the mortgage in question, nor the bonds thereby secured. In support of this proposition we submit the following:

First. The power to borrow and to secure the repayment of money, necessarily incidental to all corporations, was not thereby taken away.

Second. Even if such article and act be construed as depriving every corporation of the power to increase its indebtedness, they are inapplicable to the present transaction, because while as to part of the loan there is no affidavit of averment that by the creation of the bonds or mortgage no actual increase resulted, there is positive proof that a large pre-existing debt was satisfied by the mortgage moneys.

Third. Even if said article and act be thus construed, and if this transaction did, in reality, result in such an increase, yet, as an increase was not its necessary result, the purchasers of the bonds, being ignorant thereof, had a right to presume that the money was borrowed for a legal purpose, viz., the liquidation of a pre-created debt.

Fourth. At worst, a power to borrow money was vested in the directors, subject only to the going through certain preliminary formalities. If it was exercised without such formalities, the act was one, not *ultra vires*, but *intra vires*, and was, therefore, capable of ratification. In our case there was an actual ratification by the subsequent acquiescence of the stockholders, and by the use and retention by the corporation of the money received.

Fifth. Its seal, affixed to the bonds and mortgage, was a binding affirmance by the railroad company of the fact that all pre-requisite formalities had been complied with.

Sixth. The mortgage was a conditional sale by the railroad company, defeasible only upon the terms therein set forth. Until it has performed these conditions it cannot claim the defeasance.

First sub-point. It is elementary law, that corporations, by the very fact of their creation, are authorized to incur obligations and to con-

tract debts, in the transaction of their ordinary business, because it is impossible for them to act, without so doing. "A corporation may transact all such matters as, being auxiliary to its primary business, are transacted by ordinary individuals under similar circumstances. . . .

A corporation, by the laws of its creation, has the same capacity to buy and sell that an individual has who is competent to make contracts. Every corporation, as such, has the capacity to take and grant property, and to contract obligations, in the same manner as an individual." *Green's Brice's Ultra Vires*, 66. "It is a well-known principle, that a corporation, like a natural person, has the right to carry on its legitimate business by the legal and necessary means, not prohibited by law and by its charter." *Sunbury Railroad v. Lewis*, 9 Casey, 37.

Third sub-point. *McMasters v. Reed*, 1 Gr. 47. "Notes given by a corporation on a purchase of property are not void because the purchase may probably, but not necessarily, be in excess of its powers." *Moss v. Rossie Lead M. Co.*, 5 Hill, 137. "In the absence of contrary proof, the promissory note of a corporation will be presumed to have been given in its legitimate business." *Olcott v. Tioga R. R.*, 27 N. Y. 545. "If a corporation purchase lands at sheriff's sale, it will be presumed to be for corporate purposes until the contrary be shown." *Ex parte Penn. Ins. Co.*, 7 Cow. 540. The English rule is thus summed up by Lord ST. LEONARDS in *Eastern Counties Railway v. Hawkes*, 5 H. of L. Cases, 381.

Fourth sub-point. *Whart. Agency*, 82; *Mendorf v. Wickersham*, 1 S. 88; *Moss v. Rossie Lead M. Co.*, 5 Hill, 137; *Fisher v. La Rue*, 15 Barb. 323; *Allegheny City v. McChester*, 2 H. 83; *Houghton v. Dodge*, 5 Bos. 326; *Episcopal Church*, 1 Pick. 373; *Grove v. Hodges*, 5 S. 515; *Smith v. Hull Glass Co.*, 73 E. C. L. 925; *Reuter v. Tel. Co.*, 6 E. & B. 341; *Kelsey v. Crawford Bank*, 69 Penn. St. 426; *Bank v. Bank*, 1 Pars. 267. See, also, upon this point, *Titus v. Catawissa R. R.*, 5 Phila. 172; *New Hope v. Bank*, 3 N. Y. 166; 16 Wis. 120; L. R., 5 P. C. 391; *St. Bartholomew Church v. Wood*, 2 W. N. C. 257; *Phosphate Co. v. Green*, L. R., 7 C. P. 63; *Turquand v. Marshall*, L. R., 4 Ch. 376; *In re R. R. Co.*, id. 748.

Fifth sub-point. Stamping with the corporation seal "implies *prima facie* antecedent authority for its use." *Church v. Wood*, 2 W. N. C. 257; *Miners' Ditch Co. v. Zallenbach*, 37 Cal. 543; *Monument Nat'l Bank v. Globe Works*, 101 Mass. 57; *N. Y. C. R. R. v. Schuyler*, 34 N. Y. 30; *Madison R. R. v. Norwich S. S.*, 24 Ind. 457; *Commer's of Knox Co. v. Aspinwall*, 21 How. 541; *Re County Life Ins. Co.*, L. R., 5 Ch. 287; *Fontaine v. —*, L. R., 5 Eq. 316; *Prince of Wales Ass. v. Harding*, E. B. & E. 220; *Webb v. Comm'rs*, L. R., 5 Q. B. 642; *Re Land Credit Co.*, L. R., 4 Ch. 468; *Agar v. Athenæum Life Ass.*, 3 C. B. (N. S.) 725; *Royal British Bank v. Turquand*, 6 E. & B. 327; *Turnpike Co. v. Myers*, 6 S. & R. 12; *North v. Hallenbach M. Co.*, L. R., 2 C. 321.

Sixth sub-point. The loan was contracted and the money borrowed by the consolidated company in the State of New York, where the transaction was perfectly valid. For all practical purposes, except,

perhaps, that of citizenship, the consolidated corporation is one. It has a common stock, the same shareholders and officers, the same property and a single organization. *Graham v. R. R. Co.*, 14 Fed. Rep'r, 753. That the consolidated corporation is but one corporation, except for certain purposes, is well settled. Pennsylvania Statute Act, May 16, 1861, 23 P. L. 702; 2 Purd. Dig. 1430, pl. 75; *Horner v. Bolstrom Co.*, 18 Fed. Rep'r, 50; *Rorer Rail.* 38, 588-9, 596. The judgment in New York is conclusive, and estops defendants from setting up their present claim here. *Burke v. Miller*, 4 Gray, 224; *Morgan v. Clapp*, 101 U. S. 551. The issue of bonds, if in contravention of the form prescribed by the Constitution of Pennsylvania, is voidable only and not void. *Pullman v. Upton*, 96 U. S. 328; *Harvy v. Illinois Midland Ry. Co.*, not yet reported, U. S. S. Ct.; *Thomas v. Citizens' Ry. Co.*, 104 Ill. 462; *Mor. Corp.*, §§ 48, 71; 1 Wood Ry. Law, 554; *Zabriskie v. Cincinnati R. R. Co.*, 23 How. 381. Whatever right to sue exists is in the Rochester and Pittsburgh Railroad Company, and a stockholder cannot sue until after request made and refused. Without elaborating upon this familiar principle of law, it is sufficient to say that the bill must set forth in detail the effort to secure the desired action by the corporation, or a sufficient excuse for not having requested it. *Bronson v. La Crosse R. R. Co.*, 2 Wall. 283; *Memphis City v. Dean*, 8 id. 64; *Dodge v. Woolsey*, 18 How. 331-345; *Mor. Corp.*, § 383 *et seq.*, and cases cited. Again, the bill should contain allegations that the complainants were stockholders at the time of the act complained of. *Darnemeyer v. Coleman*, 17 Fed. Rep'r, 101. The bill is bad as multifarious, and would be so held on demurrer. 1 Dan. Ch. Pr. 334; 1 Story Eq. Pl. 271. No reason is shown why the injunction to restrain the consolidation of the New York and Pennsylvania companies should have been granted. *Robinson v. Atlantic & Gr. West. R. R. Co.*, 16 P. F. S. 160; *C. P. & A. v. Erie*, 7 Casey, 380; *Murray v. Ballou*, 1 Johns. Ch. 579; *Green v. Staylor*, 4 id. 38; *Skeel v. Spraken*, 8 Paige, 182; *Harrington v. Slade*, 22 Barb. 166.

Richard C. Dale, T. C. Hipple and Samuel Dickson, for appellees. The rule of practice is well established in this court, that upon appeals from an order granting a preliminary injunction, the merits of the case will not be considered. Such questions are to be reserved for final hearing. This rule is distinctly stated by SHARSWOOD, Ch. J., in *Truby's Appeal*, 15 Norr. 52, and has been acted upon by this court in numerous cases. If the merits of the case are to be considered, however, it may be proper to formulate and support a few propositions which are at the basis of the opinion delivered in the court below. The proceedings in the supreme court of New York, under which the Rochester and Pittsburgh Railroad Company was sold by referee, were ineffective to pass any title to the line of road and other property in Pennsylvania. Note to *Penn v. Lord Baltimore*, 2 Lead. Cas. in Eq. 1830; *Morris v. Remington*, 1 Pars. Eq. 387. The result of the cases as a whole would seem to be that, as the right of real property is essentially local, and can only be enforced at law by a recourse to the local tribunals, equity

will follow the law, and refuse to assume a power which might further the purposes of justice in particular instances, but would ultimately disturb the comity which ought to exist between the courts of different nations, by bringing the decisions of foreign tribunals into conflict with those of the *locus rei sitæ*. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. 233; *Watts v. Waddle*, 6 Pet. 389, 400; Story Eq. Jur., § 744 a; Story Conf. Laws, §§ 463, 543. The power of chancery to restrain a defendant from instituting legal proceedings obviously extends to the prohibition of suits beyond its jurisdiction, in order to prevent an evasive recourse to the tribunals of other States or Territories. *Pearce v. Olney*, 20 Conn. 544; *Dehon v. Foster*, 4 Allen, 545. The doctrines relating to this branch of the subject have been fully considered, *ante*, notes to the *Earl of Oxford's* case, 1316-1318, 1396-1401. In Hilliard on Mortgages, volume 2, pages 30-45, is found a very full and exact history of the development of proceedings upon a mortgage. The right of the State to regulate the transmission of title to real estate within its boundaries is one which has always been jealously guarded. Even the Federal courts have recognized the binding character of such regulations. In *Brine v. Ins. Co.*, 96 U. S. 627, a judgment of the circuit court for Illinois was reversed by the supreme court of the United States because the Federal court failed to give force to a State statute giving to a mortgagee twelve months in which to redeem after foreclosure. Particularly will the courts of Pennsylvania not recognize the validity of a New York decree of sale, when the New York courts have themselves declined to recognize foreclosure proceedings in other States upon the lines of a consolidated road running through several States. See *Atlantic & Great Western* cases, 55 How. Pr. 275, 286; 57 id. 9, 16, 26. The mortgage of February 1, 1885, was void so far as related to property in Pennsylvania. Const. 1874, art. 16, § 7; *Hayes v. Holly Springs*, 114 U. S. 120. A consolidated corporation formed by the consolidation and merger of corporations existing under the laws of different States remains, as to its property and franchises within each State, subject to the laws of each State, even though the legislation authorizing such consolidation expressly provides that after consolidation the several corporations shall become one. *Chesapeake & Ohio R. R. Co. v. Virginia*, 94 U. S. 726; *Ohio & Miss. R. R. Co. v. Wheeler*, 1. Black, 286. The bill in this case is not a substitute for an ejectment. *Schlecht's Appeal*, 10 P. F. S. 172; *Big Mountain Imp. Co.'s Appeal*, 4 S. 861; Green's Brice's Ultra Vires, 277, n. a. "The primary party to bring suit in regard to corporate rights or corporate property is the corporation itself, but when the corporation refuses to bring the action, or the parties to be proceeded against are in control of the corporation, one stockholder may bring action in his own name in behalf of all, to which suit the corporation must be a party defendant," citing *Dodge v. Woolsey*, 18 How. 331; *Samuel v. Holladay*, 1 Woolw. 400; *Heath v. Erie R. R.*, 8 Blatch. 347; *Brewer v. Theatre*, 104 Mass. 378; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Butts v. Woods*, 37 N. Y. 317.

PER CURIAM. This decree is affirmed, the preliminary injunction continued, and the appeal dismissed at the costs of the appellant.

APPEAL OF BOVAIRD & SEYFANG.

May 31, 1886.

PATENT — EQUITY.

A. owned a patent upon drilling jars for artesian wells; he granted to B. a license to make and sell the character of jars patented, B. to render monthly accounts, pay a royalty on each set made, and keep a book containing a list of the work done, to whom sold and the dates, which book was to be open to the inspection of A. *Held*, that B. was obliged to pay so long as he continued to manufacture within the running of the patent, and that he was bound to account. *Held*, also, that A. could enforce his rights through the aid of the equity side of the court.

Appeal from the decree of the court of common pleas of McKean county.

This was a bill in equity for an account for discovery and injunction in aid of the account, and the payment of royalties under a written agreement of license for making drilling jars for deep artesian and oil wells, under a patent.

James C. Boyce, N. B. Smiley, David Sterrett and M. F. Elliott, for appellants. If patentee join issue upon an allegation made by a licensee, contrary to an admission in his deed, instead of pleading the estoppel, the deed will be evidence for the patentee, but will not as evidence be conclusive. *Bowman v. Rostrum*, 2 Ad. & El. 295, cited in *Curtiss Patents*, § 199. Matter of estoppel should be specially pleaded as such. 1 Chit. Pl. 509. When the matter which operates as an estoppel appears on the face of the declaration, the plaintiff may demur to a plea by which the defendant attempts to set up such matter as a defense. 1 Saund. 418, note 1; *ante*, 487; see Steph. (2d ed.) 217. In covenant by the assignee of a lessor, if the declaration allege that the lessor was seized in fee, and conveyed by lease and release, the defendant may traverse the seizin in fee. *Seymour v. Franco*, after *Trinity Term*, 1828, 7 Law Jour., 18 K. B.; and *Whitton v. Peacock*, in C. P., 3d June, 1835, Shearman, attorney; *ante*, 364; 4 Bing. 403; 4 Moore, 5. Estoppel by record and by deed must, in order to make them binding, be pleaded, if there be an opportunity, otherwise the party omitting to plead it waives the estoppel, and leaves the issue at large, on which the jury may find according to the truth. *Freeman v. Cooke*, 6 D. & L. 187; *Reg. v. Houghton*, 1 El. & B. 500. The agreement not to manufacture other drilling jars than those covered by the patent was an agreement in restraint of trade and cramping to the defendants in the pursuit of their legitimate occupation, and in the manufacture of goods desired by their customers; therefore, equity should not enforce it, but the plaintiffs should be left to their remedies at law. *Keeler v. Taylor*, 53 Penn. St. 467; *Gumpers v. Rochester*, 56 id. 194; *Harkinson's Appeal*, 78 id. 196; *Gillis v. Hall*, 2 Brewst. 342. A bill for an account must aver an indebtedness to the plaintiff, at the time of filing it. *Volmer v. McCauley*, 7 Phila. 382; *Metz v. Barnham*, 8 id. 267. It was decided in *White v. Lee*, 5 Banning & Arden, 572, by Judge LOWELL, in the United States circuit court for the district of Massachusetts, that a licensee may surrender his license and defend against

the patent. It was also decided in *Moody v. Taber*, 5 Official Gazette, 273, that a letter written by a licensee declaring the license at an end was sufficient to end the license. If a lease is granted for seven, fourteen or twenty-one years, the lessee only has the option at which of the above periods the lease shall determine. *Dann v. Superior*, 31 B. & P. 399, 442; *Dann v. Superior*, 7 Ves. 231; *Price v. Dyer*, 17 id. 363. So, where the lease was for fourteen or seven years, on the ground that every doubtful grant must be construed in favor of the grantee. *Doe d. Webb v. Dixon*, 9 East, 16. A lease, for so long as the lessee should continue to inhabit the farm house and actually occupy the land, and not let or part with the lease, upon his ceasing to inhabit, immediately became forfeited. *Doe d. Lockwood v. Clark*, 8 East, 185. And see *Doe d. Norfolk v. Hauke*, 9 id. 481. Where a plaintiff has other adequate remedy to compel the discovery sought for, a bill of discovery will be dismissed. *Milne's Appeal*, Sup. Ct. Penn., Jan. 25, 1886; 2 Atlantic Rep'r, 534.

Joshua Douglass and W. B. Chapman & Son, for appellees. The admission in the agreement of the plaintiff's ownership of the patent is *prima facie* complete evidence of the same until attacked by evidence showing cause of complaint. "Having taken the license he is estopped by any admissions which it contains unless he can avoid their effect by showing that he was deceived or misled." *Curtiss Patents*, §§ 215, 216-217. The jurisdiction of courts of equity by interlocutory injunction against breach of covenant or agreement is in aid of the legal right, and has been assumed for the advancement of justice. *Kerr Injunc.* 493. In *McClurg's Appeal*, 58 Penn. St. 51 (1868), this branch of equity, viz.: the restraining by injunction the breach of a trade contract stipulating for an exclusive right, was fully recognized in this case. As to jurisdiction in equity, act October 13, 1840, *Purd. Dig.* 692. In *Dick's Appeal*, —*Samuel B. Dick and the Gibbs & Sterrett Manufacturing Co. v. Bovaird & Seyfang*, this case — reported in 106 Penn. St. 589, *TRUNKY, J.*, in delivering the opinion of the court, said: "The learned judge of the common pleas rightly ruled that the bill set out a case suable in account-render, and, therefore, within the general statute of 1840." Further reference on the same subject is respectfully made to the following: *Wesley Church v. Moore*, 10 Penn. St. 273-279; *Shriver & Dilworth v. Nimick et al.*, 41 id. 80; *Danzelsen's Appeal*, 73 id. 65; *Allison's Appeal*, 77 id. 221; *Wilhelm's Appeal*, 79 id.; *Passyunk Building Association's Appeal*, 83 id. 441; *Darlington's Appeal*, 86 id. 512; *Ressler v. Witner*, 1 *Pear.* 174; *Gandolfo v. Hood*, id. 269; *Adams Eq.* 57, §§ 1, 2, 3 — 182-3, and notes § 77; *Bisp. Eq.* 526, § 481 *et al.*; *Brightly Eq.* 118, 121, 125; 1 *Story Eq.* 64, 69; id. 439, 69; *Port v. Kimberly*, 9 *Johns.* 493; *Taylor v. Taylor*, 43 *N. Y.* 584. The prayer in the bill for general relief entitles the complainant to any relief which is consistent with the case made in the bill. *Bailey v. Burton*, 8 *Wend.* 344; *Wilkin v. Wilkin*, 1 *Johns. Ch.* 117; *Story Eq. Pl.* 40, 41 and note; *Warpe v. Gould*, 15 *Me.* 82; *Brown v. McDonald*, 1 *Hill Ch.* 302; 1 *Daniels Ch. Pr.* 383, and cases cited; *Beaumont v. Boulter*, 5 *Ves.*

485; *Polk v. Lord Clinton*, 12 id. 63; *Reed v. Cramer*, 1 Green Ch. 277; *Blecker v. Bingham*, 3 Paige Ch. 246; *D. & H. C. Co. v. Penn. Coal Co.*, 9 Harr. 131. The bill in this case being for discovery also, it will be made effectual for the purpose of full relief. Story Eq., § 64; *Glening v. Hazzard*, 6 W. 401; *Adley v. The Whitstable Co.*, 17 Ves. 323; *Kyle v. Huggin*, 1 Ive & Molk, 236; *McKenzie v. Johnson*, 4 Mudd. 373; *Bank of Ky. v. Schuylkill Bk.*, 1 Pars. 219; Hare Discovery, 8. "A license to use a patent is in many respects analogous to a lease." Kerr Inj. 428. The courts have repeatedly held that when a court of equity once acquires jurisdiction and control of a case, it will settle and determine every feature of dispute in the transaction. Brightly Eq. 121, § 124; 1 Story Eq., § 457; *Bank of U. S. v. Biddle*, 2 Pars. 53; *McGowan v. Remington*, 12 Penn. St. 56. In *Shollenberg's Appeal*, 21 Penn. St. 337, Mr. Justice WOODWARD, in delivering the opinion of the court, said: "Another principle of chancery jurisdiction, coincident with the above and peculiarly applicable to questions of account, is that the jurisdiction having once rightfully attached, it shall be made effectual for the purpose of complete relief." Also see Brightly Dig. 3175-16; *Gaylord v. Sterling*, 3 L. T. (N. S.) 67. It is submitted that the defendants cannot annul this contract and lawfully disregard its obligations without the consent and agreement of the plaintiffs. It is a universal rule of law and equity that a contract can be rescinded only by the acts of both parties. *New England Iron Co. v. Gilbert El. R. R. Co.*, 91 N. Y. 155; *Patterson v. Silliman*, 4 Casey, 304. "No warranty of validity of the letters-patent is implied in any license given thereunder, and unattended proof of invalidity is, therefore, no defense to any suit for promised royalties." Walker Patents, 221, § 307; *Birdsall v. Perego*, 5 Blatchf. 251; *Sargeant v. Larned*, 2 Curtiss, 340; *Marsh v. Dodge*, 4 Hun (N. Y.), 276; *Barlett v. Holback*, 1 Gray (Mass.), 118; *Martin v. Sweet*, 66 N. Y. 207; *Kinsman v. Parkhurst*, 18 How. 289; Kerr Inj. 425; Curtiss Patents, 246, § 217; 247, § 218; 2 Whart. Law of Ev. 1149. Where the patent is for the combination of two, three or more old inventions, a user of any of them would not be an infringement of the patent; but where there is an invention consisting of several parts, the imitation or pirating of any part of the invention is an infringement of the patent. Curtiss Patents, § 332; *Imhauser v. Buerle*, 101 U. S. 647; *Gill v. Mills*, 22 Wall. 7, 28. The defendants employed a part at least of the combination of iron and steel in the manufacture of every jar they made between the date of the contract and the expiration of the time of the patent. Every part of a combination claimed is conclusively presumed to be material to the combination. Walker Patents, § 349.

PER CURIAM. We have no doubt of this being a proper case for a court of equity. The appellants were not licensed to use the appellee's property. They were not bound to make any specific number of jars. It was optional with them whether to make any under their license. Having, however, commenced to make them, and so continuing, they became obliged to pay so long as they manufactured them, until the

expiration of the patent. They were, therefore, obliged to render an account. We see no error in the conclusion of the learned judge as to the number for which they should be charged, and the sum which they should pay.

Decree affirmed and appeal dismissed at the costs of the appellants.

PEELING v. COUNTY OF YORK.

May 31, 1886.

CONSTITUTIONAL LAW — "EMOLUMENT" — SHERIFF BOARDING PRISONERS.

The compensation ordered by authority of law to be paid to the sheriff for the boarding of prisoners in the county jail, if fixed when he entered upon the term of his office, is an "emolument" within section 13, article 3 of the Constitution.

Error to the court of common pleas of York county.

This was a case stated. The facts are set forth in the opinion of the common pleas, per WICKES, P. J., of which opinion the following is a copy :

"It is not pretended that at the time the plaintiff was elected or commissioned sheriff of York county any compensation had been fixed, which he was to receive for boarding prisoners in the county jail.

"It is in this particular the case in hand differs essentially from *Apple v. Crawford County*, 14 W. N. C. 322, cited and relied upon to sustain the plaintiff's claim.

"In that case the supreme court held that a sheriff's compensation for this service was an emolument of his office, and that being "definitely fixed by law at the time of his election," could not, under article 3, section 13 of the State Constitution, be increased or diminished during his term of office. This is the extent to which that case goes, and it does not, in our view, affect the question presented under the entirely different facts of the case at bar.

"The act of April 10, 1873 — P. L. 666 — gives the court of quarter sessions of this county the power to fix the compensation the sheriff shall receive for boarding prisoners, and further provides that the court shall have power to increase or diminish the same from time to time. Assuming the constitutional provision takes away the right to vary the amount fixed at the time the sheriff assumes his office, the power, nevertheless, resides in the court to determine in the first instance what the compensation shall be. This had not been done at the time the plaintiff was elected or at the time he entered upon the discharge of his duties.

"He assumed these duties on the first Monday of January, 1878. In March, 1878, his predecessor in office applied to the court to fix his compensation for boarding prisoners during his term, in order that he might have a settlement for that service with the county. And the court by order of March 2, 1878, fixed 'the allowance prayed for at thirty-five cents per diem.' It is obvious that at that time the compensation of the newly-elected and commissioned sheriff had not been fixed and was not embraced in that order.

"On the 8th of January, 1879, the county commissioners applied to the court to fix the compensation of the plaintiff for boarding prisoners,

and as the price of commodities had declined materially in value, prayed that it be fixed at twenty-five cents per diem. On January 23, 1879, the court ordered that the sheriff be paid thirty-five cents per diem for 1878, and twenty-five cents per diem for 1879, and under this order the sheriff presented his bill and was paid without objection or protest at that time.

"The question is not, therefore, whether the compensation fixed by law at the time the sheriff was elected can afterward be increased or diminished during his term—for it is manifest that no compensation had then been fixed at all. But it is rather, whether at the time of determining how much he shall receive for this service, the power fixing, whether legislative or judicial, can in one and the same order fix one amount for the first year and a different amount for the succeeding years. And this question is certainly not decided by *Apple v. Crawford County*.

"If the act of 1867, under which the sheriff claims in that case, had fixed a certain rate of compensation for the first year of the sheriff's term, and a different rate for the second, it will scarcely be argued that having taken his office with such a provision in force, he could afterward recover a larger rate for his term of office.

"We do not see why the order of this court made January 23, 1879, should stand upon a different footing. This method of fixing the sheriff's compensation for boarding prisoners was known to the plaintiff when he was elected—and it is to be presumed he knew—certainly he could readily have ascertained that no compensation covering either his official term or that of his predecessor had then been determined. He took his office subject to the power of the court to say what sum of money he should receive for this service, and I can conceive of no legal reason why the order of the court was not just as binding upon him and the county, as if it had been made prior to his election. We, therefore, enter judgment for the defendant in the case stated."

Horace Keesey, for plaintiff in error. The question of its being an emolument is settled by the case of *Apple v. County of Crawford*, 14 W. N. C. 322.

Levi Maish and *J. R. Strawbridge*, for defendant in error. The learned judge below in his opinion pointed out the difference between the case at bar and the case of *Apple v. County of Crawford*, 14 W. N. C. 322, on which the plaintiff relies.

MEROUR, Ch. J. This contention arises under the act of April 10, 1873—P. L. 666—modified by section 13, article 3 of the Constitution of 1874. The latter declares "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

The compensation ordered, by authority of law, to be paid to the sheriff for the board of prisoners in the county jail, is an emolument of his office within the section of the Constitution cited. *Apple v. County of Crawford*, 105 Penn. St. 300.

The difficulty of the plaintiff in successfully invoking the aid of this section to sustain his contention arises from the fact that there was not

any fixed compensation for such an emolument applicable to his office, when he entered on the term thereof.

It appears that his predecessor served an entire term without any rate of compensation having been fixed, or existed, applicable to his term. Two months after the expiration of his term, on his application for the purpose of enabling him to settle with the county for the boarding of prisoners, the court fixed the compensation to be paid to him for a claim arising during his term.

This order was one of doubtful authority even between the former sheriff and the county. It was, however, limited in its application to the payment for past services to one whose term of office had expired. Although made after the term of the plaintiff had commenced, yet it did not apply to him nor to the office of sheriff generally. No compensation had been fixed when the term of his office commenced. The only order applicable to the plaintiff is the one made on the 23d of January, 1879. Although this fixes one per diem for 1878, and another for 1879, yet it is by virtue of an order made at one time, and soon after the plaintiff had entered upon the second year of his term. He took the office subject to the power of the court to fix his compensation for this service. It made but one order designating the sum he should be paid. He cannot accept one part and repudiate the other part. It is of binding force in its entirety. It follows that the judgment entered on the case stated is correct.

Judgment affirmed.

APPEAL OF KELSEY.

May 31, 1886.

PARTITION — TENANT IN COMMON — IMPROVEMENTS — REPAIRS — NEW ERECTION — LIABILITY.

Where a co-tenant in common undertakes to improve the whole estate, the improvement inures to the benefit of all.

A tenant in common is liable to his co-tenant for repairs absolutely necessary to buildings already erected, and which have fallen into decay, but he is not liable for new and permanent erections which the latter may have set up on the premises.

A., B., C. and D. were tenants in common of certain land. A. and B., being in actual possession, set up certain new structures upon a portion of the land in order to obtain a more complete enjoyment of their interests. *Held*, that in partition proceedings C. and D. were not, under the circumstances, entitled to a share of the improvements set up by A. and B.

Appeal from the decree of the court of common pleas of Lackawanna county.

In the case of *Stevens et al. v. Joseph Church and Charlotte Church, his wife*, decided by the supreme court in 1880, a decree was made directing the defendants to convey to the plaintiff the undivided four-ninths of a certain piece of land situate in Lackawanna county. Mrs. Church, who held title, died before executing the deed, and left to survive her a son, Charles, who inherited his mother's estate.

The title of this land had been previously settled in an action of ejectment brought, in 1867, by A. Ruland and wife against the same defendants, affirmed by the supreme court in 14 P. F. S. 432, Ruland

and wife being also plaintiffs in the case first named and entitled under the decision to a deed of one-eighteenth of the land.

In both these cases Church and wife were held to be trustees *ex maleficio*.

The present case was a bill for a partition of the land between the parties in the proportions belonging to each as thus judicially determined.

Church and his wife held possession of the land during the litigation, and erected several houses and a coal-breaker thereon after the suits were commenced, and received all rents and profits.

A claim was made in the court below by the plaintiffs for a share of the value of these improvements, which was not allowed. Hence this appeal. The land was divided by the master and commissioners, and five-ninths thereof allotted to Church and his son, and upon their share all the improvements, except a small house, are located. Of the house the plaintiffs were allotted a share, because it was built before the title of Mrs. Church and her husband accrued.

Isaac P. Hand and *Henry W. Palmer*, for appellants. These defendants being trustees of the plaintiffs as to four-ninths of this land wrongfully held it in their possession, and excluded the owners from its enjoyment. They improved it in the face of the plaintiffs' assertion of title by their action of ejectment and bill in equity. They put the plaintiffs to the vexation and expense of a long and costly litigation, and stand, as we contend, in no better case than that of one who knowingly improves the land of another against his consent. *Crest v. Jack*, 3 Watts, 238; *Gregg v. Patterson*, 9 W. & S. 197, decide that one who improves the land of another without permission must lose his improvement. And the *cestui que trust* has always his option to take or refuse the benefit or loss of the unauthorized act of his trustee. *Harrison v. Harrison*, 2 Atk. 120; 2 P. Wms. 453; *Wykoff v. Wykoff*, 3 W. & S. 486. Says Hill, *429: "Trustees who are invested with general powers of management will be justified in laying out money in the repair and improvement of the property. But without any general authority, or a special power, they would run the risk of having payments disallowed, if they ventured to make such application of trust funds." *Green v. Winter*, 1 Johns. Ch. 26. A trustee, acting without express authority, will not be allowed the expense of pulling down and rebuilding a house. Hill, 571; *Iridge v. Brown*, 2 N. C. C. 191. It is an established doctrine that trustees can only be allowed for necessary expenditures. *Fountain v. Pello*, 1 Ves. Jr. 337.

A. H. Winton and *A. Ricketts*, for appellee.

MERCUR, Ch. J. This bill was to compel partition of lands in which the appellees held the undivided five-ninths. The court decreed partition and awarded to the appellants four-ninths of the land. Their complaint now is the refusal of the court to allow to them a proportionate value of the permanent improvements erected on the land by the appellees. It may be conceded that there may be cases of partition in which the improvements should be held to inure to the

benefit of all the co-tenants. It is well intimated such might be the case where one co-tenant undertakes to improve the whole estate as by erecting a building covering the whole of a city lot. Here, however, the improvements appear to have been such only as were reasonably necessary for the proper enjoyment of the land by the co-tenant who made them. While the title was in the wife of the appellee yet he was tenant by courtesy initiate, and, therefore, in making the improvements presumably for himself and his wife, he cannot be treated as a mere stranger or volunteer. While a tenant in common is liable to his co-tenant for repairs absolutely necessary to buildings already erected and in being, which fall into decay, yet he is not liable to his co-tenant for new and permanent buildings which the latter erects thereon. *Beatty v. Bordwell*, 91 Penn. St. 438; *Crest v. Jack*, 3 Watts, 238; *Deck's Appeal*, 57 Penn. St. 467. Hence although the appellees owned the larger share of the land, they were powerless to compel the appellants to contribute toward the improvements. The appellees must either forego the proper use and enjoyment of their estate or else incur the necessary expense to make it productive. They chose to do the latter. The appellants paid nothing toward the improvements, and their estate was not injured by the erection thereof. This is a proceeding in equity. Due regard must be had to the equitable rights of each party. Under the facts of this case it would not be a just application of the rules in equity to give to the appellants any share of the value of the permanent improvements made by the appellees only.

Decree affirmed and appeal dismissed at the costs of the appellants.

BRADFORD OIL COMPANY v. BLAIR.

May 31, 1886.

LEASE—OPERATING FOR OIL—DILIGENCE.

A. leased to B. at one-eighth royalty the right to sink oil wells on a certain farm; the writing between the parties contained the following: "The party of the second part covenants and agrees at all times to permit the party of the first part, or his agent, to enter the premises for the purpose of inspecting the operations, examining the books, and ascertaining how much oil has been pumped, or other product obtained, and also to continue with due diligence, and without delay, to prosecute the business to success or abandonment, and if successful, to prosecute the same without interruption for the common benefit of the parties aforesaid." *Held*, the agreement imposed on the assigns of B. an obligation to use due diligence in operating on the premises.

Error to the court of common pleas of McKean county.

The facts are set forth in the charge of the common pleas, per BROWN, P. J., of which charge the following is a copy:

"James E. Blair, the plaintiff, was the owner of a farm in Bradford township, containing one hundred and fifty-four acres of land, or thereabouts. By a writing bearing date July 17, 1875, he leased the same to one L. G. Peck, for a term of twenty years; Peck, his heirs and assigns, to have the sole and exclusive right to bore and explore for oil, and other enumerated minerals, and to gather and collect the same.

"By the terms of the lease, Peck bound himself, his heirs and assigns, to give to Mr. Blair a one-eighth part of the oil or other products of

the land, and also to continue with due diligence, and without delay, to prosecute the business to success or abandonment, and if successful he further covenanted to prosecute the same without interruption for the common benefit of the parties; and by 'common benefit of the parties,' we now say to you — lest we might afterward omit to say it — is meant to prosecute the same whenever it could be done so as not only to give a profit to the lessor, who was expending no money, but to afford a profit to the lessee, who was expending money.

"On the 27th of July, 1875, Peck assigned an undivided one-half of his interest under the lease to Wesley Chambers, and an undivided one-fourth to J. T. Jones; on the thirteenth of May, the defendant, the Bradford Oil Company, became the owner of the entire leasehold by assignment from Peck, Chambers and Jones, thus vesting in the Bradford Oil Company the entire interest acquired by Peck under the lease from the plaintiff, and thus in law, as we now say to you, imposing upon the defendant during the term of its ownership a liability to the same extent that Peck, the original lessee, was liable by the terms of the written contract.

"On the 7th of January, 1881, the Bradford Oil Company assigned all its interest under the lease to F. E. Boden and J. J. Carter, and for any failure to comply with the terms of the lease after that time the defendant is not responsible; and in order that your attention may not be taxed with inquiry into the character of the operations at a time not deemed essential by either party, we may here say what the counsel for the plaintiff has stated in your hearing during the trial, viz.: that the plaintiff does not claim to recover any thing against the defendant for any failure to operate the lease with vigilance after the month of October, 1878.

"Thus you will see that the issue here, so far as the lapse of time is concerned, is between the 13th of May, 1876, and some time in the month of October, 1878, a period of about two years and five months.

"Now I ask you to bear this particularly in mind during your deliberations that the time that transpired between the time that the defendant became the owner in May, 1876, and some time in October, 1878, is the period to which your attention will be directed; the plaintiff is now before the court, claiming that the defendant did not during the time mentioned keep the covenants binding it to prosecute the business without interruption for the common benefit of the parties, and that by reason of its failure so to do he has sustained damages, for the amount of which he asks you to give him a verdict.

"Is the claim of the plaintiff that the defendant during the time mentioned failed to comply with the obligations of the lease, sustained by the evidence? And if so, what amount of damages will fairly compensate him for such failure — are the two main questions now to be answered by the court and jury.

"The evidence shows that the lessee and his assigns were successful in their explorations for oil, and that the business of producing the same has been prosecuted without interruption. The remaining question then is, did the Bradford Oil Company, during the two years and five months or thereabouts, fail to prosecute the business of exploring

for and gathering oil in such manner as, under the circumstances, was for the common benefit of itself and the plaintiff? If it did so fail, the plaintiff ought to recover; if it did not, the plaintiff ought not to recover.

"The duty of interpreting the lease, and of defining the obligations its terms impose, is exclusively for the court; and your duty as jurors is to take our interpretation as the correct one, and apply the evidence to its meaning as we define it. In the exercise of this duty we say to you that the agreement to prosecute the business for the common benefit of the parties imposes no obligation on the defendant to prosecute the business to any greater extent than could reasonably be done and leave a profit to the defendant. In other words, if the knowledge and skill of persons engaged in the oil producing business and the machinery and appliances then known, and the prices of the product, were such that the business could not be then carried on with a profit to the defendant after giving to the plaintiff the agreed royalty, then we think the defendant was not bound to prosecute the same to any greater extent than was done; but if it could have been prosecuted profitably to a greater extent to the mutual benefit of the parties, and ought to have been, under the circumstances, then the defendant was bound so to prosecute it, and if it has failed, must respond in damages.

"The consideration of the lease, in part at least, was the agreement to render to Mr. Blair the one-eighth of the product, and the stipulations of the lessee as set down in the agreement are, in our opinion, equivalent to a covenant on the part of the lessee and his assigns that they will prosecute the business of boring and exploring for oil and gathering the same in a proper manner and with reasonable diligence to the end that Mr. Blair should have the royalty or income in the contemplation of the parties at the time the agreement was made.

"In determining whether the defendants during the time they owned the lease — that is to say, from some time in May, 1876, or during the time for which the plaintiffs claim they are responsible — from some time in May, 1876, to October, 1878 — did prosecute the business in a proper manner and with reasonable diligence, I think it proper to say that you ought not to find against the defendant by reason of its failure to operate the south-easterly part of the farm, unless the evidence satisfies you that such failure was a want of diligence under the light and knowledge then existing, and in this connection you will call to mind the fact that prior to some time in the fall of 1878, there had been no operations in that immediate locality; you should, in determining the question of whether the defendant has prosecuted the business with reasonable diligence, consider the quality of the land for oil-producing purposes as it was then generally known or supposed to be; the cost of production; the price of the product; the knowledge and skill then generally possessed by persons engaged in the business in the locality; and whether the appliances used and the manner of operating was or was not such as men ordinarily skillful in the business usually resorted to in the location and at the time mentioned, and whether the extent of their operations and the vigor of their prosecution was or was not such

as was reasonably to be expected under the then existing circumstances.

“ You must not allow the plaintiff any damages for the price of oil drained or claimed to be drained from the land by reason of operations on the adjoining lands ; but inasmuch as what is reasonable diligence is a question to be determined by the light of the then existing circumstances, you may take the operations on the adjoining lands into account so far, and only so far, as they enable you to answer the question whether the defendants were or were not wanting in ordinary diligence ; and we further say that you must not find the defendant wanting in diligence merely from the fact — if it is a fact — that it did not sink an equal or any number of wells opposite or in proximity to wells that were sunk on the adjoining lands and near to the plaintiff's line ; the defendant's duty is not to be measured by what was done on the adjoining lands, except so far as what was done bears upon the main question running through this part of the case, and which we repeat, was the defendant — taking all the circumstances, including the operations upon the adjoining property, into account — wanting in diligence in its operations upon the plaintiff's land ? I emphasize the injunction that the duties and obligations of the defendant — and ask you particularly to bear that in mind — that the duties and obligations of the defendant must not be judged by the light and knowledge obtained after its ownership of the plaintiff's land had ceased, but by such as existed or prevailed during the existence of such ownership ; now, so judging, you will ascertain from the evidence whether the defendant did all that it could be reasonably expected to do in the business of developing the land and producing the oil therefrom ; if it did, your verdict would be for the defendant. If it did not, it should be for the plaintiff, for such amount as will compensate him fairly for the damages he has sustained ; and in regard to the measure of damages we instruct you in this way : In case you find that the defendant did not use due diligence in operating plaintiff's premises you will ascertain, as well as you can from the evidence, how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the times when it should have been delivered to the plaintiff ; and from this you will deduct the cost of producing what he ought to have received at the time and under the circumstances and with the appliances then known ; and upon such balance you will compute the interest from the time it ought to have been delivered to the plaintiff down to the present time ; I am not able to lay down to you any more definite rule than this. I am not able to say to you to what conclusion you will arrive from the evidence in this case ; as counsel on both sides have said, the question for the jury may be a difficult one. Counsel have commented fully on the evidence and it is not our purpose to go over it in detail. I repeat, then, you will find as best you can from the evidence, in case you find that the plaintiff ought to recover, how much more oil he ought to have received than he actually did receive during the time in controversy, its value, and from that you will deduct the cost of producing out of the ground as near as you can ascertain it, from the evidence, at the time and under the circumstances, and you will strike

a balance, and on that balance find a verdict in favor of the plaintiff."

F. L. Blackmarr and *C. W. Stone*, for plaintiff in error. The construction of the language of the covenant is in direct contravention of the rules in *Spencer's* case, 1 Smith Lead. Cas. 137; *Cathcart v. Bowman*, 5 Barr, 319; *Herbaugh v. Zentmyer*, 2 Rawle, 160. "All documents to which a person was party or privy are in general admissible in evidence against him." "All written contracts are made for the express purpose of being afterward used as evidence of the contract." Stark. Ev. *459. The fact that the supplemental contract is not under seal while the original lease is does not affect it. *Chesapeake & Ohio Canal Co. v. Ray*, 11 Otto, 522; *Phila. W. B. R. R. Co. v. Tremble*, 10 Wall. 367; *The Delaware v. Oregon Iron Co.*, 14 id. 579; *Swain v. Seamens*, 9 id. 252; 19 L. C. 559; *Wilgus v. Whitehead*, 8 Norr. 183; *McNish v. Reynolds*, 14 id. 486; *Spangler v. Springer*, 10 Harr. 454; 1 Greenl. Ev., §§ 304-305. "Implied promises or promises in law exist only when there is no express promise between the parties, *expressum facit cessare tacitum*. Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject-matter, which is certainly sound law, unless the express contract has been rescinded or abandoned." *Hawkins v. United States*, 6 Otto, 689; *Vanderkar v. Vanderkar*, 11 Johns. 135; *Frost v. Raymond*, 2 Caines' Cas. 192; *Sumner v. Williams*, 8 Mass. 201; 2 Wash. Real Prop. 671. The plaintiff claimed no special damages in the declaration, but only in the most general terms. He could recover then, if at all, only such damages as necessarily resulted from defendant's default. 2 Greenl. Ev. 254; 1 Chit. Pl. 338, 396; *Bishop Manuf. Co. v. Endley*, 23 Conn. 212; *Squir v. Gould*, 14 Wend. 160; *Stanfield v. Phillips*, 28 P. F. S. 76; 2 Wait Act. and Def. 434. What damage, if any, necessarily resulted to plaintiff? It is not disputed that he got his oil, only he got it later than he claimed he should have done. His only necessarily resulting damage was the loss of the use of the oil, or of the money it would bring; in other words, the interest on its value from the time it was produced. *Cherry v. Miller*, 1 Pitts. Leg. J. 98. Whatever measure of damages was adopted it ought to have been clearly and strongly impressed on the jury and the evidence on each side bearing on it called to their attention. The case of *Pennsylvania Iron Co. v. Diller*, 3 East. Rep'r, 159, was like the case at bar, an action of covenant, and in delivering the opinion of the court, his honor, Judge GREEN, says: "In such cases the attention of the jury should be called to the particular breaches alleged and to the evidence on each side as to the damages claimed to have been sustained." This the court in the case at bar did not do. The right to recover nominal damages may be complete when it is shown that any damages have been sustained, but if more is asked there must be a proof of more. *Lentz v. Choteau*, 6 W. 438. Again Blair, under and by virtue of the terms of his lease, covenanted with the lessee and his assigns that they should have quiet possession and enjoyment of the premises during the term of the lease.

The defendant proved affirmatively that Blair's covenant for quiet enjoyment had been broken. This proof was uncontradicted, and under the following authorities we were entitled to an unqualified affirmance of this point. *Hemphill v. Eckfeldt*, 5 Wh. 278; *Ross v. Dysart et al.*, 9 Casey, 454; *Maule v. Ashmead*, 8 Harr. 484.

B. D. Hamlin, D. H. Jack and Elliott & Watrous, for defendant in error. "A covenant in a lease to use a house as a private dwelling-house only runs with the land though the word 'assigns' is not used." *Wilkinson v. Rogers*, 12 Week. Rep'r, 119. "Three licensees of a right to dig minerals, jointly and severally, covenanted with the grantor of the license to pay him compensation for injury to surface. Two of them assigned their right under the license. Held, that the covenant ran with the land so as to bind the assignee, and that the covenant of the three licensees being joint and several, the grantor was entitled to recover the whole compensation from the assignee of two of them." *Norval v. Pascos*, 10 Jur. (N. S.) 792; 2 Fish. Dig. Eng. Cas. 2898. "In order that a covenant may run with the land, its performance or non-performance must affect the nature, quality or value of the property demised — independent of collateral circumstances or must affect the mode of enjoyment." *Norman v. Wells*, 17 Wend. 136. "A covenant in a lease not to use the demised premises in any other manner than as a sewing machine store, without the written consent of the plaintiff, was held to run with the land and bind the assignee." *Bro-laskey v. Hood*, 6 Phila. 193. As to covenant, *Streafer v. Fisher*, 1 R. 155; *Herbaugh, Assignee of Zantmyer, v. Zantmyer*, 2 Rawle, 159. "An assignee of a lessee is only liable in respect of possession, for he bears the burden only while he enjoys the benefit." *Weidner v. Foster*, 2 P. & W. 23. "Covenant will lie against an assignee of part of the thing demised." Id. Upon this question we also cite the following cases: *Heir of Dunbar v. Jumper, Assignee of Thompson*, 2 Yeates, 74; *Pollard v. Schaffer*, 1 Dall. 210; *Fisher's Ex'rs v. Lewis*, 1 Clark, 72; *Jones v. Grundrim*, 3 Watts & Serg. 531.

PER CURIAM. The agreement imposed on the company an obligation to use due diligence in operating on the premises. That was necessary for the common benefit of both parties. We do not think damages for not securing flowing oil are to be ascertained exactly as if it were a stationary mineral.

If oil be not utilized at a proper time it may be lost forever by reason of others operating near by. Not so with a stationary mineral. It remains for future development. While there is some difficulty in the way the damages were ascertained in this case, yet no better or more accurate manner is pointed out.

Looking at the whole case we see no sufficient cause to justify a reversal of the judgment.

Judgment affirmed.

IN RE ROAD IN DENMORE TOWNSHIP.

May 31, 1886.

ROAD — LAYING OUT OF — GRADE — ROAD VIEWERS — ENTERTAINING OF.

In the absence of the record showing to the contrary, it will be presumed that, whenever practicable, a public road was laid out at proper grade.

In the absence of a rule of court prohibiting road viewers from being entertained at the expense of interested land-owners; and where the proper court finds that road viewers were so entertained, but under circumstances evincing no sinister purpose or effort to unduly influence them, the proceedings will not, because of such entertaining, be set aside.

Certiorari to the court of quarter sessions of Lancaster county.

This grew out of exceptions to the report of road viewers. The following is a copy of the specifications of error:

"1. The court below erred in not sustaining the first exception filed to report of viewers in the court below, which is as follows: 'The report of viewers — W. B. Lamborn, Samuel M. Long and James R. McComsey — does not set forth that said road laid out does not at any point or points exceed an elevation of five degrees, or that by moderate filling and bridging, the declination of the road may be preserved within that limit at the crossing of ravines and streams, as set forth in the act of assembly.'

"2. The court below erred in refusing to sustain the second exception filed to report of viewers in the court below, which is: 'The viewers were entertained on the day of the view on September 29, 1885, by Jacob M. Swarr, one of the petitioners, at his residence, near the road laid out by viewers.'

B. F. Davis, for *certiorari*. The act of assembly of June 13, 1836, sets forth: "And, whenever practicable, the viewers shall lay out the said roads at an elevation not exceeding five degrees — except at the crossing of ravines and streams — where, by moderate filling and bridging, the declination of the road may be preserved within that limit." 2 *Purd. Dig.* 1496-3. The evident intention of the law-makers was to keep the elevation of roads within that limit wherever practicable, and that said limit should not be exceeded without assigning some reason for doing so. This the viewers did not do. They undertook to set forth the elevation themselves, but omitted the number of degrees. As to entertaining viewers, *Magnolia Street*, 8 Phila. 468. In Lancaster county the payment of costs on part of a petitioner for a view depends upon his success. P. L. 1867, 338. To support the other view of the question, *The Road in Plymouth Township*, 5 Rawle, 150, is cited. In that case the supreme court say: "The expenses of a re-review are borne by the parties at whose instance it was awarded; and we know of no reason why a petitioner should not entertain the viewers at his own house instead of a tavern." The fair inference from the argument of the supreme court is, if liability for costs depended on the character of the report, the proceedings would have been set aside. And, finding that there was no abuse of hospitality, sustained the report. The reason that moved the supreme court in that case does not exist here; there the petitioners had to pay the costs and

provide for the re-reviewers in any event; their decision could not affect their interest in that respect. In this case it is entirely different; the payment of the costs on the part of petitioners depended altogether on their having a favorable report of the viewers. See, also, *Sadsbury Township*, 5 Lan. Bar, 162, Mar. 7, 1874.

S. P. Eby, contra. The viewers are not bound to report the elevation of the road. The court below has no special rule on the subject, and the law does not require it. The act of 13th of June, 1836, section 3, which prescribes the duties of the viewers, makes a distinction between their several duties, requiring the performance of one class of them to be set forth in their report as having been actually done. The other class it is sufficient if done; and their performance need not be set forth in the report. Says Justice BELL, 9 Barr, 70, in *Road in Middle Creek and Union Townships*: "The presumption is that the requirements of the statutes have been complied with by the viewers, and, therefore, it is not necessary specially so to state on the report, unless specially required by the acts regulating the subject." As Judge LIVINGSTON, in his opinion in this case in the court below, following the authorities of 13 Serg. & Rawle, 25; 4 Binn. 174, and 2 id. 250, has properly said: "If the viewers have disregarded the provisions of the law relating to elevation, exceptions may be filed, and the exceptant may show by proof that the elevation of the road laid out exceeds five degrees, and that it was practicable to lay out a road between the points at an elevation not exceeding five degrees." While this court will not hear evidence in a *certiorari* in a road case, courts of quarter sessions have always done so, and this practice has been sanctioned by numerous decisions.

PER CURIAM. Both the assignments of error are to questions of fact. On *certiorari* we cannot look at the depositions. They are no part of the record. We adopt the facts found by the court as correct.

The act of assembly specifies what the viewers shall state in their report, but does not mention the elevation of the road as one of those things. In the absence of the record showing to the contrary, it will be presumed that "whenever practicable," the road was laid at a proper grade. In the absence of any rule of court prohibiting the viewers from being entertained, and upon the finding of the court that it was done under circumstances evincing no sinister purpose or effort to unduly influence the viewers, the second specification cannot be sustained. When viewers are required to go a considerable distance in the country, a necessity for refreshments may exist, that would not in a city.

Judgment affirmed.

BROCKLEY'S APPEAL.

May 31, 1886.

WILL — "LEFT."

A testator set forth in his will as follows: "I give and bequeath unto my dear wife . . . all my estate, real and personal, and wheresoever found at the time of my death, giving her full power and authority to sell the whole or any part of my real estate, and execute deed or deeds therefor. And in case any of

my said estate be left after the death of my said wife, I order it to be divided as follows." The wife sold the real estate but used no part of the proceeds. *Held*, that she held the proceeds as she had held the land, and upon her death it was "left" as a part of the estate of her husband.

Follweiler's Appeal, 102 Penn. St. 581, followed.

Appeal from the decree of the orphans' court of Lancaster county. The facts are sufficiently stated in the syllabus.

B. F. Davis, for appellant. *D. P. Rosenmiller*, for appellee.

PER CURIAM. There is no error in this decree. It is ruled by *Follweiler's Appeal*, 102 Penn. St. 581. Although Mrs. Brogly did sell the real estate under a power given in the will of her husband, yet it is found as a fact that she did not use any part of the proceeds. She, therefore, held them as she held the land, and in the language of the will they were "left" as a part of the estate of her husband.

Decree affirmed, and appeal dismissed at the costs of the appellant.

SENSENIQ v. PARRY.

May 31, 1886.

INJUNCTION — BOND — FEE PAID TO COUNSEL.

An injunction bond, *inter alia*, contained the following: "Shall indemnify the said . . . for all damages that may be sustained by reason of such injunction." *Held*, this did not include a fee paid to counsel.*

Error to the court of common pleas of Lancaster county.

This was an action of debt on an injunction bond. The plaintiff and one of the defendants were owners of adjoining lots of ground. The plaintiff had made arrangements to put a building on the rear of his lot, and with the view of preparing the foundations commenced pulling down an old building and wall that stood near the line between the parties. Before he had made any progress in pulling down the wall, the defendant procured a preliminary injunction restraining him from interfering in any way with the wall, alleging as a reason that it was a party wall.

The plaintiff, in obedience to the requirements of the injunction, immediately stopped operations and discharged his hands. Later, the injunction was dissolved, and on appeal to the supreme court the judgment of the court below was affirmed. Immediately upon the dissolution of the injunction the plaintiff commenced work on his new building; but owing to the loss of four weeks' time during which he had been delayed by the injunction, he was overtaken by winter before his work was finished, and was subject to loss and inconvenience, whereupon he brought an action upon the injunction bond.

On the trial the plaintiff proved damages sustained by him, by reason of the injunction, amounting to at least \$1,000, without including counsel fees and costs incurred in dissolving the injunction. The court excluded the testimony of plaintiff to prove the amount of counsel fees paid by him in procuring the dissolution of the injunction, on the ground that they could not be considered as damages. The defendant called experts to show that the new structure might have been erected

* See *Lindsey v. Parker*, 8 East. Rep'r, 11.

without interfering with the old wall. The verdict was for the defendant.

D. G. Eshleman, S. H. Reynolds and A. J. Eberly, for plaintiff in error. In ascertaining damages in an action upon an injunction bond a reasonable sum may be allowed for expenses incurred in procuring a dissolution. High Inj., § 967; Hilliard Inj., chap. 2, § 54. Counsel fees paid in procuring a dissolution of an injunction are allowed in an action on the bond. High Inj., § 973; *Ryan v. Anderson*, 25 Ill. 272, 283; *Derry Bank v. Heath*, 45 N. H. 524; *Corcoran v. Judson*, 24 N. Y. 106; *Praeder v. Grim*, 13 Cal. 585; *Edwards v. Bodine*, 11 Paige, 224.

Wm. Aug. Atlee and B. Frank Eshleman, for defendant in error. "In estimating damages sustained by the improper issuing of an injunction, courts proceed upon equitable grounds, and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed. And where no damages have been actually incurred, none should be assessed." High Inj., § 964. This bond was given in Pennsylvania, the case was tried in Pennsylvania and must be governed by the laws of Pennsylvania. The counsel for plaintiff in error have cited High Inj., § 973, and analyzed many cases, all of which and more are cited by High to sustain his position, to show that counsel fees are, in some States, allowed as damages. They are not in Pennsylvania. In this State for a time they seem to have been allowed, but in *Good v. Mylin*, 8 Barr, 51, this court restored the true rule, Gibson, Ch. J., saying: "To overrule decisions so recent and direct must cast a doubt on the stability of judicial decision. Yet it is better to eradicate an erroneous principle while it has scarce taken root, than to let it grow up into a fixed rule of property," and the judgment of the court below was reversed because counsel fees had been allowed as damages. In *Stopp v. Smith*, 21 P. F. S. 285, this court reversed a judgment where counsel fees had been allowed, saying: "The principle was exploded in *Good v. Mylin*," and adhered to that ruling. In *Murphy v. Jarvis*, 1 Phila. 84, Judge SHARSWOOD adhered to the rule and held counsel fees not recoverable as damages. See, also, Sedg. Dam., § 99; *Haverstick v. Gas Co.*, 5 Casey, 254.

PER CURIAM. There was no error in disallowing the evidence of counsel fee paid by the plaintiff. It is not such legal damage as is specified in the condition of the injunction bond, as to permit a recovery therefor. *Good v. Mylin*, 8 Penn. St. 51; *Stopp v. Smith*, 71 id. 285. All other alleged damages "sustained by reason of such injunction" was a question of fact, and the evidence relating thereto was submitted to the jury in a clear and correct charge. There was no error in the admission of evidence tending to disprove damages.

Judgment affirmed.

STOKE v. MILLER.

May 31, 1886.

SLANDER.

A. circulated a report about B., a single woman, to the effect that she had vermin upon her person which she had contracted from her lover. *Held*, the words used in circulating the report were actionable.

Error to the court of common pleas of Lancaster county.
The facts are sufficiently stated in the syllabus.

J. W. Johnson, for plaintiff in error. *Gosling v. Morgan*, 8 C. 255; *Colbert v. Caldwell*, 3 Gr. 186; *Stitzel v. Reynolds*, 17 S. 56; *McClurg v. Ross*, 5 Binn. 220.

W. A. Wilson, for defendant in error. We respectfully submit that the words laid and proved are actionable *per se*. If they impute fornication, as we contend, it would seem that there can be no reasonable doubt on this point. The rule undoubtedly is, as laid down in *Shaffer v. Kinzer*, 1 Binn. 537; *McClurg v. Ross*, 5 id. 218; *Andres v. Koppenheaver*, 3 S. & R. 255; *Gosling v. Morgan*, 8 Casey, 273; *Klump v. Dunn*, 16 S. 146; *Beck v. Stitzel*, 9 H. 522. It appears to be expressly decided, in *Vanderlip v. Roe*, 11 Harr. 82; *Walton v. Singleton*, 7 S. & R. 449; *Evans v. Tibbins*, 2 Gr. 451, that words imputing fornication are actionable. These cases will be more particularly examined hereafter for another purpose. The same doctrine is also held in other States, in some of which fornication is not even an indictable offense. *Smalley v. Anderson*, 2 Metc. (Ky.) 56; *Wilson v. Robbins*, Wr. 40 (Ohio); *McBragh v. Hill*, 4 Ired. 136 (N. C.); *Rickett v. Stanley*, 6 Blackf. 169; *Joval v. Pomeroy*, 2 N. J. 271. But do the words laid in our declaration and proved on the trial impute fornication to the plaintiff? The rule of law in regard to the construction of words, alleged to be slanderous, is laid down in *Rue v. Mitchell*, 2 Dall. 58; *Call v. Foresman*, 5 Watts, 331; *Bricker v. Potts*, 2 Jones, 200; *Lukehart v. Byerly*, 3 Smith, 418; *Stitzel v. Reynolds*, 9 id. 488, and many other cases. It was first formulated by Judge SHIPPEN in *Rue v. Mitchell*, and is in these words: "The sense in which words are received by the world is the sense which courts of justice ought to ascribe to them on the trial of actions for slander. Slander imputes an injury, and the injury must arise from the manner in which the slanderous language is understood."

PER CURIAM. The words averred in the declaration and proved on the trial are clearly actionable. Spoken of a single woman impliedly charges her with degradation of character, and justified the jury in finding the intent was to impute to her an act of fornication, which is an indictable offense under the laws of this Commonwealth.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

SOLOMON, *App't*, v. MANHATTAN RAILWAY COMPANY, *Resp't*.

November 23, 1886.

NEGLIGENCE — CONTRIBUTORY — ATTEMPTING TO BOARD MOVING TRAIN.

One of the defendant's trains, on its elevated railway, had reached and was about leaving the Chatham square station, on the Second avenue line, on the evening of December 9, 1881, when the deceased, with other persons, hastened from another train to get on board. As they came up running for that purpose, the gate of the car was closed, and the train started to leave the station. It was moving very slow, but with constantly accelerated speed, when two persons, running in advance of the deceased, pushed open the closed gate and boarded the car. The deceased also attempted to get on, but at that moment the conductor, while the deceased having one foot on the platform and his hands grasping the stanchions of the car platform was stepping on the car, again closed the gate. Deceased's foot was caught by the gate so that he was carried along by the moving car, until struck by a projecting water-pipe, at the north end of the station, by which he was knocked from the car upon the track below and fatally injured. *Held*, that plaintiff was guilty of contributory negligence, and a nonsuit was properly directed.*

Appeal from judgment of general term, first department, reversing a judgment in favor of plaintiff and granting a new trial.

George Putnam Smith, for appellant. *Edward S. Rapallo*, for respondent.

ANDREWS, J. It was undisputed that the train was in motion at the time the plaintiff's intestate attempted to enter it. It had been brought to a stop, according to the usual custom, on reaching the Chatham square station, for the purpose of discharging and receiving passengers, and had started again before the deceased and the two men in front of him, hurrying from the Third avenue train across the bridge and down the steps to the station platform of the Second avenue road, had reached the rear of the first car. It is also undisputed that the conductor, who was standing on the platform between the first and second cars, had given the signal to start the train and had closed or attempted to close the gate before the first of the three men reached the car. The train at this time, as we have said, had started and was slowly moving but with a constantly accelerated speed. The two men in advance of the intestate succeeded in safely boarding the train. The intestate was a few feet behind them. He attempted to get on the platform of the car after the others. The evidence tends to show that he took hold of the stanchions of the car with both hands, and placed one foot upon the car platform, and was in the act of passing on to the car when the conductor closed the gate against the deceased, who, clinging to the car or possibly being caught in some way by the gate, was carried along a few feet, until his body came in contact with a water-pipe extending horizontally at the end of the station platform, and received the injuries of which he subsequently died.

There is a conflict of evidence as to whether the gate had been fully closed before the two men in front of the intestate reached the car. The conductor testified that it was closed at that time, and was pushed open by them. Witnesses for the plaintiff testified that the conductor

* See 69 Ala. 106; S. C., 44 Am. Rep. 505; 19 Eng. Rep. 231; *Sacor v. Toledo, etc., R. Co.*, 10 Fed. Rep. ; *Abbey v. New York, etc., R. Co.* 20 W. Dig. 37.

was closing the gate as the two men approached the car and opened it for them to enter, and then closed it as the intestate was attempting to get on. There is also some discrepancy in the evidence as to the distance from the car platform to the water-pipe at the end of the station platform, when the intestate reached the car. One of the plaintiff's witnesses, who saw the whole transaction, testified that the distance was four or five feet, and other witnesses testified that it was ten feet. Wilson, a witness for the plaintiff, testified: "Although my glance was momentary. I saw him — deceased — constantly from the time he put his foot on the car until he struck the projection; in my best judgment that may have been five feet, but I think it was about four feet, the distance." Haller, also a witness for the plaintiff, was asked: "The whole occurrence, from the time the conductor pulled the bell to start the car until Mr. Solomon struck against the projection and fell, occupied but a very short space of time, did it not?" He answered: "A very little time; quicker than I can tell you."

In view of the undisputed fact that the car was moving when the deceased attempted to enter it, it is evident that the obstruction against which the deceased was carried was perilously near, and that a collision was inevitable if the deceased should fail to get on to the car, and should be carried along a few feet in the position in which he was when the gate was closed. The station platform was lighted, and "every thing was clear" The deceased had been accustomed to take the train in the evening at this station for more than a year. His son, who usually accompanied his father, testified that "the train stops very sharp, and goes off very quick." The trains ran every five minutes. There can be no doubt that the deceased was familiar with the surroundings, and was acquainted with the manner of operating the trains. We are of opinion that the nonsuit was properly directed. It must be assumed that the deceased when he attempted to enter the car knew that it was in motion. We cannot know what was passing in his mind, or of what existing facts he was actually cognizant, except by inference. But what others saw and knew in respect to matters equally open to his observation must be presumed to have been seen and known by him; especially is this presumption a reasonable one in respect to matters which common prudence required him to know and observe before he attempted to enter the car. Knowing, then, as must be inferred, that the train was in motion, he took the risk of the attempt to board it. The movement of the train was itself notice to him that the time for receiving passengers had passed. He undoubtedly thought he could board the train in safety, and except for the act of the conductor in closing the gate, the attempt would probably have been successful. It does not appear that the deceased knew of the attempt of the conductor to close the gate before the two men who preceded him entered the car. But he was in a position to have seen it, and the act was observed by the other witnesses.

We are of the opinion that the attempt of the deceased to enter the train under the circumstances disclosed, was in law, a negligent act which contributed to his death. It is, we think, the general rule of law, established by the decisions in this and other States, as claimed by the

learned counsel for the respondent, that the boarding or alighting from a moving train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was by the act of the defendant put to an election between alternative dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger and create a confidence that the attempt could be made in safety. *McIntyre's* case, 37 N. Y. 287; and *Filler's* case, 49 id. 47, were cases of injury sustained by passengers, in the one case, by going from one car to another by direction of one of the trainmen to get a seat while the train was in motion; and in the other by leaving a moving car at a station by direction of the brakeman, who directed the plaintiff, a woman, to get off, saying the train would not stop.

In *Burrows v. Erie Railway Co.*, 63 N. Y. 556, the court reversed a judgment recovered for an injury to a passenger in alighting at his station from a moving car, and in *Morrison v. Erie Railway Co.*, 56 N. Y. 302, the court reversed a verdict for the plaintiff under very similar circumstances. It is said by RAPALLO, J., in *Burrows v. Erie Railway Co.*, that "the cases in which a recovery has been allowed, notwithstanding that the passenger undertook to leave the car while in motion, are exceptional and depend upon peculiar circumstances. In short, as we now understand the rule established by the decisions, it is presumptively a negligent act for a passenger to attempt to alight from a moving train, and it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience, but that to excuse such an act and free the plaintiff from the charge of contributory negligence, there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and judgment."

Negligence no doubt is usually a question of fact of which the jury must inquire, but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict. The conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion, now generally accepted, that it is in law a dangerous and therefore a negligent act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens on the former case. He may be compelled to await for another train; but this is an inconvenience merely, which will not justify exposing himself to hazard.

In *Phillips* case, 49 N. Y. 177, the plaintiff was thrown against a

platform in attempting to board a train while in motion, and a nonsuit was sustained in this court.

In the present case, the intestate was familiar with the situation. He must have known that according to the rules the time for receiving passengers had passed, and that the greatest celerity and promptness was required on the part of those intrusted with the management of trains. It is said that the opening of the gate by the conductor was an invitation for him to enter, and that if the conductor had not closed the gate upon him he would have boarded the train in safety. It is true that the opening of the gate to admit the two men in front of the deceased, and their safe entrance, may have given the intestate confidence that he could enter also. But the act of the conductor, as the sequel shows, was not intended as an invitation to the intestate, and the conductor's mis-judgment or negligence was one of the hazards which the intestate ran. It did not relieve him from the imputation of negligence, because he did not foresee the obstruction which would be interposed, or that without the negligence of the conductor the accident would not have happened. One of the very dangers of the situation arose from the fact that all the contingencies upon which the success of the effort to enter the car depended, could not be anticipated. If men will take such hazards they must bear the consequences of their own rashness, and it is no just reason for visiting the consequences upon another that his negligence co-operated in producing the result.

We think the judgment should be affirmed.

RUGER, Ch. J., EARL and FINCH, JJ., concur; MILLER and DANFORTH, JJ., dissent; RAPALLO, J., taking no part.

Judgment affirmed.

CARD, *Resp't*, v. MANHATTAN RAILWAY Co., *App'l't*.*

November 23, 1886.

E. S. Rapallo, for appellant. *E. W. Simmons*, for respondent.

FINCH, J. The opinion recently delivered in the case of *Solomon v. Manhattan Railway Co.* substantially covers all the questions raised by this appeal, and makes it our duty to reverse the judgment of the courts below. In both cases after the gates were shut and the intending passenger was excluded and the train was in motion, the injured party clung to the moving cars, and was thereby killed. In the one case the deceased had his foot upon the car step and was obviously making a physical effort to get upon the train; in this case the trial court deemed it debatable whether the deceased was endeavoring to get upon the car, or was merely walking along by the side of the moving train, expostulating with the gateman. But disregarding all the evidence of the defense and taking as true the plaintiff's proofs, two facts remain undisputed. After the gate was closed and the train in motion, the excluded passenger had hold of the stanchions of the platform, clinging to them as the train moved while the gateman was pushing him away. Three witnesses for the plaintiff saw the accident. The wife and sister observed only the gateman pushing the deceased at

* See preceding case.

a moment when they are unable to say whether the train had started or not; but the third witness, a passenger in an adjoining car, and apparently wholly disinterested, testifies distinctly that after the gate was slammed and the train in motion, the deceased was holding on to the iron standard supporting the roof of the platform, while the gate-man was trying to push him away, and that this continued until the deceased disappeared from sight. It is not material whether the act of the deceased should or should not be deemed a physical effort to get upon the car. It was an interference with the moving train obviously dangerous and imprudent, from which the injury resulted, and for which there was no necessity or excuse. The motion for a nonsuit should have been granted.

Judgment reversed, new trial granted, costs to abide the event.

All concur, except DANFORTH, J., not voting, and RAPALLO, J., taking no part.

JOHNSON, *Resp't*, v. MYERS, *App't*.

November 23, 1886.

COSTS — CLAIM AGAINST ESTATE — ADDITIONAL ALLOWANCE.

An order granting an additional allowance to plaintiff in an action on a claim against a decedent's estate and in which he was successful, will be reversed if payment of the claim was not unreasonably resisted or refused.

Appeal from an order affirming an order granting an additional allowance. The head-note states the point.

Wm. G. Tracey, for appellant. *Chas. A. Hawley*, for respondent.

FINCH, J. An order was made in this case granting costs to the plaintiff and an additional allowance. It is resisted upon this appeal on the ground that the plaintiff's demand was not presented to the executrix for payment before the commencement of the action, and that such payment was not unreasonably resisted or refused. Both questions turn upon disputed facts as to which it is the general rule of this court to follow the conclusions of the courts below unless for some very obvious and sufficient reasons. *Field v. Field*, 77 N. Y. 294. The statute — 3 R. S. (5th ed.) 175, §§ 39, 40 — authorizes publication of a notice to creditors "requiring all persons having claims against the deceased to exhibit the same with the vouchers thereof to such executor or administrator," etc., and allows the latter upon such presentation to require production of vouchers and an affidavit of the claimant. The proofs on the part of the plaintiff show that her claims, with the books and vouchers on which they rested, were fully exhibited to the authorized agent of the executrix before the commencement of the action and were examined and rejected by the assertion of counter-claims sufficient to extinguish them and all ultimate liability denied. This fact is no further disputed than by an affidavit of the defendant's attorney that no "formal claim" was ever made, though he admits "informal negotiations for a settlement." But while the courts below were justified in holding that the plaintiff's claim was duly exhibited and properly presented, the examinations we have made of the facts in controversy very strongly impresses us with the conviction that the defense of this

action was reasonable and proper, and while the defendant estate was unsuccessful in the end, there was abundant reason in the complicated nature of the accounts, in the great amount of business transacted and in the supposed and actual existence of grave counter-claims to justify the defense actually made and prevent us from holding it to have been unreasonable. Judgment was demanded for more than \$60,000 with a large amount of interest. Judgment was rendered for a sum very materially less, and still further reduced by a deduction of the general term of more than \$10,000. We discover no trace of bad faith in the defense interposed but much to justify the inquiry and examination which it compelled.

For this reason we think costs should not have been awarded and we, therefore, reverse the order appealed from.

All concur.

Order reversed.

SHAW v. SHELDON.

November 23, 1886.

MASTER AND SERVANT—USUAL RISKS.

The rule that where an employee serves with full knowledge and appreciation of the danger, he takes upon himself the risk of injury, from neglect of the master to suitably protect machinery, applied.

Appeal from the judgment entered in Cayuga county clerk's office upon the decision of the general term of the fifth department of the supreme court, July 13, 1885, in favor of the plaintiff and denying defendants' motion for a new trial upon the exceptions taken upon the trial of this action at the Cayuga circuit in May, 1884, which were, after the rendition of a verdict in favor of the plaintiff for \$2,500, directed by Hon. Francis A. Macomber, who presided at the trial, to be heard in the first instance at general term.

The action was brought by the plaintiff to recover damages occasioned by the death of her husband, Peter Shaw, through the alleged negligence of the defendants, composing the firm of Sheldon & Co.

The answer alleged a want of knowledge or information of the material allegations of the complaint, and that the deceased received the injuries resulting in his death by reason of his contributory negligence.

The defendants were engaged in the operation of a rolling mill at Auburn, N. Y., and the deceased was a roller in their employ. In the process of manufacture carried on by the defendants, iron was subjected to pressure between various sets of heavy rollers of corrugated iron. These rollers revolved, the ends or necks being set in bearings in which they moved. The defendants had a series of these rollers in close proximity to each other, and various sets, composing what was known as a train, being united by couplings into which the ends of the several sets of rollers were inserted at a point beyond the bearing. In consequence of the passage through these rollers of the heated iron, the rollers and bearings become heated to such an extent as to damage them, unless they are kept constantly supplied with water sufficient in quantity to cool them off. For that purpose, the defendants provided over

the various sets of rollers a trough which was supplied with water, and from which water was conducted to the rollers.

The couplings between the respective sets of rollers were so arranged that those of the upper and lower rollers of each set were so close together that when in revolution, they were productive of danger in case any of the employees should come in contact with them.

It was the general custom and mode of construction of machinery of this character in most rolling mills, to cover the couplings with wood or metal, so as to prevent the employees, who work about the machinery, from coming in contact with such couplings.

When the deceased first entered the defendants' employ, a wooden cover had been provided for the coupling, but this covering was subsequently destroyed, and for some time prior to his death the couplings were allowed to remain uncovered, excepting that the front of the coupling was partially covered by a tub or bosh of sheet iron, in which was placed a grindstone, and which was generally filled with water.

This bosh did not, however, sufficiently protect the couplings so as to serve the purpose of a covering usually employed in other mills.

On the evening of May 18, 1883, while Peter Shaw was at work on the finishing rollers, he was informed by one of his co-employees, that the water was not running from the trough to the rollers. It was of great importance to the defendants that the flow of water should not cease, and the men in their employ, whenever they observed that the flow had stopped, habitually climbed upon the bosh, which stood in front of the couplings, for the purpose of looking into the trough, which was higher than their heads, in order to ascertain the cause of the stoppage and to again cause the water to flow. Shaw accordingly, upon observing that the water no longer flowed, stepped upon the bosh and was seen to look into the trough. While so standing, his foot slipped, or his clothing was caught by the suction of the couplings between them, his leg was drawn between the revolving iron, and he sustained such injuries that he died in consequence of the effects thereof on May 29, 1884.

The flow of water from the troughs was so frequently interrupted that it was one of the most ordinary things for the employees to step upon a bosh to look into the trough to ascertain the cause of the stoppage, and this occurred on an average several times a day.

As the stopping of the machinery is a matter of expense, the defendants' rolls were never stopped on account of a temporary stoppage of the flow of water. The bosh was brought into court, and the top appeared to be perfectly smooth and polished. This smoothness was occasioned by the frequency with which the men in the mill stepped upon the bosh for the purpose of looking into the troughs. The only other way to examine the trough was to pass entirely around all the machinery and to go to the rear of the rolls where red-hot iron was constantly passing, and to step upon a plate which projected from the machine. This course was never adopted in the mill, except when those desiring to look into the trough happened to be at the particular point specified. The duty of examining the troughs was not imposed upon any particular person. Any of the employees who happened to

be in a situation to look, or who was not otherwise employed, considered it his duty to start the flow of water whenever it stopped. The work of the deceased related to the putting of iron through the different series of rollers. The general work of the mill was under the superintendence of one Thompson. Although Shaw was called the "boss" roller, he received that name because he was the first of the finishing rollers.

Richard C. Steel, for appellant, cited *DeForrest v. Jewett*, 88 N. Y. 268; *Burke v. Witherbee*, 98 id. 565; *Powers v. N. Y., etc., R. R. Co.*, id. 278; *Beach Cont. Neg.*, § 123; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411; S. C., 3 Am. Rep. 143; *Plank v. N. Y., etc., R. R. Co.*, 60 N. Y. 607; *Mehan v. N. Y., etc., R. R. Co.*, 73 id. 585; *DuBois v. City of Kingston*, 102 id. 219; S. C., 4 East. Rep'r, 724.

Louis Marshall, for respondent. As to the duty of the master to furnish proper, safe and adequate machinery so as to protect the servant against unnecessary risks, see, *Clarke v. Holmes*, 7 Hurlst. & Norm. 937; *Mellors v. Shaw*, 1 Best & Smith, 437; *Walling v. Ooster, L. R.*, 6 Exch. 73; *Hough v. Texas, etc., R. R. Co.*, 100 U. S. 213; *Painton v. Northern Cent. R. R. Co.*, 83 N. Y. 7; *Kain v. Smith*, 89 id. 375; *Ellis v. N. Y., etc., R. R. Co.*, 95 id. 546; *Schuanderer v. Birg*, 33 Hun, 186; *Kirkpatrick v. N. Y., etc., R. R. Co.*, 79 N. Y. 240; *Fuller v. Jewett*, 80 id. 46; *Swoboda v. Ward*, 40 Mich. 420; *Cooley Torts*, 556-7, and cases cited; *M. & C. R. R. Co. v. Dolan*, 32 Mich. 513; *Combs v. New Bedford Cordage Co.*, 102 Mass. 572; *Reynolds v. Hindman*, 32 Iowa, 146; *Dowling v. Allen*, 6 Mo. App. 195; *Smith v. N. Y., etc., R. R. Co.*, 19 N. Y. 127; *Dorsey v. Phillips Construction Co.*, 42 Wis. 597; *Cayzer v. Taylor*, 10 Gray, 274; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14; *Toledo Railway v. Conroy*, 68 Ill. 516; *Vosburgh v. Lake Shore, etc., R. R. Co.*, 94 N. Y. 374; *St. Louis R. R. Co. v. Valirius*, 56 Ind. 512; *Patterson v. Pittsburgh, etc., R. R. Co.*, 46 Penn. St. 389. The question of contributory negligence was for the jury. *Assop v. Yates*, 2 H. & N. 768; *Williams v. Clough*, 3 id. 258; in *Gibson v. Erie Railway Co.*, 63 N. Y. 451; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521; *Booth v. Boston, etc., R. R. Co.*, 73 id. 40; *Hawley v. North Cent. R. R. Co.*, 82 id.; *White v. Sharp*, 27 Hun, 94; *Sprong v. Boston, etc., R. R. Co.*, 58 N. Y. 56; *Marsh v. Chickering*; *Sweeney v. Berlin, etc., Envelope Co.*; *Kennedy v. Manhattan R. R. Co.*, 33 Hun, 457; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 632; *Ochsenbein v. Shapley*, 85 id. 274; *Cosgrove v. N. Y., etc., R. R. Co.*, 87 id. 91; *Jones v. N. Y. C. & H. R. R. Co.*, 28 Hun, 366; S. C., 92 N. Y. 628.

PER CURIAM. The majority of the court are of opinion that this judgment should be reversed for the reason that the facts establish beyond dispute that the injured employee entered the service and remained in it with a full knowledge and appreciation of the risk and danger resulting from leaving the couplings uncovered. The fact was entirely obvious, the resultant peril plain at a glance, and the injured servant a skilled workman, a foreman of the rollers, accustomed to the machinery and the service, and having the capacity and ability to fully

appreciate the consequences of leaving the couplings uncovered. Within the rule applicable to such cases the plaintiff's intestate took upon himself the risk of injury from the observed and obvious omission.

The court are also of opinion that the trial judge erred in charging the jury that if they believed the evidence of the superintendent that he asked the deceased if he wanted the couplings covered, and the latter declined the precaution, it was a circumstance for them to consider upon the question of the assumption of consequent dangers by the deceased. If the fact sworn to was true, it conclusively proved that the servant took upon himself the risks of the omission and freed the employer from responsibility. The jury should have been so charged. The principal doubt among us on this branch of the case has been whether the defendant's exception was sufficient to bring up the question.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except RUGER, Ch. J., DANFORTH and FINCH, JJ., dissenting.

Cox, App't, v. MAYOR, ETC., OF NEW YORK, Resp't.

November 23, 1886.

NEW YORK CITY — ACTION BY POLICE JUSTICE FOR SALARY.

A police justice in New York city had been paid an unauthorized salary for several years, and thereafter paid a salary which was legal in amount. In an action to recover the balance between the amount paid and the sum claimed, *held*, that the complaint was properly dismissed.

The city was given a judgment on its counter-claim setting up over-payments. *Held*, that the decision at general term disallowing the same, on the ground that they were voluntary, was right.

Appeal from judgment, general term, first department, modifying a judgment in favor of defendants. The opinion states the case.

Thomas Allison, for appellant. *D. J. Dean*, for respondent.

EARL, J. The plaintiff was elected one of the police justices of the city of New York in the fall of 1869 for a term of six years commencing on the first day of January following, and he served in his office until November 3, 1873, when his term came to an end pursuant to the provisions of section 2 of chapter 538 of the Laws of 1873. He was paid for his salary at the rate of \$10,000 per year to and including July 31, 1871, and thereafter while he was in office he demanded his salary at the same rate, but was paid only at the rate of \$5,000. He commenced this action to recover the balance of his salary, being the difference between the \$5,000 paid and the \$10,000 claimed.

The defendants in their answer alleged that the plaintiff's salary was lawfully but \$5,000, and that he was paid the greater sum in 1870 and 1871 by mistake and without authority of law, and they set up the over-payment of \$7,916.66 as a counter-claim for which they demanded judgment.

The action was brought to trial before a judge without a jury, and he found that plaintiff's salary was lawfully but \$5,000, dismissed his

complaint and gave judgment to the defendants for their counter-claim. The plaintiff appealed to the general term where the court modified the judgment by disallowing the counter-claim, and affirms it as so modified. Both parties then appealed to this court.

While this case is not free from some difficulty and doubt, we find no satisfactory reason for differing from the general term. The act, chapter 508 of the Laws of 1860, provided for the reorganization of the police courts in the city of New York, and imposed additional duties upon the police justices; and in section 26 provided as follows: "And for the additional duties imposed in this act the common council or board of supervisors in said city and county may increase the compensation of any officer mentioned herein." At the time that act was passed the salary of police justices was \$3,500; and in December, 1862, the common council, professing to act under that statute, increased the salary to \$5,000, payable monthly from January 1, 1863. By section 11 of the act, chapter 876 of the Laws of 1869, it was enacted that "the common council or any head of department of the city of New York is hereby prohibited from creating any new office or department, or increasing the salaries of those now in office, or their successors, except as provided by acts passed by the legislature."

On the 31st day of December, 1869, the common council adopted a resolution which provided that from and after January 1, 1870, the salary of police justices should be \$10,000, payable in equal monthly installments. The claim of the plaintiff is that by this resolution his salary became lawfully fixed at the sum of \$10,000. Whether or not this claim is well founded depends upon the construction to be given to section 26 of the act of 1860. Did that section empower the common council to increase the salary of police justices from time to time or only once? We are of opinion that it authorized but one increase, and that by the increase made in 1862 the power of the common council to increase the salary was exhausted.*

By the act of 1860, additional duties were imposed upon the police justices, and in view of that circumstance and to adjust the salary to the new state of things, the power to increase was conferred. It was not a power which, to promote the public good or to carry out a definite public policy, was required to be continuously possessed or repeatedly exercised. The language of the statute seems to have been carefully selected, and if it had been intended to lodge a power in the common council liable from continuous importunities of office-holders to be abused, we might expect to find the intent expressed in more appropriate and unmistakable phraseology. It is a delegated power which should not be extended by construction, implication or doubtful inference. There was authority to make the salary commensurate with the public service required, and this was to be exercised, not piecemeal, but once for all. Therefore, the resolution for a further increase of the salary on the 31st of December, 1869, was unauthorized, and was also in violation of section 11 of the act of 1869, above quoted, and the plaintiff cannot, therefore, base his claim upon that resolution alone.

* See *Coogan v. Barbour*, 1 East. Rep'r, 200.

But the claim is made that the legislature approved and ratified the increase of the salary of police justices to \$10,000, and that, therefore, plaintiff's claim to the increase is well founded.

In chapter 383, Laws of 1870, page 888, it was enacted as follows: "The mayor and comptroller are hereby authorized to fix the salaries of the civil justices of said city—and any or either of them—as they may deem the legal business of the respective districts to justify, not exceeding the salary now paid to the police justices of the city." The civil justices were then receiving a salary of \$5,000, and in pursuance of that act, the mayor and comptroller fixed their salary at \$10,000, and it was held that thereby that sum became the lawful salary. *Quinn v. The Mayor*, 63 Barb. 595; affirmed in this court, 53 N. Y. 627. It is contended that the legislature must be presumed to have known that the salary of police justices had been increased to \$10,000, and to have intended to confer authority to make a like increase to the civil justices, and that thus it ratified the salary then allowed to the police justices. We cannot assent to this claim. It is a rule of construction that the legislature is presumed to have knowledge of the facts directly involved in its acts. But it would be quite absurd to presume that it had knowledge of all the collateral and remote facts involved, or that it contemplated all the consequences to flow directly or indirectly from its legislation. Its knowledge falls far short of omniscience, and the rule can go but little further than to deny the right to assail legislative acts on the ground that they were passed through ignorance or mistake of fact. There can be no presumption that the legislature knew when they passed the act referred to that there had been an attempted unlawful increase in the salary of police justices, or that it knew what salary was in fact paid or payable to them. It was simply dealing with the salary of civil justices, and empowered the officers named to fix that at any sum not exceeding that paid to the police justices, and there can be no inference that it intended in any way to act upon or affect the salary of the latter officials, and hence there is no ground for saying that it approved that salary. It was, however, held upon a course of reasoning, not altogether satisfactory, that as \$10,000 was the salary actually paid to the police justices at that time, the strict letter of the act authorized an increase of the salary of the civil justices to the same amount, and that conclusion was reached without determining whether or not the salary of the police justices had been lawfully increased to \$10,000.

By the statute, chapter 876 of the Laws of 1869, section 12, page 2133, the legislature required that thereafter all estimates for the anticipated expenditures of all boards and departments of the government of the city of New York should be made by the chief officers of every such board and department in connection with the mayor and comptroller, and submitted to the common council at the first meeting thereof in January in each year, and that the estimates so submitted, whether acted upon or not by the common council, should be presented by the mayor to both branches of the legislature, on or before the first Tuesday in March, and that the same, when so presented, were to be taken to be the sole official estimates of such boards and departments for such

annual expenditures of the year, and to include all expenses that in the opinion of such officers might be necessary.

As thus required, the estimates of the anticipated expenditures of the city for the year 1870 were made up at a meeting of the chief officers of the boards and departments of the city, and the mayor and comptroller, held November 29, 1869, when a resolution was adopted approving of the same. In those estimates the salaries of the police justices were estimated and stated in detail under the general head, "Salaries city courts," which included the police courts, at \$5,000. Before those estimates were, however, submitted to the common council, it had increased the salaries of police justices to \$10,000 per annum. In consequence of this increase, new estimates of the expenses of the city courts, which included the police courts, were made, showing the estimated salary of each of the police justices to be \$10,000 per annum. Pursuant to the further requirements of the statute, the estimates so made were submitted to the common council at the first meeting of the board held in January, 1870. The estimates so submitted, showed in detail, in the estimated expenses of the "city courts," the salary of the police justices to be \$10,000, and they were acted upon by the common council, and its action was approved by the mayor. Those estimates were transmitted by the mayor before the first Tuesday of March, 1870, to both branches of the legislature, accompanied by a memorial of the mayor and comptroller, praying that action might be taken by the legislature upon the same. Upon this memorial, and accompanying estimates, the legislature made the necessary appropriation to meet the expenses estimated. This was done by the statute known as the city tax levy of 1870, being chapter 383, Laws of 1870, page 881. By this act, page 888, the amount appropriated and authorized to be raised for salaries of the city courts was \$364,435.

It is further claimed that by this action of the legislature authorizing a levy of taxes for city expenses, including the large gross sum for the city courts, which was in part made up by the amount needed to pay the salaries of police justices at \$10,000, the salary at that sum was also approved and ratified.

It cannot be presumed that the legislature had knowledge of all the facts upon which the city authorities based the estimates consisting of hundreds, and probably thousands, of items submitted to it. It knew that those authorities had made their estimates of the money needed for city expenditures, and it authorized the money to be raised; but it did not authorize the money, when raised, to be paid out for unlawful purposes. It authorized a gross sum to be raised for city courts, but, when raised, that sum was to be paid out not otherwise than according to law. In authorizing that amount to be raised, there is no reason for saying that it meant to change or increase salaries, or to ratify any illegal action of the city officers. Sound policy requires that legislative ratification, of what was previously unlawful, should be found in plain language, and not left to uncertain implication and doubtful inferences resting upon slender foundations. If the legislature had expressly authorized the raising of a gross sum in terms to pay each of the police justices a salary of \$10,000, we would have had a different case. Rati-

fication, whether by the legislature or individuals, is a matter of intention, and that should be made to appear.

The plaintiff's complaint was, therefore, properly dismissed, and it only remains to be determined whether the counter-claim of the defendants was properly disallowed.

The salary had in form been increased before the plaintiff entered upon the duties of his office, and he received payment at the rate of \$10,000 per year for one year and seven months, so far as appears, in good faith, without any mistake of fact, he and the other city officers concerned believing that the increase had lawfully been made. He received the payments more than six years before the commencement of this action out of moneys for that purpose lawfully placed in the city treasury by the combined action of the State and local legislatures. If the statute of limitations had, therefore, been set up in the reply as a defense to the counter-claim, it would have been a complete answer to the same. Under the circumstances, it would be a hard measure of justice to compel the plaintiff at this late day to restore the money thus received, with the interest thereon. As appears from the opinion of the general term, the counter-claim was there disallowed on the ground that the payments to the plaintiff were voluntary; and, without giving our reasons at length, we simply announce our concurrence in that conclusion.

The judgment should be affirmed.

All concur.

Judgment affirmed.

LARKINS, *Resp't*, v. MAXON, *App't*.

November 28, 1886.

COSTS — DISBURSEMENTS — CODE PROC., § 817.

By subdivision 8 of section 8 of the repealing act of 1880, the right to disbursements, given by section 817 of the old Code upon the reference of a claim against a deceased person, was preserved.

Appeal from an order and judgment of affirmance and for costs rendered by the general term of the fourth department from a judgment in favor of the respondent for damages and disbursements, and from an order of the special term, confirming the report of a referee appointed pursuant to statute to hear a contested claim presented to the administrator of Orville C. Sprague, deceased.

The claim was for services rendered appellant's testator, as a domestic in his family. Much testimony was taken at the trial, bearing on the question whether the claimant was a member of Sprague's family, or a domestic, also upon the question of an agreement by Sprague to pay the claimant for her services by devising property to her.

The referee found from this testimony in his report :

That between the 5th day of October, 1867, and the 20th day of February, 1880, plaintiff rendered and performed work, labor and services for said Orville C. Sprague, at his request, as a domestic in his family, for the term of six hundred and two and one-third weeks ; that said services were worth \$1.50 per week ; that her — plaintiffs — rela-

tions in Sprague's family were affectionate and kindly and like those of a daughter; that her services prior to the time she talked of leaving, in or about 1875, were not done under any express contract and none existed before that time. The other facts appear in the opinion.

Elon R. Brown, for appellant. *W. H. Gilman*, for respondent.

PER CURIAM. We do not think that the findings of the referee were inconsistent. A domestic may be treated in many respects like a daughter without holding that relation to the employer. The facts were sufficient to establish at least an implied contract for compensation, and so far as there was an express one, it has not been fulfilled by the devise and legacy given by Mrs. Sprague. The destroyed wills of Sprague and his wife, bore somewhat on the actually existing relations between the parties and formed incidents in the history of those relations. Since the referee found as a fact the existence of an implied contract, his opinion about an understanding "not amounting to contract" was immaterial.

From the judgment entered on the report of the referee the general term struck out the disbursements taxed and allowed upon the ground that section 317 of the old Code of Procedure, which provided for their taxation, was repealed by the repealing act of 1880, and the right was not preserved by subdivision 8 of section 3 of that act. Upon the construction of that saving clause there has been a difference of opinion in the supreme court. In *Miller v. Miller*, 32 Hun, 481, and *Daggett v. Mead*, 11 Abb. N. C. 116, the saving clause was held to prevent the destruction only of the right to such disbursements as were provided for in the Revised Statutes, and there being none such in a case like the present there was nothing saved. To the contrary, are *Krill v. Brownell*, 40 Hun, 72; *Sutton v. Newton*, 15 Abb. N. C. 452; *Hale v. Edmunds*, 67 How. Pr. 202, and *Overheiser v. Morehouse*, 16 Abb. N. C. 208. We think these last cited cases establish the true construction of the subdivision referred to, and that it was intended and did preserve the right to disbursements given by the former Code upon the reference of a claim against a decedent.

The order of the general term striking out disbursements should be reversed and the judgment as entered at special term be affirmed, with costs of the appeal to this court.

All concur.

Judgment affirmed.

PEOPLE v. KNICKERBOCKER LIFE INS. CO.

November 23, 1886.

INSURANCE — LIFE — NEW POLICY — FORFEITURE.

Defendant issued a policy containing the words conspicuously printed thereon: "Non-forfeiture policy." One of the provisions of the policy was that if, after two annual premiums had been paid, default was made in the payment of premiums, the company, upon surrender of the policy, would issue to the assured a new policy for the value acquired under the old one at the time of the default, "subject to any notes that might have been received on account of premiums;" and further, that the holder of the new policy should not be subject "to any subsequent charge except the interest annually on all premium notes remaining unpaid on this policy."

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Held, that default in the payment of interest on the premium notes by the holder of the new policy forfeited all claim under said policy.*

Appeal from an order of the general term affirming an order of the special term sustaining receiver's exceptions, and denying motion to confirm referee's report.

The original policy contained a provision that if after the receipt by the company of two or more annual premiums, the policy should cease in consequence of the non-payment of premiums, the company on the surrender of the same will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years have been made, it will issue a policy for two-tenths of the sum originally insured; if for three years, three-tenths; and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy." The claimant allowed the policy to lapse after paying partly in cash and partly in notes, six annual premiums. Thereafter she surrendered it, and the company issued a new policy for six-tenths of the amount of the original policy, which contained a recital that it was issued in consideration of the surrender of the old policy and of the representation made in the application therefor, and of the payment of interest annually, every twenty-second day of November, on all notes or credits given for premiums on the original policy. The outstanding notes or credits amounted to \$1,620, and were charged against the policy. The new policy also contained this clause: "If the interest upon said notes or credits shall not be paid on or before the day or days above mentioned for the payment thereof * * * then, and in every such case, the company shall not be liable to pay the sum assured or any part thereof, and said policy shall cease and be null and void, without notice to any party or parties interested herein." The claimant paid interest on the notes for three years after the new policy was issued, until 1877, and then ceased to pay interest, and made no further payments. In 1882, the company became insolvent, and a receiver was appointed. It is claimed that the claimant had no actual knowledge that the new policy contained the clause of forfeiture above quoted, and that it was fraudulently inserted by the company.

John B. Green, for appellant. *Leslie W. Russell*, for respondent.

ANDREWS, J. The words "non-forfeiture policy" were conspicuously printed on the original policy. But a reference to the body of the policy shows that it was not intended to make the policy non-forfeitable, except in a limited sense. The assured was not relieved from the obligation to pay the premium annually on the day specified. By the express terms of the contract an omission to pay the premium on the day it became due, avoided the policy. But if at the time of such omission he had paid two or more premiums, the company bound itself to issue a new policy for as many tenths of the original insurance as there had been premiums paid. This was the only sense in which

*[See to same effect *Holman v. Conn. Life Ins. Co.*, ante, 18.]

the original policy was non-forfeitable. The assured would not lose all benefit from premiums paid, if the policy should become void by an omission to pay subsequent premiums. An omission to pay the premiums when due, terminated the original contract, but the assured, if he had paid two or more premiums, would, on a surrender of the policy, be entitled to the substituted contract, as provided.

In case of a breach of any of the conditions of the policy other than the omission to pay the premiums when due, the assured was in no way protected against an absolute forfeiture of the policy. It is claimed that the insertion in the new policy of the clause of forfeiture for non-payment of interest annually on the outstanding premium notes given for premiums on the old policy, was unauthorized by the terms of the original policy. We think this claim is not well founded. The company did not undertake to give a new policy free from all conditions. It was expressly provided that the new policy should be "subject to any notes that may have been received on account of premiums." The intention to impose upon the assured, in case a new policy should be issued, an obligation to pay the interest annually on premium notes outstanding, is clearly shown by the further provision in the original policy, that the assured to whom a new policy should be issued was not to be subjected "to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy." If the premiums had been paid in cash, no further payment would have been necessary. If paid in part in notes, only the annual interest thereon would be required to be paid, and the principal would remain a charge on the policy, to be settled on the final liquidation. It is true that the original policy did not provide for the insertion in the new policy of a clause of forfeiture for non-payment of the interest. But it was made forfeitable on the non-payment of the premiums at the day, with a provision for a substituted contract, and it was also subject to forfeiture for breaches of other conditions. Clauses of forfeiture were contemplated. The new contract was to be made subject to the payment by the assured of annual interest on the outstanding notes, and the right of the company to insert a clause of forfeiture as a means of enforcing this obligation and of protecting the company against the accumulation of unpaid interest, was, we think, implied. The successful prosecution of the business of life insurance requires prompt payment by policyholders of their obligations. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting companies from embarrassment. *BRADLEY, J., N. Y. Life Ins. Co. v. Statham*, 93 U. S. 30. The policy of following breaches of conditions by forfeiture was indicated in the original policy, and the fair construction of the agreement to give a new policy subject to the annual payment of interest on outstanding notes, authorized the insertion in the new policy of the usual provision of forfeiture on non-payment. We are of opinion that the new policy conformed to the agreement in the original policy, and it is, therefore, unnecessary to determine whether the claimant could be permitted, after having accepted the policy and held it for years without objection, to now insist that the forfeiture clause was inserted without

authority and excuse himself on the ground that he did not know of its existence until after the insolvency of the company.

The case of *Cowles v. Continental Life Ins. Co.*, decided by the supreme court of New Hampshire — 2 East. Rep'r, 741 — and of *Bruce v. same company*, decided by the supreme court of Vermont — 2 East. Rep'r, 452 — involved the construction of clauses in original policies dissimilar to those in question. The clause considered in those cases, so far as the reports show, did not provide that the new policy should be subject to the payment by the assured of annual interest on the outstanding notes.

The order should be affirmed.

All concur.

Order affirmed.

LOCKWOOD, *App't*, v. BRANTLY, *Resp't*.

EXECUTOR AND ADMINISTRATOR — TESTAMENTARY TRUSTEE — LACHES ON THE PART OF BENEFICIARIES IN ASKING TO HAVE FUNDS TURNED OVER TO EXECUTOR — ACQUIESCENCE IN HOLDER'S TITLE — QUESTION OF FACT.

Appeal from a judgment of the general term, affirming an order of the special term dismissing plaintiff's complaint. The opinion states the case.

Henry Cooper, for appellant. *Howard R. Payne*, for respondent.

DANFORTH, J. This action was commenced May 12, 1883. It appears from the record that Benjamin F. Cooper died at the city of Utica on the 6th of May, 1864, after devising all his property in trust, first, for the support and benefit of Mary A., his wife, and Helen, his daughter, and if there should be any surplus, then second, for the support of his sons William and Henry. The persons named as trustees and his son William B. were appointed executors, but Graham and William B. alone qualified as such. The will was admitted to probate in June, 1864, and the above-named executors and Graham as trustee continued to act in their several capacities until December 20, 1880, when, upon proceedings instituted in the supreme court by Graham, Mary A., Helen, William B. and Henry Cooper, an order was made discharging Graham from his office of executor and trustee, and from that time Brantly continued sole executor until his death in 1882, when James B. Lockwood was appointed in his place. At the commencement of this suit, therefore, William B. Cooper was the sole executor of the will of Benjamin, and Lockwood sole testamentary trustee. William B. Cooper refused to join as plaintiff, either as an individual or as executor, and was, therefore, made co-defendant in both capacities with William T. Brantly, who was sued as the administrator of the Brantly before mentioned. The plaintiffs are Lockwood, who sues as trustee of the estate of Benjamin F. Cooper, Mary A. Cooper, Helen Cooper and Henry Cooper, beneficiaries under his will.

The object of the action is to compel the defendant Brantly to transfer to the defendant William, as executor, or to the plaintiff Lockwood, as trustee, certain shares of the capital stock of the Utica Cotton Mills, and \$1,600.24, with interest, being the amount of dividends paid thereon

since the 1st day of August, 1871. The defendant Brantly alone answered, denying certain material allegations of the complaint and setting up several affirmative defenses. At special term the issues were decided in favor of the defendant and the complaint dismissed. Upon appeal by the plaintiffs the general term affirmed that decision, and against the judgment then rendered, they appeal to this court. The present controversy brings in question the title to the stock above referred to. It is undisputed that six shares were owned by the testator; that on the 15th day of May, 1861, he duly transferred those shares to William T. Brantly, the respondents' intestate, as collateral security for a loan of \$500 theretofore made to him, and at that time with the interest thereon unpaid and due. For a time Cooper, under a power of attorney from Brantly, collected the dividends and applied them to his own use. Afterward Brantly assigned the stock to "William B. Cooper, trustee," and on the 3d of February, 1864, they were so transferred on the books of the company and a new certificate issued to the assignee. He collected the dividends until February 1, 1865, and after that, until August, 1866, they were collected by Graham and paid over by Brantly's direction to Mrs. Cooper and Helen Cooper. It is also found, by the learned trial court upon evidence before him, that upon the 7th of July, 1866, Cooper, as trustee, for value received, transferred the stock to Brantly, who thereafter, until his death in March, 1882, held, claimed and treated the stock as absolutely his own and received the dividends thereon.

The plaintiffs' contention is in substance that notwithstanding this new and absolute assignment, Brantly afterward held the stock either as he had first received it, as collateral security, or the dividends having amounted to the sum for payment of which it was pledged, as depository, without a lien upon or interest of any kind in it; in either event as trustee. It certainly does not appear upon what actual consideration the final transfer to Brantly was made, but the fact of transfer and the claim of ownership were known to every one of the parties interested, long before the death of Mr. Brantly, and to William B. Cooper and Graham at the very time of the transfer, for both were actors in the transaction. They were trustees and executors, they knew of the terms of the original assignment by way of pledge or collateral security, and of the subsequent absolute conveyance. So did Henry Cooper, one of the beneficiaries under the will, and Mary E. and Helen Cooper, whose meagre support was derived from an estate insufficient for the purpose, and was eked out by the frequent benevolence of Brantly, avowedly founded upon his possession and ownership of the stock in question. Not one of the persons disputed the title of Brantly, and although in 1880, Graham, on their petition, was relieved of his trust, no claim was made by either that the stock formed part of the estate of B. F. Cooper, with the management of which he had been charged. Not then, nor till after the death of Brantly did this contention arise. Had it been otherwise it may be presumed some fuller explanation might have been had from him. If it be now scant the plaintiffs cannot complain. On the part of Brantly there was no concealment; on the part of every one interested there was perfect acquiescence.

From these facts it would seem to follow that at the time of Lockwood's appointment as testamentary trustee, the estate intrusted to him was in no way concerned or interested in the stock in question. The defendant's intestate had acquired a good legal title to it, and we agree with both courts whose judgments are before us, that there is in evidence nothing which would justify any tribunal in depriving his estate of its benefit. Indeed there is no reason to believe that this action would have been brought, except for the death of Brantly, and that circumstance should not relieve the plaintiffs from giving the fullest measure of proof, and repelling by evidence the presumption which, after a lapse of more than twenty years, requires us to hold that the apparent title was the real title. Here is not only lapse of time and negligence in asserting the contrary, but acquiescence, three objections to the plaintiffs' claim, which, upon the testimony, are wholly unexplained except upon the theory that so long as Brantly lived, all parties interested recognized his title as unassailable. There would be great danger of an unjust advantage, if, he being dead, the same parties should now be allowed to question it. It is difficult to find good faith in the plaintiffs' claim; there has certainly been no diligence in asserting it. We think there is no equity in the suit and the complaint was properly dismissed.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHNSON, *Resp't*, v. MYERS, *App't*.

November 23, 1896.

EVIDENCE.

In an action by a wife as administratrix of her husband's estate to recover for services rendered, plaintiff was asked what proportion of her husband's time was devoted to the defendant's business. The question was objected to as calling for an opinion. *Held*, that the question was competent as calling for a fact.

Appeal from a judgment of the general term affirming a judgment entered upon the report of a referee in favor of the plaintiff. The opinion states the case.

Wm. G. Tracy, for appellant. *Chas. A. Hawly*, for respondent.

FINCH, J. The plaintiff as administratrix recovered compensation in two separate actions for services rendered by Johnson to Myers, in his life-time, and to his executrix after his death.

Myers appears to have been an able and successful though somewhat illiterate business man, whose enterprises were varied and extensive, widely scattered as to locality, and involving heavy risks of capital, obstructed by adverse interests and the frequent hostility of litigation. In executing his plans he found it both necessary and wise to secure and use intelligent and trained assistance. To some extent he obtained the aid of Johnson by joining him as an associate in his enterprises; but beyond that he employed him largely in his own affairs, putting confidence in the ability and honesty of the chosen agent. Necessarily the line between the partnership work of Johnson and that performed by

him for the benefit of Myers individually, was extremely difficult to draw, and after the death of both parties it has made an accurate and precise separation impossible, and to be accomplished only approximately and by a careful judgment founded upon such evidence as the nature of the case permitted. No person was so likely to know in a general way the amount of service rendered by Johnson as his wife. His coming and going, his telegrams and letters, the litigations calling him abroad, the meetings and conversations of the parties would be within her knowledge to some considerable extent; not always accurately in detail, but generally as a whole. She testified that in the summer of 1870, Myers, complaining of his arm, and saying that Johnson knew more about his business than any man living, sought his help to "settle up his business," and Johnson entered upon the work and furnished the assistance. That she told the exact truth in this respect is put beyond dispute by the letters of Myers written mainly by his then secretary and agent, Yoe. Under date of July 6, 1870, the latter writes that Myers is sick, and adds, "he wishes you to look after his affairs generally, until he is able to return." Under date of July 14, 1870, Yoe writes again that Myers is still sick and "he desires you to look after his matters, and that if you desire any to counsel in his affairs, you will confer with T. B. Fitch, Esq., and if necessary come to Syracuse to see him." Then follow thirty-four letters running down to the middle of October, when Myers went to New York, where he died a few weeks later. The burden of Myers' letters is the detail of his business to be attended to. Much of it concerned the sale of the Trenton Arms Company to DeMuir. While it is true that Johnson and Myers were joint owners of that property, the title stood in the name of Myers, who sold the whole of it to DeMuir, as early as December, 1869, and from that time on owed Johnson his proportion of the purchase-price. Further subjects are the collection of mortgages; the discharge of judgments; the sale of houses, and the difficulty with Randall and Williams, in which Johnson seems to have had no personal interest. Beyond any question the statement of Mrs. Johnson was true. She further testified to an arrangement made with Fitch after Myers' death, for the rendition of services to the estate. How entirely true that is, becomes evident from the multitude of Fitch's letters, calling upon Johnson in every conceivable shape for information, advice, and service, from the account of moneys received by Johnson, and paid over by him running to about \$100,000, and from numerous vouchers in which the estate is found paying Johnson for his expenses, and returning to him moneys advanced. Mrs. Johnson further said, that from 1864 her husband was more or less occupied with the affairs of Myers and his estate. This also was undeniably true. The defendant drew from her on cross-examination the fact that in 1864, while they lived in Trenton, Johnson came to Syracuse every week, during six weeks, at the request of Myers, and that she knew it was on Myers' individual business; that he went to Brooklyn, attended to litigations, and consulted with lawyers. Many letters during this period tend to corroborate her statement. But what is quite as conclusive as a detailed examination of the services, is the defendant's own request, to find, marked num-

ber 6, and couched in this language: "That said William Johnson rendered *some* services for said Austin Myers *during his life-time*. That the services so rendered by him were reasonably worth the sum of \$3,600, and no more, and that said item is a proper charge on this accounting in favor of the estate of said Johnson."

In the face of this admission it requires some nerve to insist that Johnson's services rendered all related to the joint property. Mrs. Johnson swearing to this knowledge, shown to be correct, and with abundant opportunity to know, and that the best of any living person, was then asked what proportion of Johnson's time was devoted to Myers' business. To this it was objected that the witness was incompetent to give an opinion, and that it appeared that Johnson and Myers were partners. The objection was overruled and an exception taken. The witness answered, "one-half from 1864 to the time of Johnson's death." The objection was not sound. The question called for a fact within the witness' knowledge, and not for an opinion. If a person familiar with the character of Myers' business had been asked how much of one man's time it would have taken to conduct or transact it, that would have called for an opinion, but if asked how much time it did take, no opinion would be sought, but a fact founded upon knowledge. That was the character of the question put to Mrs. Johnson. A fact was asked for of which she had some knowledge, and which she could answer to the extent of that knowledge. How gravely inconsistent it would be for us to hold the admission of this question error is apparent from our own ruling in a much more debatable case. *Hallahan v. N. Y., L. E. & Western R. R.*, 102 N. Y. 195; S. C., 4 East. Rep'r, 914. There the witness, who saw the passenger, answered: "I should judge" that deceased's elbow was not out of the window from the position that he held in the car. A motion to strike out the answer was denied on the ground that if the answer seemed an opinion it was in effect not one, but at least was admissible as an opinion founded upon knowledge. Estimates of time and value thus founded, are always admissible, and no objection was taken in this case that Mrs. Johnson had not sufficient knowledge. She swore that she had—the opportunity was certainly hers, and the facts corroborate and support the truth of her answer. Bearing upon them, as we have said, was a voluminous correspondence, read in evidence, the details of the defendant's own account against Johnson, which show a large mass of business done by him for Myers and his estate, resulting in the receipt and payment of very considerable sums of money, and the evidence of other witnesses as to services rendered and the value of the same. The finding of the referee upon the subject was not unreasonable, or outside of the inferences which were possible from the proof.

An exception was taken to a question put to Jewett, which was this: "Have you ever been with Col. Johnson when he was professedly in Capt. Myers' business?" The ground of the objection was that the question called for the declarations of Johnson in his own favor. That was not the object or effect of the evidence. The purpose was not to prove by Johnson's statements that he was at work for Myers, but to show that the witness was acquainted with the kind of business

in which Johnson was engaged, and which, by other evidence it was claimed to have been shown, was that of Myers with a view of obtaining from the witness his estimate of the value of Johnson's services. This is made quite apparent by what immediately preceded the objection. Jewett had said that he saw Johnson engaged in work which the latter represented to be that of Myers. A motion was made to strike out Johnson's declarations in the absence of Myers, and the motion was granted. The referee, therefore, certainly did not understand the word "professedly," used in the question as calling for a class of evidence just held by him to be inadmissible, and must have understood the inquiry as merely preliminary to the proof of value afterward given. It may be added that the answer was harmless. It showed the intestate ostensibly engaged in services for Myers, but not that he was so engaged or what the services were. The referee quite certainly understood that those facts were not proved by Jewett.

The plaintiff was permitted to show what the value of the services of such a man as Colonel Johnson was and to this there was an exception. It is now argued that his character and ability had nothing to do with the value of the services. We think it had much. The duty to be done required the best of judgment, a skill and ability beyond the average, and was largely of a confidential character. It had no common and general market value. The work was not merely ministerial or a service which anybody could render. The business was varied and complicated and in many directions responsible, and the man chosen to perform it by reason of his capacity and ability had a right to be paid upon the standard of the capacity which entered into the work and formed the principal and essential value of the services.

The remaining questions argued respect the counter-claims of the defendant which were disallowed upon the trial. In the main they depended upon pure questions of fact involving the credibility of witnesses and the drift and effect of items in the books of account. They were argued exhaustively before us, leaving upon our minds a conviction which a careful subsequent examination has strengthened that they furnish no ground for a reversal of the judgments. The reasons given by the referee and the general term substantially cover the ground and meet our approval, and a renewed discussion of them is neither necessary nor suitable.

Each of the two judgments should be affirmed, that against the defendant as executrix without costs; and that against her as an individual with costs.

MILLER, EARL and DANFORTH, JJ., concur; RUGER, Ch. J., RAPALLO and ANDREWS, JJ., dissent.

Judgment affirmed.

BRACKETT, *Resp't*, v. GRISWOLD, *App'l't*.

November 23, 1886.

ACTION — ABATEMENT — DEATH OF PLAINTIFF.

Plaintiff's intestate was a creditor of a mining corporation whose officers in making their annual report were alleged to have stated falsely the amount of capital paid in. For this cause of action conjoined with one for conspiracy, suit was brought, pending which and before verdict or judgment, plaintiff died. *Held*, that the cause of action for the penalty abated; but that for conspiracy, survived.

This is an appeal by the defendant from an order of the general term, in the third department, affirming an order of the special term, made under section 757 of the Code of Civil Procedure, reviving the action and substituting the plaintiff, as administrator, etc., in place and stead of the original plaintiff, Samuel Bonnell, Jr., deceased. The action was brought against the defendant to recover a penalty alleged to have been incurred by him, as a trustee of the "Iron Mountains Company of Lake Champlain," a company incorporated under the manufacturers act of 1848, and its amendments, in consequence of the failure of the company to make and file a report, and for making and filing a false report under said act, and also for a fraudulent conspiracy to organize, and for organizing, a bogus corporation, by which the original plaintiff, Samuel Bonnell, Jr., a creditor of said company, was injured. The action had been tried at special term, and submitted to Judge TAPPAN on the evidence for decision when the plaintiff, Bonnell, died and the order of the special term revived the action and substituted Brackett as the administrator of Bonnell, as plaintiff therein.

W. C. Holbrook and *M. D. Grover*, for appellant. *A. Pond* and *R. L. Hand*, for respondent.

FINCH, J. This appeal is taken from an order of revivor. The plaintiff's intestate was a creditor of a mining corporation whose officers in making their annual report were alleged to have stated falsely the amount of capital paid in. For this cause of action, conjoined with one for conspiracy, a suit was brought, pending which and before verdict or judgment, the plaintiff died. The question presented is whether his cause of action for the penalty of a false report died with him or survived to his administrator. We have many times held that the provisions under which the asserted right of action accrued are highly penal in their nature, and have recently said, more specifically, that they are to be classed with actions *ex delicto*, and do not affect or concern any property right or interest as the subject of injury. *Stokes v. Stickney*, 96 N. Y. 323.

At common law, the action abated upon the death of either party, the one by whom or to whom the wrong was done; and that rule must apply unless it is made inapplicable by the provisions of the Revised Statutes. 2 R. S., § 1, p. 448. But we have decided that those provisions affect only injuries to property rights, and where such are not invaded the common-law rule still prevails. *Hegerich v. Keddie*, 99 N. Y. 258; S. C., 1 East. Rep'r, 86. In that case, while concurring in the result, I thought the statute should receive a broader interpretation and contemplated survivability as the rule and abatement as the exceptions, and the construction finally reached was adopted after full deliberation and argument. It must now be deemed settled and requires us to hold that the cause of action for the penalty died with the intestate. We have not been unmindful that in our discussion of this question we have assumed the assignability of a cause of action as a test, treating that and survivability as convertible terms; nor that we have also said that a cause of action for the penalty so far follows the creditor's debt and belongs to it as an incident that an assignment of the debt carries with

it a right to the protection of the statute. *Stokes v. Stickney, supra*; *Bolero v. Crosby*, 49 N. Y. 188. But it was neither said nor meant that such right was itself assignable. Relatively to the debt it is rather a remedy than a right, and while it becomes, in connection with the debt, a cause of action, it belongs to the assignee of such debt by force of the statute which gives it to him by virtue of his having become a creditor and not because of any derivative right resting upon and born of the assignor's ended and extinguished right. In other words the new holder has his own right of action, or none. Having become a creditor he thereby obtains the right which the statute gives him, and must depend upon that for his relief and not upon an impossible transfer by the assignor of the debt. The questions which may spring out of this ruling may best be reserved till they arise.

So far as the cause of action was for a conspiracy to cheat or defraud the intestate, it was for an injury to a property right and did not die with its owner. The order of revivor was so far proper, but should have been limited to the cause of action which survived. That has been tried and judgment upon it given for the defendant. The plaintiff has recovered upon a cause of action which did not survive, and that recovery cannot be sustained.

The judgment should be reversed, and as a new trial would be unavailing, judgment should be rendered for the defendant, with costs.

All concur.

Judgment reversed.

ANGEVINE, *Resp't*, v. JACKSON, *App't*.

November 28, 1886.

PRACTICE — APPEAL FROM SURROGATE'S DECREE — NO EXCEPTIONS.

A surrogate on finding that a will was the testator's free act, unaffected by any improper agency, admitted the same to probate. No exception was taken to any finding, but there was an exception to each and every portion of the decree. *Held*, that the exception was useless as it indicated no specific error.

The surrogate refused to make certain findings on request; no exception was taken to such refusal. The general term reversed the surrogate's decree and ordered issues to be tried by a jury. *Held*, that the reversal was unauthorized. The practice is governed by Code Civ. Pro., § 2545.

Appeal from judgment and decree of general term, second department, reversing a decree of surrogate of Queens county admitting a will to probate.

H. E. Sickels, for appellant. *B. W. Downing*, for respondent.

FINCH, J. Probate of the will of Oliver Mott was resisted upon the ground of mental incapacity and undue influence. After listening to numerous witnesses and taking a large amount of testimony, the surrogate rendered his decision, finding as facts that the decedent was a capable testator, and the will was his free act and unaffected by any improper agency, and, as a conclusion of law, that the will should be admitted to probate. No exception was taken to any of these findings. The case recites an exception to the surrogate's decree and each and every part of it. We have repeatedly pointed out the uselessness of such an exception. *Ward v. Craig*, 87 N. Y. 550; *Hepburn v. Mont-*

gomery, 97 id. 617. It indicates no specific error; it directs attention to no finding, and leaves court and counsel in the dark as to the precise cause of complaint. The case further shows a series of findings which the surrogate was requested to make and which requests were refused. There was no exception to the refusal. The contestants appealed, and upon this case, which contained no exception, raising any question of fact or law, and in which no errors in the admission or rejection of evidence are even claimed to exist, the general term reversed the decree of the surrogate and ordered issues to be tried by a jury entirely disregarding the provisions of the Code. Those provisions point out the practice to be followed with care and precision. § 2545. The surrogate is required to file in his office his decision, stating separately the facts found and the conclusions of law. Either party may except to the findings of fact or of law, and upon the settlement of the case may request findings and take exceptions to a refusal, and the appeal brings up for review in the appellate court any question of fact or law thus raised by exceptions taken. The purpose was to assimilate the practice upon appeals from a surrogate's decree in the prescribed cases to that which regulated appeals from a judgment rendered by the court or a referee, and to substitute a system which would point out specific errors, and evolve the exact questions intended to be reviewed. Nothing of this kind was before the general term, and without some exception to some ruling or determination that tribunal was powerless to reverse.

For this reason the judgment and order of the general term should be reversed and that of the surrogate affirmed, with costs.

All concur.

Judgment reversed.

ANSONIA BRASS AND COPPER Co., *App't*, v. CONNER ET AL., *Resp'ts*.

November 23, 1886.

EXECUTION — TIME TO RETURN — PROCEEDINGS STAYED.

An injunction issued by a United States court, staying a sheriff's proceedings under an execution, operates to extend the time in which he is bound to make return thereto by as many days as he is under stay.

Appeal from a judgment of the general term of the court of common pleas contained in a judgment of the city court of New York, entered on a remittitur from the general term of the court of common pleas for the city and county of New York, affirming a judgment of the general term of the city court of New York — formerly the marine court of the city of New York — which affirmed a judgment of the said court at trial term, dismissing the complaint.

The court below made an order allowing plaintiff to appeal to the court of appeals.

Marshall P. Stafford, for appellant. *Henry Thompson*, for respondents.

RUGER, Ch. J. The main question in this case is whether an order made by a court of competent jurisdiction staying the sheriff from any

interference under an execution with the property of a judgment debtor suspends, during its continuance, the running of the statutory term of sixty days given to the sheriff for executing the process.

The execution in question was issued under section 290 of the Code of Procedure, which provided that "an execution shall be returnable within sixty days after its receipt by the officer to the clerk with whom the record of judgment is filed." This was substantially a re-enactment of section 24, chapter 386, Laws of 1840, which was suspended temporarily by section 245 of the Code of Procedure, adopted in 1848, and amended by section 290 in 1849. Previous to the act of 1840, executions were made returnable in term time, and no fixed period of time intervened between their receipt and return by the sheriff.

It will thus be seen that the period of sixty days for the service of such process was originally provided by the act of 1840, and has ever since remained the same, with the exception of a few months in 1848 and 1849. The reason why this period was adopted has been stated to be for the "benefit of the sheriffs" — *Renard v. O'Brien*, 35 N. Y. 99 — but we think this hardly comprises all the reasons for the provision, which are obvious from its nature.

It undoubtedly contemplates a reasonable opportunity for the sheriff to execute the process free from unreasonable demand of an impatient creditor for more peremptory service, and authority in the sheriff to extend indulgence for a limited time to a delinquent and embarrassed debtor. Crocker Sheriffs, § 488; *McDonald v. Neilson*, 2 Cow. 139. The opportunity for indulgence afforded by the section is certainly not for the creditor's interest, as he is justly entitled to his money upon the recovery of his judgment.

The limitation upon the right of the sheriff to hold the execution was undoubtedly for the benefit of the judgment creditor, and intended to fix a time beyond which, in the usual and regular process of collection, his right to payment should not be postponed. This, however, does not affect the right of any party interested to stay the enforcement of an execution for sufficient cause. The sufficiency of the cause must, of course, be determined by the tribunal to which application for a stay is made, and when it has adjudged that sufficient cause exists, its order, provided that it has jurisdiction of the matter and the parties, is obligatory upon them, and must be obeyed. It was said by Judge MILLER, in *Wehle v. Conner*, 69 N. Y. 546, in an action against the sheriff for not returning an execution, that "proof that plaintiff had directed the execution not to be returned, or that the sheriff had procured it to be stayed by order of the court, are unlawful defenses." In the case of *Paige v. Willet*, 38 N. Y. 28, it was held that the sheriff was not charged with interest accruing upon moneys collected by him on execution, but retained beyond the return day, in obedience to an order restraining him from paying them over to the judgment creditor. The principle of this case seems clearly to recognize the exemption of the sheriff from liability when acting under the order of the court. In *People v. Conway*, 3 Abb. 216, it was decided that an order by a court of competent jurisdiction staying the sheriff's proceedings excused him from returning the writ according to its requirements, and that he

could not, while thus restrained, be adjudged guilty of contempt in disobeying the mandate of the writ, or the notice of the judgment creditor to make return. This decision was made at special term, but was rendered by the late Judge DAVIES, and accords with the analogies of the law.

The statute of limitations suspends its bar against parties who are incapacitated from commencing an action by reason of disability, and the law frequently deducts from the time within which an act is to be performed, those *dies non* upon which the party is unable to act.

So, too, the time limited for the issue of an execution, or making an application for leave to do so, does not run while the plaintiff is stayed by an injunction or other order from proceeding in the matter. § 1382, Code of Civil Procedure. The policy of the statute could not be accomplished if the sheriff should be deprived of the advantageous use of the time extended to him by injunction, orders or stays of proceedings covering the whole, or even a material portion of that time allowed to him to serve the writ. Suppose the sheriff is stayed during the first fifty days of the life of the process, and the remaining time does not afford him sufficient opportunity to discover property and make the money therefrom by a sale, is it reasonable that he should be visited with a penalty for not returning the process according to its requirement? Or suppose after a levy and before a sale, his proceedings are stayed until after the return day, can he be adjudged liable for the judgment debt because he did not make return? We cannot think so. Would the sheriff be justified in the case last supposed in abandoning his levy and returning the execution at the end of sixty days from its receipt, and yet if not, under the plaintiff's contention he would become liable to pay the judgment. Can a sheriff be made liable for the amount of a judgment which he is debarred from collecting, but which on the sixtieth day he has secured by a levy upon property sufficient to satisfy it, but which he is unable to advertise and sell by reason of the necessity of returning his writ? We think not. It is claimed if he does not return his writ he becomes liable, and certainly if he does return it he not only abandons the levy but makes himself liable for the debt as for a false return. He could not, under these circumstances, protect himself from suit by advancing the money to the plaintiff and retaining the execution to reimburse himself, for this it has been held he could not lawfully do — *Stillwell v. Carpenter*, 11 N. Y. 61; *Mills v. Young*, 23 Wend. 314; *Sherman v. Boyce*, 15 Johns. 443 — and thus under the plaintiff's contention the officer would be made liable for the debt in any event, although he is entirely without fault, and has by *vis major* been disabled during the whole period of the life of the writ from executing its command.

If the stay is granted from some alleged vice in the process, or the judgment upon which it is founded, as it usually is, is there any reason why the sheriff should bear the loss occasioned by such delay, and the offending party be exempted therefrom? The law does not sanction such manifest injustice, and will give the statute a reasonable construction to avoid such a result.

We think the true policy of the statute can be satisfied only when

the sheriff has sixty full days in which to perform the duties enjoined upon him. The onerous liabilities which the law imposes upon him for not returning process for a false return, and for non-performance of his official duties, require that his time for their performance should not be curtailed or limited by periods of disability to act.

Although the sheriff cannot levy upon property except during the life of the execution — *Davos v. Elliott*, 2 Caines, 244; *Hathaway v. Howell*, 54 N. Y. 114 — he yet can complete the act already initiated by the levy by selling after the return day — *Davos v. Elliott*, *supra*, — and it is often indispensable to the security of the rights of the plaintiff that he should retain his writ for that purpose.

It is not questioned but that a stay procured by an appeal and security given thereon operates as a suspension of the time within which the sheriff is required to return the writ, and in such a case the sheriff retains the execution and a levy made thereon until the final determination of the appeal even though years elapse, and then in case of affirmance of the original judgment makes the amount by virtue of his original levy. The stay effected by an appeal simply restrains the officer from collecting the execution. His power to return the writ is not in terms extended or restricted and is not effected unless the right to enforce the writ suspends its requirement to make return within sixty days. Yet I think it has never been doubted that it was the duty of a sheriff to hold his execution and levy after appeal and until the final determination of the case. The analogy between such a stay and the one under discussion seems perfect and requires us to hold that any stay which restrains the sheriff from enforcing the execution suspends the running of the time in which he is required to return the writ. It is also claimed by the appellant that the bankrupt court had no authority to make the order in question restraining the sheriff from selling the property. We think this point is not sustainable.

It cannot be questioned but that the judgment debtor, whose property has been taken by a sheriff under execution, remains its general owner subject only to the special property acquired by the sheriff by reason of his levy and his right to dispose of so much thereof by sale as may be required to satisfy the execution. *Scott v. Morgan*, 94 N. Y. 508. The residue of property remaining unsold after satisfaction of the judgment reverts to the debtor by virtue of his ownership. While, however, still in the hands of the sheriff, it is liable to attachment and levy on behalf of other creditors, and the resulting interest in the surplus constitutes property in the debtor subject to be reached by creditors generally under the bankrupt law. *Ansonia Brass and Copper Co. v. Babbitt*, 74 N. Y. 401.

The order in question was made by the district court of the United States for the southern district of New York, in a proceeding in bankruptcy instituted by the judgment debtor, and upon an application by him, showing among other things the seizure by the sheriff of his property under an execution issued upon a judgment recovered in the supreme court by the plaintiff herein, and which was alleged to have been obtained fraudulently and in violation of the provisions of the bankrupt act. The order was made on the 27th day of November, 1875, and purported to restrain the plaintiff herein and the defendant

"from interfering in any way with the said property — held by the sheriff under levy — of said" bankrupt until the further order of the court. The plaintiff herein assumed the validity of this order and appeared in the bankrupt court upon an application to vacate it and for leave to the sheriff to sell under his execution. Upon this application an order was made by the bankrupt court on the seventeenth day of December, thereafter, vacating the stay and granting leave to the sheriff to sell, and plaintiff availed itself of such leave. *Dorrance v. Henderson*, 92 N. Y. 406.

Without entering into a general discussion of the jurisdiction of the bankrupt court, we may say that we entertain no doubt of their power to examine into the validity of alleged claims upon the bankrupt's property and restrain by temporary injunction the sale and disposition thereof during the pendency of proceedings in bankruptcy in such court. This must result from and is the necessary incident of the power conferred upon them to collect and marshal the bankrupt's assets and ascertain and liquidate the liens and other specific claims thereon. § 4972, Rev. Stat. U. S. Any other view would render such courts powerless to enforce the provisions referred to.

Express power to stay proceedings instituted in any court by the creditors of a bankrupt for the collection of debts provable in bankruptcy against him, and for stay of execution thereon, is also given by section 5106 of the Revised Statutes of the United States.

The judgment should be affirmed.

All concur.

Judgment affirmed.

BOSTWICK, *Resp't*, v. BEACH, *App't*.*

November 23, 1886.

WILL — POWER OF SALE — SPECIFIC PERFORMANCE — DOWER — DELAY BY VENDOR — RIGHTS OF PARTIES.

Where the executors of a will, empowered by its terms to sell the testator's real estate, enter into an executory contract for a sale thereof, performance of such contract may be enforced in equity at the suit of the purchaser. In such case the contract is in effect an execution of the power and confers upon the purchaser an equitable title which the court will compel the executors to perfect, provided the contract is fair, for a fair consideration, and there is no default or laches on the purchaser's part.

In such case the purchaser where he agrees to pay full value, is entitled to a clear title; if there are incumbrances on the land he is entitled to have them removed out of the purchase-money.

The purchaser may elect to take the land subject to a dower right and would be entitled to an abatement from the contract price equal to the gross cash value of the dower right.

If the widow is not a party to the contract of sale she cannot be compelled to accept in lieu of dower a money compensation out of the proceeds; in such case the purchaser must either elect to take the title subject to the dower right or abandon the purchase; but if the widow joins in the contract of sale without any reservation of dower right, she consents to make a good title and to look to the purchase-money as a substitute.

A right of dower may be disposed of before admeasurement. *Payne v. Becker*, 87 N. Y. 158, followed.

Where, on a contract for the sale of land, the purchaser is ready and willing to perform, and delay is on the part of the vendor, the purchaser is entitled to the

*Affirming 31 Hun, 348.

rents and profits from the time when according to the terms of the contract, possession should have been delivered, or if the vendor has remained in possession, he is chargeable with the value of the use and occupation from the same time.

The purchaser must pay interest on the purchase-money if it has remained in his hands unappropriated; if it has been appropriated and notice given to the vendor, but the purchaser has received no interest, he is not liable to pay interest to the vendor.

Appeal from judgment of general term, fourth department, reversing a judgment entered for plaintiff on trial at special term.

C. D. Adams, for appellants. *A. H. Sawyer*, for respondent.

RAPALLO, J. The will of Nelson J. Beach contained a valid power in trust to his executrix and executors to sell and convey his real estate, and declared that the sale should take place at an early day. Until such sale the testator directed that his wife retain possession of the house occupied by him, for herself and her unmarried daughter, together with a certain portion of his farm.

The testator died February 22, 1876, seized in fee of the farm in question, which contained about two hundred and seventy-five acres of land, of the value of about \$11,000, and was subject to a mortgage of \$900 and the widow's right of dower.

Although, under the will, it was the duty of the executrix and executors to sell this farm at an early day, no sale appears to have been made until December 27, 1881, when the contract upon which this action was brought was entered into. In the meantime the widow and executrix, Emily P. Beach, remained in the substantial occupancy of the farm, and the estate received no income therefrom, but bore the charge of interest on the mortgage, and insurance and repairs upon the buildings. That state of affairs continued at the time of the commencement of this action.

The receipt signed by the executrix and executors on the 27th of December, 1881, and set forth in the complaint, constituted, in our judgment, a valid contract for the sale of the farm to the plaintiff. It contained all the essential elements of a contract, and was very similar in form to the contract set out in the case of *Westervelt v. Matherson*, Hoff. Ch. 37, and therein adjudged to be sufficient.

We entertain no doubt that where the executors of the will of a deceased person, empowered by the terms of the will to sell his real estate, enter into an executory contract for such sale, performance of such contract may be enforced in equity at the suit of the purchaser. The contract of sale is in effect an execution of the power, and confers upon the purchaser an equitable title to the land sold, and the court will compel the executors to perfect that title by a conveyance, where the contract is fair and for a sufficient consideration, and there is no default or laches on the part of the purchaser. We are not referred to any authority directly in point, but the cases of *Bowen v. Trustees of Irish Presbyterian Church*, 6 Bosw. 245, and *Demerest v. Ray, Ex'r*, 29 Barb. 563, are analogous in principle.

There can be no valid objection, therefore, to decreeing the execution and delivery to the plaintiff by the executrix and executor, of a deed conveying all the title which the testator had, at the time of his

decease, to the farm in question, on his complying with the terms of the sale.

This, however, would not accomplish complete justice. The purchaser is entitled to a clear title, free of incumbrances, where he agrees to pay the full value of the property. Rawle Cov. Tit. 430; *Burwell v. Jackson*, 5 Seld. 535.

The mortgage of \$900 presented no obstacle to the carrying out of the contract of sale, for the rule is well settled as laid down in *Westervelt v. Matherson*, Hoff. Ch. 37, that a purchaser for full value is entitled to have incumbrances removed out of the purchase-money. So far as the mortgage is concerned, that disposition of the case would do complete justice between the parties, for the estate of the testator would receive the full value of his interest at the time of his decease, such interest having been subject to the mortgage. As to the dower right of the widow, a more complicated question is presented. If the purchaser should elect to carry out his purchase and take title to the land subject to that dower right, he would clearly be entitled to do so, and in that event would be entitled to an abatement from the contract price, equal to the gross cash value of the right of dower. If a seller of land is not able to comply fully with the contract, either in respect of the quantity of land, or the extent of the estate, the court will, at the election of the buyer, decree specific performance of the contract so far as the same can be performed, awarding compensation to the purchaser by way of abatement from the purchase-price, for any deficiency in title, quantity of land, or other matters touching the estate, the value of which are capable of being ascertained, and thus compensated without doing injustice to either party. Upon this principle specific performance has been decreed where there was an outstanding dower right which the vendor could not control, and the purchaser elected to take subject to that incumbrance. The gross value of the dower right has been adjudged in such cases to be the measure of compensation to be allowed to the purchaser by way of abatement from the price. *Woodbury v. Ludy*, 14 Allen, 1; id. 94, 98, 104.

If, in the case now before us, the widow had not been a party to the contract of sale, she could not be compelled to accept, in lieu of dower, a money compensation out of the proceeds, and the only course open to the purchaser would have been, either to reject the purchase *in toto*, or to elect to take title subject to her right to have her dower admeasured, and to be allowed out of the purchase-money a sum equivalent to the gross value of such dower right, which is ascertainable on established legal principles.

But here the widow was also executrix, and, as such, one of the parties to the contract of sale. She is also made a defendant in this action in her individual capacity. We think that by joining in the contract of sale, without any reservation therein of her dower right, she consented, so far as her individual rights were concerned, to make a good title to the purchaser, and to look to the purchase-money as a substitute for the land, for her dower right therein. The point made on the part of the defendant that she could not dispose of her dower before it was admeasured is decided adversely to her in the case of *Payne v.*

Becker, 87 N. Y. 153. She should, therefore, be decreed to release her dower to the purchaser on the payment to her of the gross value out of the purchase-money.

The defense interposed on behalf of the widow to the effect that she joined in and executed the contract of sale without knowing or understanding its contents or effect, or comprehending the transaction, is negatived by the findings of the trial court. It appears that the contract was in all respects fair, for a full price, and one which it was her duty as executrix to make, and that her co-executors were desirous of carrying it into effect, and offered to her to make liberal provision for her individual interest in the land by investing about two-thirds of the proceeds for her benefit during her life, but that she has refused to carry out the sale, and has retained the substantial occupancy of the property ever since the time fixed for the completion of the sale, viz.: March 1, 1862.

The only remaining questions are those which relate to the rents and profits from the time when the purchaser became entitled to his deed.

There can be but little controversy about the ordinary rules for the determination of these questions. Where the purchaser is ready and willing to perform, and the delay is on the part of the vendor, the purchaser is entitled to the rents and profits from the time when, according to the terms of the contract, possession should have been delivered, or if the vendor had remained in possession, he is chargeable with the value of the use and occupation, from the same period, and the purchaser is chargeable with interest on the purchase-money if it has remained in his hands unappropriated. But where it has been appropriated, and notice thereof given to the vendor, and the purchaser has received no interest thereon, he is not liable to pay interest to the vendor. *Fry Spec. Perf.* 481, 483, 889; *Dias v. Glover*, 1 Hoff. Ch. 71, 78; *Story Eq.*, § 789; *Worrall v. Munn*, 38 N. Y. 142.

In this case it appears from the findings that \$500 of the purchase-money was paid to the vendors at the time of the making of the contract, and that on the day appointed for its performance he tendered the residue, \$10,500, and, on its being refused by the defendants, he deposited the same with the First National Bank of Lowville, on notice to the defendants, subject to their order and to be delivered to them on the execution and delivery of a deed of the farm which had been previously tendered to them for execution, and which was an executor's deed in the ordinary form. The appropriation of the purchase-money thus appears to have been complete and sufficient to discharge the plaintiff from liability to pay interest thereon.

The judgment appealed from attempts to adjust the equities by requiring the defendants to execute and deliver to the plaintiff an ordinary executor's deed of the premises, and renders judgment against them as executors for the rental value of the farm since March 1, 1882, fixed at \$350 over and above the widow's use of one-third thereof, and rendering judgment against the defendant Emily P. Beach individually, as well as in her representative capacity, for the amount remaining unpaid upon the mortgage, together with the value of her dower interest therein, to be ascertained according to the rules and practice of

the court. We think that in these respects it requires modification. The amount unpaid upon the mortgage, instead of being charged personally upon the widow, should be paid out of the purchase-money. Instead of a personal judgment against the widow for the value of her dower interest, she should be directed to release her dower. The value of her dower right should be ascertained as of the 1st of March, 1882. She would have been entitled to that if she had performed the contract. The plaintiff being entitled to the whole of the rental value of the premises since that time, so much thereof as has been deducted, by reason of her dower right from the rental value allowed to him as against the executors, should be paid to him out of the gross sum ascertained as the value of her dower right.

The judgments of the general and special terms should be modified accordingly, and with these modifications the interlocutory judgment appealed from should be affirmed without costs of this appeal to either party.

All concur.

Judgment affirmed.

BYRNES, *Resp'ts*, v. STILWELL, *App'lts*.

November 28, 1886.

WILL — VESTED REMAINDER IN FEE.

An estate in fee created by will cannot be cut down or limited by a subsequent clause unless it is as clear and decisive as the language of the clause which devises the estate.

Testator by his will made in 1827, devised and bequeathed to his daughter M. a life estate in certain lots of land. Then followed this clause:

"And from and immediately after the decease of my said daughter M., I give, devise and bequeath the last aforesaid two lots of ground, houses, buildings and premises, . . . so as aforesaid given unto my said daughter M., during her natural life, unto the lawful child or children of my said daughter, his, her or their heirs forever; if more than one, share and share alike, as tenants in common. And in case any or either of the children of my said daughter M., at the time of her death, be dead, leaving a lawful child or children him or her surviving, such child or children shall take the share or portion which his, her or their parents would have been entitled to, if living, to have and to hold to him, her or them, and their heirs forever." The daughter, at the time of testator's death, was the mother of six children; she had five thereafter; in 1883 she died leaving her surviving eight children; three who were living at the time of testator's death having died without issue before their mother.

Held, that the three children who died during the mother's life, took (as tenants in common, subject to open and let in children born after testator's death), a vested remainder in fee, which was unaffected by their death without issue before their mother.

Appeal from a final judgment rendered at a special term of the supreme court, in the first department, in an action for partition, after the affirmance, upon appeal to the general term, of an interlocutory judgment, and the refusal by the general term of a new trial, upon an application made in the first instance at the general term. Code, § 1336.

Benj. M. Stilwell, for appellants. *Daniel T. Walden*, for respondents.

MILLER, J. The question arising in this case depends upon the construction to be placed upon the provisions contained in the

last will and testament of John W. Gilbert, deceased, which provisions, so far as material, are as follows: "I give, devise and bequeath unto my daughter Maria, the wife of John Wood, for and during, and for the full end and term of her natural life, my two lots of ground situate, lying and being in the second — late third — ward of the city of New York. . . . And from and immediately after the decease of my said daughter Maria, I give, devise and bequeath the last aforesaid two lots of ground, houses, buildings and premises . . . so as aforesaid given unto my said daughter Maria, during her natural life, unto the lawful child or children of my said daughter, his or her or their heirs forever; if more than one, share and share alike, as tenants in common; and in case any or either of the children of my said daughter Maria, at the time of her death, be dead leaving a lawful child or children him or her surviving, such child or children shall take the share or portion which his, her or their parent would have been entitled to if living; to have and hold to him, her or them, and their heirs forever."

The will was executed on the 13th day of February, 1827, and the testator died in or about 1828.

The devisee, Maria, at the time of the testator's death, was the mother of six children. Another child was born to her during the life-time of her then husband, and after the death of the testator. In 1830 her husband died, and in 1834 she intermarried with William Mulock, by whom she had four children. In May, 1882, she departed this life, and left her surviving eight children, three who were living at the time of the testator's death having died without issue before her death.

The question we are called upon to determine is whether either of the three children who were living at the death of the testator, but who died during the life-time of their mother, without leaving issue, took, under the provisions of this will, such a vested estate in the lands as was alienable or devisable by them, or descendible from them.

The learned judge, at special term, found that they did not; and that the remainder which, upon the death of the testator, vested in these children of his daughter Maria, was subject to be, and was, divested by their death before their mother, without issue, and this judgment was affirmed by the general term. The intention of the testator, which is to be derived from the language employed in the will itself, which is to be interpreted in the light of the surrounding circumstances, is the controlling element in the construction of wills, and, so far as can be ascertained in accordance with the rule stated, should be taken into consideration and carried into effect.

The clause in the will cited, devises the lands in question to his daughter during her life; it then provides for the child or children of his daughter, and his, her or their lawful heirs forever, if more than one, share and share alike, after the life estate first given has terminated; and in case of the death of any of his daughter's children leaving a lawful child or children surviving, such child or children to take the share or portion which the parent would have been entitled to if living. No provision is made by the will in case of the death of any

child or children of his daughter before the termination of the life-estate of the mother.

It is apparent that the devise in question was a remainder in fee to the children of the testator's daughter, subject to open and let in children born after his death, and for that reason the five children born to his daughter after his death each became entitled to a share of this remainder. Whether such remainder could be enlarged by the death of any of the remaindermen without issue is a serious question, which is not free from difficulty. It will be observed that no words of survivorship are contained in the will, either in the main devise or in the subsequent clause, which indicate an intention of the testator that the surviving brothers and sisters were to take in the event of the death of any of his daughter's children without issue. There are no words to that effect in the devise in question, and the existence of any such intention cannot, we think, be derived as a matter of inference from the language employed in the will. After the death of the daughter, the devise is to her child or children, and his, her or their heirs forever, and if more than one, share and share alike as tenants in common, and if the intention of the testator was to restrict or limit the shares devised to his daughter's children, so that in the event of any of them dying in the life-time of their mother, his or her share should not pass to the heirs at law but to the survivor, he clearly would not have added these words of inheritance, and would have used appropriate language for that purpose. The language employed, as well as the omission to use words of a different import, indicate the intention of the testator that each of the children named should take an absolute fee, subject to be diminished by the birth of other children, as tenants in common and as contra-distinguished from joint tenants.

The use of the words "if living," in the additional clause of the will, did not, we think, refer to the time of the death of the daughter and to the children then living, or indicate an intention that in case any of the children died during the mother's life without issue, that the number of shares should be limited to those who survived their mother. Such a construction would be in direct contradiction of the previous language employed in the principal devise, and cannot be maintained in the absence of any words which convey such an intention. It may be remarked that the words cited are not connected with and do not constitute a part of the principal devise to the children of the testator's daughter, and manifestly were not intended to limit the shares which the daughter's children, if living at the testator's death or afterward born, were to take under the will, but had special reference to the share or shares which the issue of her deceased children were to take in case any of his daughter's children had died leaving issue. He had provided for all the others in the first portion of the devise, and it was only the issue of such as might die before the death of his daughter, and whose issue would not take under this devise, for whom he intended to provide. It may also be added that it is of no importance whether the words "if living" relate to the time of the testator's death or his daughter's death, inasmuch as none of his daughter's children died

leaving issue, either during the testator's life-time or during his daughter's life-time, and, therefore, the contingency intended to be provided against never happened. For this reason there was no qualification or limitation upon the devise which preceded it.

An estate in fee created by a will cannot be cut down or limited by a subsequent clause unless it is as clear and decisive as the language of the clause which devises the estate. *Thornhill v. Hall*, 2 Clark & Fin. 22; *Roseboom v. Roseboom*, 81 N. Y. 359; *Campbell v. Beaumont*, 91 id. 467; *Freeman v. Coit*, 96 id. 68.

The effect of the construction contended for by the counsel for the respondent would be, that in case all the children of the testator's daughter had died during her life-time without issue and there were no survivors, the estate would pass to the collateral heirs. The grandchildren of the testator would thus be divested of any absolute interest in the estate by remote kindred. They would take only an unsubstantial estate, and in case they did not survive their mother they would be vested with no interest whatever.

The law favors the vesting of estates, and courts will always give such a construction to a will as will tend to best provide for descendants or posterity, and will prevent the disinheritance of remaindermen who may happen to die before the termination of the precedent estate. *Moore v. Lyons*, 25 Wend. 142; *Scott v. Gurnsey*, 48 N. Y. 106; *Low v. Harmony*, 72 id. 408.

We are referred by the counsel for the respondent to numerous cases which it is claimed sustain the position contended for by him, but none of them are precisely in point. Those relied upon in this State are clearly distinguishable, as will be noticed upon an examination of the same. In *Nodine v. Greenfield*, 7 Paige, 544, the devise was to the widow for life, and then to the children of another person, who should be living at her death, and the issue of such as should die, and in default of such children or issue then living, then over to such person, and if he were dead, to the testator's next of kin. It will be seen that the facts differ materially from those presented in the case now considered, and the case is not analogous.

In *Depeyster v. Olendenning*, 8 Paige, 292, there was a devise of the life interest to the wife, then to his children, and upon their death to their issue, and if either of them died without issue, their shares to go to the survivors. Here is an express provision in favor of the survivors, which makes a marked distinction between the cases cited and the one at bar and renders it entirely inapplicable.

In *Kane v. Astor's Executors*, 5 Sandf. 469, the devise was to the daughter during life and then to the surviving issue, thus expressly providing for any who survived.

In *Matter of Ryder*, 11 Paige Ch. 185, the devise was to A. for life, remainder to her surviving children and to the issue of such as should have died leaving issue at her death. Here also the survivor is provided for.

In *Sheridan v. House*, 4 Keyes, 569, there was a grant to J. for life, and after his decease to his heirs forever, and it was held that this vested future estate of each child, though liable to be defeated by the

child's death before that of his father, was, nevertheless, under our statute law devisable, descendible and alienable. This decision sustains the view that the devisees had a vested interest which they could lawfully dispose of, and it does not aid the plaintiffs' case. If any thing, it establishes that the devisees who died had an interest which was vested and transferable and devisable, subject to the conditions provided for in the grant. As the remainder in the case cited was limited to the heirs and assigns for life, before the right is absolute the tenant for life must die to terminate the estate and to ascertain the heirs. The character of heir must be gone before the remainder vests in possession, and hence the remainder may be defeated by the death of any child before his father. In the case at bar, the devise is to the child or children of the life-tenant, thus specifying the character of the devise after the death of the life-tenant and leaving no uncertainty as to who was entitled to the remainder.

In *Moore v. Littell*, 41 N. Y. 66, the devise was to a person named and after his death to his heirs and assigns forever, and the remarks made concerning the case last cited are applicable.

In *Smith v. Scholtz*, 68 N. Y. 41, the devise was to the grandchildren of the testator with a provision in favor of the survivor and the heirs of such survivor, and it contains nothing adverse to the views we have expressed.

Reliance is also placed on *Kelso v. Lorillard*, 85 N. Y. 177, where the devise was to the husband for life, remainder to a son if he should live until he became of age and then over. Here is an express provision for defeat of the estate in case of the death of the son before maturity, and the case in no way sustains the rule contended for by the respondent's counsel.

Some other decisions are referred to which have been examined, but none of them, we think, are in conflict with the views already expressed.

It may be remarked, as to the cases relied upon by the respondent, that in several of them there was an express devise over of the remainder, either to the survivor or to some other person, in case of the death of the first devisee without issue during the life-time of the tenant; or other language which limited the devise of the remainder so that it could only take effect in case of his surviving the life-tenant. None of the cases sustain the position that where there are no words of limitation or survivorship, or of devise over to some other person, in the event of the death of the remainderman without issue during the life estate, his share is to be divested entirely, or become vested in the survivor or any other person than the heirs or assigns.

The appellant's counsel cites several cases to sustain the position that the testator intended that upon his death his daughter should be entitled to and should take a life estate in his land, and that her children who should then be living should at the same time be entitled to and should take a vested remainder in fee in the lands; if more than one, share and share alike, and as tenants in common, subject, however, to open and let in after-born children to an equal share with them. *Wemple v. Fonda*, 2 Johns. 288; *Doe v. Provost*, 4 id. 61; *Livingston v. Green*, 52 N. Y. 124; *Enbury v. Sheldon*, 68 id. 233. It is true that the authorities

referred to tend strongly to uphold this construction of the testator's will. While they bear upon the subject they do not, however, precisely cover the point here presented and cannot be regarded, therefore, as entirely conclusive.

The question is a new one and has never been determined in this court. Its solution must, therefore, stand upon the construction to be placed upon the testator's will by invoking the rules of law which are applicable to such a case.

It follows that the court below was in error in its conclusion, and the judgment should be modified in accordance with this opinion, with costs to the appellant to be paid out of the proceeds of the sale.

All concur.

Judgment modified.

PHELPS, *App'ts*, v. BOLAND, *Resp't*.*

November 23, 1886.

SURETY — RELEASE — FOREIGN BANKRUPTCY — DISCHARGE OF PRINCIPAL — CREDITOR ACCEPTING COMPROMISE.

Defendant, a citizen of this country, having drawn a bill of exchange to his own order at sixty days' sight upon J. & Co., English merchants, residing in Liverpool, sold it to plaintiffs, American bankers, residing in New York. The bill was duly accepted, and at maturity, was protested for non-payment. In an action against the drawer, one of the defenses was, and the facts were proved upon the trial, that after the bill had been drawn and accepted, the acceptors had been discharged by their creditors under the authority of the English bankrupt laws, in which the plaintiffs proved this indebtedness, and received their proportionate part of the composition paid by the acceptors. *Held*, that although the foreign discharge would have been in and of itself no defense, yet, having voluntarily submitted themselves, and their rights as creditors to the foreign jurisdiction, proved their debt, and accepted the compromise, defendant was released from all liability as surety.

Appeal by plaintiffs from a judgment entered in favor of the defendant, upon an order of the general term, supreme court, first department, overruling plaintiffs' exceptions, and ordering judgment upon the verdict directed at the trial term in defendant's favor.

Thos. H. Hubbard, for appellants. *Frank D. Sturges*, for respondent.

FINCH, J. The defendant, a citizen of this country, drew a bill of exchange to his own order at sixty days' sight upon Johnston & Co., who were English merchants, residing in Liverpool. The defendant sold it to the plaintiffs, who were American bankers, residing in New York. The bill was duly accepted by Johnston & Co., payable in London, who thereby, as to the plaintiffs, became the principal debtors, the drawer being contingently liable upon their default, and holding the position of a surety for the payment of their debt. The bill was protested for non-payment at its maturity, Johnston & Co. having failed, and being unable to meet their liabilities, and the holders now sue the drawer to recover its amount. The latter defends upon the ground that, as surety, he was entitled, upon the payment of the bill, to be subrogated to the rights of the holder, and that the latter had so destroyed or materially impaired those rights as to have lost all remedy

* Affirming 30 Hun, 366.

against the drawer. The fact relied on as the cause and basis of this result is that the acceptors were discharged in bankruptcy upon a compromise by the English courts, and that the plaintiffs, who were originally not parties to the proceeding, became so afterward voluntarily, and proved their claim and accepted the composition decreed, whereby the judgment became binding upon them in this country, as well as in England, and so the acceptor was wholly discharged, and right of subrogation as surety rendered valueless.

The answer made to this contention is that the foreign discharge in bankruptcy was operative against the holders in this country, even although they had never become parties to the proceedings, and so the release of the acceptor flowed from no act of theirs, and consequently they had not invaded or affected the drawer's rights.

The authority pressed upon our attention, and which we are asked to follow, is that of *May v. Breed*, 7 Cush. 15. The deserved reputation of the court, and the great ability of its reasoning may well make us hesitate and reflect before adopting a contrary conclusion; but, deeming the question substantially settled, both in our own State and in the Federal courts, adversely to the opinion cited, we feel it our duty to acquiesce in that result. Two propositions are conceded on all sides. That the title of a foreign assignee, conferred by the foreign bankrupt law, may be asserted in our courts, but cannot operate or be effectual as against our own citizens pursuing their remedies as creditors against the bankrupt or his property within our jurisdiction, or when the recognition of such title is against our public policy, is conceded in *May v. Breed*, and has quite recently been decided by us. *In re Waite*, 99 N. Y. 433. And that, as between the States of the Union, a discharge by the law of one will not bar the right of a creditor who is a citizen of another and not a party to the proceeding, is equally well settled by a substantial concurrence of authority.

The argument of the learned chief justice in the Massachusetts case is largely occupied with an effort to show that these two propositions do not decide the case of a discharge by the foreign court of a debt or obligation contracted under the law of its jurisdiction and to be there paid and discharged. It is asserted that the cases between citizens of different States in our own country rest, not upon doctrines of international law, but upon provisions of the Federal Constitution and governmental relations peculiar to our national organization. The most important and authoritative of these is *Ogden v. Saunders*, 12 Wheat. 217; and it is subjected to the double criticism that it did not in all respects reflect the opinion of the court; and that it decided no question of international law.

The first suggestion was fully and finally answered in *Baldwin v. Hale*, 1 Wall. 223, where the authority assailed was vindicated, and its doctrine expressly ratified and affirmed. The second suggestion seems to us not sustained by a careful reading of the case. The question before the court was stated to be "whether a discharge of a debtor under a State insolvent law would be valid against a creditor and citizen of another State who has never voluntarily subjected himself to the State laws otherwise than by the origin of his contract," and was argued

in two forms; first, as a question of international law, and, second, under the Federal Constitution. Upon the first branch of the argument the English rule was admitted to be that "the assignment of the bankrupt's effects under a law of the country of the contract should carry the interest in his debts wherever his debtor may reside;" and then it was declared to be "perfectly clear that in the United States a different doctrine has been established; and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carried with it a negation of the principle altogether." At a later stage of the opinion attention is called to the circumstance that the discharge is always and necessarily an adjudication of a court, and depends wholly upon the operative force of that adjudication; and that neither comity nor justice requires that we shall hold one of our own citizens bound by a judgment of a foreign court, to which he was not a party, could not be compelled to be a party, of which he might have had no notice. I have less hesitancy in thus asserting the error of *May v. Breed* in construing the decision of the Federal court as standing outside of international law, and so not authority in a case like this, because I observe that Mr. Redfield, in editing a new edition of *Story on the Conflict of Laws*, has deemed it necessary to criticise his author's assertion of the same error—§ 341, *a*—and more especially because the supreme court itself in the later case of *Baldwin v. Hale*, *supra*, put its decision mainly upon a ground not peculiar to our Federal relations, but upon the effect of a foreign judgment. This last case also, referring to the Massachusetts doctrine "that if the contract was to be performed in the State where the discharge was obtained, it was a good defense to an action on the contract, although the plaintiff was a citizen of another State and had not in any manner become a party to the proceedings," expressly repudiated the conclusion, saying that "irrespective of authority it would be difficult if not impossible to sanction that doctrine."

In our own State two cases have been decided in substantial accord with the ruling of the Federal court. *Gardner v. Oliver Lee & Co.'s Bank*, 11 Barb. 558; *In re Waite*, *supra*. The latter case stated the general rule without grafting upon it any exception founded upon the origin of the contract. We are content to follow these authorities without entering into the wide and difficult discussion in which they culminated. It follows, therefore, in the present case, that the foreign discharge would have been, in and of itself, no defense to the American holder of the bill. If property of the bankrupt should be found in any jurisdiction, the plaintiffs were at liberty to proceed against it by attachment, and collect their debt out of such property, and the foreign bankruptcy proceedings would neither prevent nor stand in the way, for the sufficient reason that their only force in our jurisdiction comes from our consent, and we have chosen thus to limit that consent. This right remaining to the plaintiffs was a valuable right. It charged with the payment of the protested bill any present or future acquisitions of the acceptors which might come into our jurisdiction, and might result in the collection of the whole debt or a compromise settlement induced by the desire or interest of the debtors to have access to our

markets and freedom to resume their business among us. To that right, thus valuable and material, it was the privilege of the surety to succeed by way of subrogation whenever he should pay the debt, and the plaintiffs could not deprive him of it or impair or destroy it except at the peril of releasing him from his liability. Just that was what the plaintiffs did. Tempted by the compromise offered they sought to obtain the defendant's consent to its acceptance by him. That consent he withheld, but they, acting upon their own conceptions of what was most for their interest, voluntarily submitted themselves and their rights as creditors to the foreign jurisdiction, proved their debt and accepted the compromise decreed. The condition of the dividend was a release of the debtor. They could not take the compromise and avoid the condition, and so by their act they discharged the acceptors entirely and everywhere. That such is the effect of their voluntary submission to the foreign jurisdiction is inevitable on principle, and has been often decided. *Gardner v. Oliver Lee & Co.'s Bank, supra*; *Clay v. Smith*, 3 Peters (U. S.) 411. The unavoidable consequence follows. The creditor having by his own voluntary act released the debtor from all remaining liability, his surety is discharged. The courts below so held, and we think correctly.

But another suggestion has arisen among us, original with the court, and not at all urged in the brief of counsel, prepared with great thoroughness and ability. That suggestion is that Borland consented to the acceptance of the dividend by plaintiffs, and so lost the right to complain; and the evidence on which this is founded is said to exist in two letters which passed between the parties. It is not pretended that plaintiffs' letter asks Borland's consent to their acceptance of the dividend, or that he, in terms, gave that consent, but such consent, not directly asked or given, is sought to be inferred from what was written. The letters are but the declarations of the parties bearing on the issue, and none the less so because they happen to be in writing. The proper inferences to be drawn from them were questions of fact more or less affected by the other evidence in the case. Whether from the language used, Borland meant to give his consent and waive his rights, or plaintiffs understood him to consent and acted upon that understanding or without it, were certainly inquiries for the jury and not for the court. But neither party asked to go to the jury upon any question of fact, and each by asking judgment in his own favor waived any possible question of fact, and conceded that only questions of law were involved. Were this otherwise, the result would not be changed. As I have said plaintiffs did not ask Borland's consent to their proving their own claim. On the contrary they asked him to prove his, in order that they might not be compelled to prove theirs. The plain meaning was, we ask you to prove yours; if you decline we shall prove ours at all events. To this request, the only one made, Borland returns a refusal. That it is politely said in the phrase addressed to the counsel, "I would much prefer that your clients adopt some other course for securing to themselves dividends," means only in connection with their explicit avowal, do it yourselves if you choose to do it at all. And then, as if fearing the very misconstruction now suggested, he adds: "I think, upon

the whole, it may be better to leave the matter as it stands at present rather than complicate it by assuming to be bailee of any funds they may claim as theirs. I do not aspire to the position." Unquestionably his meaning is, it is best that neither of us touch this dividend, and I, at least, refuse. Language must be tortured to make this a consent and a waiver of the surety's rights.

The judgment should be affirmed, with costs.

All concur, except EARL, J., dissenting, RUGER, Ch. J., not voting. Judgment affirmed.

MORRISON, *Resp't*, v. VAN BENTHUYSEN, ETC., *Appl'ts*.*

November 23, 1886.

PRACTICE — COMPULSORY REFERENCE — SUBSTANTIAL ISSUE — FRAUD.

Plaintiff's assignor bought upon an execution against G. his individual interest in the firm property of T. & H., of which firm G. was a member.

Thereafter upon a sale upon executions, upon judgments against the firm, the firm property was sold to W. for a sum less than sufficient to pay the firm debts.

The complaint charged that the price obtained upon the sale of the firm property to W. was much less than the value of the property, and was brought about by the fraudulent practices and representations of W., and that but for these the property would have realized enough to have resulted in a substantial advantage to plaintiff's assignor.

The plaintiff asks to have the sale declared void, and that an accounting be had.

Held, that the substantial issue was the fraud, and that a compulsory reference ought not to have been ordered.

Appeal from order of general term, third department, reversing an order of reference granted at the Albany circuit.

N. C. Moak, for appellants. *E. F. Bullard*, for respondent.

FINCH, J. This appeal involves a question of power to order a compulsory reference. The special term made such order, but the general term reversed it, holding that no power existed to grant it. The action was an equitable one. The complaint in substance alleged that the assignor of the plaintiff became the owner through an execution sale of the interest of one Thompson, in the partnership property of Thompson & Horrocks, and so entitled to ascertain and recover that interest; that upon judgments and executions against the partnership property, the whole of it was sold to George Warhurst, at a price very far below its actual value; that the sacrifice was occasioned by the fraudulent conduct of Warhurst in preventing purchasers from bidding by a false representation of a chattel mortgage incumbrance, and a direct bargain with another judgment creditor not to bid; that Warhurst transferred the property purchased to the defendants, Jane Van Benthuyssen and Anna Horrocks, by a conveyance made without consideration and with a fraudulent intent; that Warhurst is dead, and the defendant Nuttall is his executor, and Thompson went into bankruptcy, and all his rights passed to the defendant Hicks, as assignee; that Horrocks by a compromise arrangement had satisfied all the debts of the firm; and that Warhurst and his fraudulent vendees had used some of the property purchased, had sold some, and collected insurance money upon a portion destroyed by fire. The relief asked is that the sale to Warhurst

* Affirming 40 Hun, 428.

be set aside; that his estate and his fraudulent vendees account for the use of the property and its value; that the Warhurst judgments be satisfied out of those assets, and the balance be paid to plaintiff, and Thompson's assignee; and that a receiver be appointed to sell the property, and give to the plaintiff two-thirds of it, that having been Thompson's proportion of the capital. To this action Horrocks, one member of the firm and the sole surviving partner is not a party. No accounting of the partnership assets is asked for on either side, and none can be had in his absence. It is not for us to conjecture how the plaintiff's action can be maintained without making Horrocks a party. If it can be it will be because no partnership accounting is required. If it cannot be the plaintiff may be obliged to amend his complaint, and bring in Horrocks as a party, and then for the first time such an accounting will become possible and necessary. But as the case stands the only accounting requisite or sought is to ascertain the value of the property fraudulently sold, the value of the use, and possibly the amount of insurance realized. These are purely items of damage, and involve no accounting. *Camp v. Ingersoll*, 86 N. Y. 433. The theory of the plaintiff is that he will be entitled to the whole or two-thirds of such aggregate values. He perhaps may seek to uphold that theory by the contention that the sale, though void as to plaintiff, is good as to Horrocks, who does not repudiate it, and so has lost all interest in the question, or in the fruits of the litigation, or upon some other ground as yet undisclosed. But whatever else may be true about the case it seems entirely certain that there can be no receivership of the partnership assets, and no administration and settlement of its affairs in an action to which the sole surviving partner is not a party. It follows that no long account was involved in the action, and that the decision of the general term was correct.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

IN THE MATTER OF THE ACCOUNTING OF ELBRIDGE T. GERRY AS TRUSTEE.

November 23, 1886.

TRUST — LIFE-TENANT — REMAINDERMEN — DIVIDENDS ON STOCK.

The will creating the trust provided that the fund should be invested in funded stock of the United States or of the State of New York, or in good bonds and mortgages on real estate, and the annual interest, income and dividends thereof paid to the testator's daughter during her life, and upon her death, the principal or capital sum aforesaid should be divided among his other children. The interest collectible upon the sum so invested was accordingly paid to the daughter during her life. A sale of the securities after her death resulted in a surplus of about \$20,000 over the amount of the original investment, and this sum was claimed both by the representatives of the life-tenant and by the remaindermen. *Held*, that the increase went to the remaindermen.

Appeal from certain portions of a judgment or decree of the supreme court for the first department, directing the distribution of a trust estate.

The opinion states the case.

E. L. Fancher, for appellant. *George G. Kip*, for respondent.

RUGER, Ch. J. The matter here in controversy arises between the representatives of the life estate and certain remaindermen with reference to the proper distribution between them of an increase in the amount of the trust fund discoverable upon a sale of the securities in which it was invested after the life estate terminated.

The fund was created in the year 1828 under the will of Peter P. Goelet devising to his executors as trustees the sum of \$50,000 to invest "in funded stock of the United States or of the State of New York, or in good bonds and mortgages on real estate," with direction to pay "the annual interest, income and dividends thereof" to his daughter, Jean B. Goelet, during her life, and upon her death, leaving no issue, to divide the "principal or capital sum aforesaid," "among my other children in equal proportions." A codicil to said will, made in the same year, increased the said fund by an additional sum of \$20,000, which, upon the death of said Jean B. Goelet without issue, was also directed to be paid to her surviving brothers and sisters or to their respective representatives.

During the existence of this trust which extended for fifty-four years to the death of Jean B. Goelet in 1882, the annual interest collectible upon the sum invested was duly paid to her by its trustees. It does not appear affirmatively in the case in what securities the capital sum was originally invested or when any investment or conversion of them occurred; but the evidence shows that in 1880 it was represented in unequal proportions by United States bonds, bonds of the cities of New York and Brooklyn, bonds and mortgages on real estate, and the sum of \$3,424.95 in cash. The cash seems to be the result of an increase in the value of some securities exchanged or converted by the trustees prior to 1880. In April, 1880, an order was made by the supreme court in a proceeding instituted by Robert Goelet and Ogden Goelet who with Elbridge T. Gerry had succeeded to the said trusteeship, under the will of Peter Goelet, who died in 1879, to ascertain the amount of said fund, the securities in which it was invested, and to obtain their discharge from the duties and obligations of said trusteeship upon the delivery of said trust funds to their associate, Mr. Gerry. Jean B. Goelet and Mr. Gerry were both parties to this proceeding and acquiesced in the order of the court appointing Mr. Gerry sole trustee and defining the securities and the capital of the trust fund as it then existed.

It may fairly be assumed from the evidence that the fund has already been kept invested in securities upon which there was a fixed rate of interest payable annually, determinable by the provisions of the security, and that it has never been possible for the trustee to receive or secure therefrom any extra dividends or any greater annual income than that producible by fixed rates of interest. A sale of these securities by the trustee after the death of the life-tenant resulted in a surplus of nearly \$23,000 over the amount of the original investment, and this sum is claimed respectively by the representatives of the life-tenants and by the remaindermen.

The primary rule for the determination of questions arising upon

the construction of wills is the ascertainment of the intent of the testator from a consideration of its provisions. In the case in hand the will provides specifically for the interest which the legatee for life was to take in the fund and it is limited to the "annual interest, income and dividends thereof." All beyond this must of necessity have been intended to go to the remaindermen, for there are no other persons who could lawfully take it.

This case is not analogous to, and presents none of the questions or embarrassments attending the division of gain or profits arising upon investments in trade or the stock of corporate business enterprises, and which are usually represented by dividends either regular or extra payable in cash, stock or scrip or remaining undivided in the hands of the corporation. The authorities in such cases are very numerous, and show that it is often a matter of great difficulty to distinguish with precision between those gains constituting an accretion to the fund and those which legitimately may be termed the earnings of the investment properly distributable by way of dividends to the stockholders of the corporation. In this case, however, the investment is directed to be made in securities bearing a fixed rate of interest which can neither be increased by the prosperity or diminished by the misfortunes of the debtors and are eventually to be satisfied by the repayment of the principal sum of the obligation.

At the time of the conversion of this fund by the trustee he held in his hands obligations which upon their face called for the repayment to him of the sum of \$70,000 only, and the purchasers from him received obligations which at maturity were redeemable by the obligors at that sum.

The cause occasioning the increase in question seems to have been a depreciation in the rate of interest affected by natural causes and which gave an increased value to securities bearing the higher rates of former times. This constituted in no sense a profit upon the investment, but was an accretion to the fund itself arising from natural causes and was liable to be altogether lost by the approximation of the securities to the period of their maturity. The benefit derivable from this condition was enjoyed annually by the beneficiaries of the fund in the increased value of the income derivable therefrom. Had the life-tenant lived to the maturity of the bonds she would have received in annual interest the entire difference, if any existing at any time prior thereto, between the face and market value of these securities.

The theory of the will did not contemplate any traffic in securities by the trustee but a permanent investment in interest-bearing obligations, subject to be sold or exchanged only when the exigencies of the trust required it to be done.

It is quite clear that the life-tenant could not have compelled the trustee to sell or convert securities lawfully purchased and held by him upon the ground that their market value had appreciated in his hands any more than he could have compelled her to make good any depreciation in the value of such securities. The acquisition and retention of such securities was one of the objects contemplated by the will of the testator, and was essential to execute his designs, and a proceeding to

compel a sale of the securities would plainly have been contrary to his intent in creating the trust. If the will had required the trustees to invest in real estate the rents, income and profits of which were made payable to the life-tenant with remainder over, it cannot be questioned but that any increase of the value of the land from natural causes would have been an accretion to the capital and inured to the benefit of the remaindermen. *Perry Trusts*, § 545, p. 486; *Cogswell v. Cogswell*, 2 Edw. Ch. 240. And we can see no difference in principle between this case and the one supposed.

The question here presented was up in the cases of *Townsend v. U. S. Trust Co.*, 3 Redf. 222, and *Whitney v. Pharis*, 4 id. 180, before the surrogate of New York, and it was there held that an enhancement of the value of United States bonds held in trust went to the remaindermen, and not to the legatee for life. These decisions accord with our views.

The cases cited by the learned counsel for the appellant may all be classified as cases where the terms of the trust authorized investments in the stock of private corporations or trading enterprises whose profits are largely affected by the vicissitudes of business and trade, and the disposition of whose gains and profits is largely if not wholly left to the discretion of the managers of the enterprise. In such cases it was plainly the intention of the settler of the trust that the life tenant should have the advantage of any extraordinary profits realized from the investment.

As we before said, these cases are not analogous. The circumstance that the trustee in this case at some time invested a portion of the funds in unauthorized securities would not seem to have effected any change in the respective rights of the life-tenant and remaindermen in the *corpus* of the trust. When the fact came to their knowledge, in 1880, they each and all seem to have acquiesced in and approved the action of the trustee in making the investment, and it cannot now be objected on the part of either of them that any interest of theirs was thereby varied or changed. It was optional with those parties at that time by taking appropriate proceedings for that purpose, to have required the defaulting trustee to invest the fund in the securities specified in the will, or made compensation in some other form for the damages, if any, occasioned by his wrongful act, but it was also competent for them to ratify and approve the action of the trustee by accepting the securities held by him as representing the trust fund, and this, we think, was determined by the proceedings taken to release Robert and Ogden Goelet from the duties of trustees under the will. The action of the trustee in making the investments in question was sagacious and inured to the benefit of all the parties concerned, and they should not, after long acquiescence in such dealing, be allowed to obtain an advantage by questioning its legality.

But further than this we think the securities in which the funds were actually invested by the trustee until changed by some proceedings taken for that purpose, so far as the beneficiaries were concerned, represented the trust fund, and their earnings, income and increase would, as between the several parties interested therein, be subject to

the same rules of division and distribution as though it had been invested and kept on interest in accordance with the terms of the will. The remaindermen could not thereby be deprived of a natural accretion to the fund, however invested, or the life-tenant become entitled to an increase, which, if the fund had been lawfully invested, would not have accrued to her. Indeed, in prosecuting this proceeding the representatives of the life-tenant have ratified the acts of the trustee in making the investment in question by treating the unauthorized securities as the *corpus* of the fund, and claiming their increased value as income earned by the employment of the capital. In other words, while claiming the advantage to be derived from the unauthorized act of the trustee, they insist that such act was the efficient cause of transforming what was otherwise an accretion to the fund going to the remaindermen, into profits accruing to the life-tenant.

The life-tenant was not the sole party interested in the determination of this question, and inasmuch as she during her life-time and the remaindermen also acquiesced in and approved the conduct of the trustee in making the investment, her representatives should not now be allowed to acquire an advantage by denying the lawfulness of his proceeding.

The judgment of the court below should be affirmed, without costs to either party.

All concur.

Judgment affirmed.

IN RE APPLICATION OF GARDNER.

November 23, 1886.

MASTER AND SERVANT — CLAIM FOR SERVICES — STATUTE OF LIMITATIONS.

Plaintiff's claim against the estate of the deceased was for wages for housework or as house-keeper for deceased, covering a period of about forty years. Plaintiff proved two payments on account of such services, one in the spring and one in the fall of 1879. There was no proof of any express agreement as to the time or measure of compensation, or of any usage in such a case.

Held, that it was to be taken as a general hiring, but that the law would not imply that payment was to be postponed until the end of the service; and that the statute of limitations precluded a recovery for any services rendered more than six years before the payment made in the spring of 1879.

Appeal from a judgment of the supreme court affirming an order of the surrogate of Tompkins county denying the application of Robert B. Gardner as administrator of the estate of Allen B. Gardner, for leave to sell real estate for payment of the debts of his intestate.

Mr. Howland, for appellant. *Mr. Tuttle*, for respondent.

DANFORTH, J. The only claim which justified the application was one presented in favor of Lucy C. Gardner, a sister of the deceased, for housekeeping or housework, and in regard to that the surrogate found that the claimant began to perform valuable services for her brother at his request and as his servant, on or about November 1, 1843, and continued to perform such services until his death, on or about November 1, 1882, a period of thirty-nine years; that they were worth a certain sum per week, varying in amount in different years, and

that "to apply on" those services the deceased paid the claimant \$2 in the spring of 1879, and \$30 in the fall of that year, "and that he had paid her a little money occasionally," "every few years some," but that "the particular times or amounts of such payments were not stated or shown," and holding as matter of law that the statute of limitations precluded a recovery for any service rendered more than six years before the payment made in the spring of 1879, he gave judgment for the residue only, viz.: For services rendered during six years prior to April 1, 1879, and from that time to the death of the deceased, in all nine years.

In cases of this character there is often great difficulty in getting at the truth so as to adjust fairly the rights of both parties. But here every question has been settled to their satisfaction excepting that relating to the application of the statute of limitations. The effect of that statute is to prevent one who neglects to enforce his right of action upon a contract obligation or liability, whether express or implied, from doing so after the expiration of six years from the time the cause of action accrued. Here there was no express agreement as to the time or measure of compensation, nor any evidence of usage in respect thereto, and I am unable to find any circumstance to distinguish the claimant's case from that decided by this court in *Davis v. Gorton*, 16 N. Y. 255, where it was in substance held that a similar indefinite engagement was to be taken as a general hiring, but that the law would not imply an agreement that compensation should be postponed until the termination of the employment, and a judgment which had been rendered on the opposite theory was reversed. It did not appear in that case that any payments had been made, but in *Gilbert v. Comstock*, 93 N. Y. 484, that fact was in evidence and an allowance for six years prior thereto was justified. That circumstance was present in the case at bar, and the same effect has been given to it.

We think the claimant can require nothing more. In *Smith v. Velie*, 60 N. Y. 106, on which the appellant relies, there were open mutual accounts between the parties, and while that condition of things continued the statute was no bar,* for, in such a case, if the last item is within six years, it draws after it items beyond that period. In the absence of an express agreement as to time of payment, the law will no doubt presume that the parties contracted in reference to the usage prevailing in respect thereto in that kind of employment, and when shown, it would be taken into account, but here, as before suggested, none is proven. The witnesses indeed estimate the value of the service at a certain sum per week, and such is the finding of the referee, and from that it might, perhaps, be inferred that weekly payments were usual in such cases, but however that may be, both reason and authority repel the implication that under such a general contract as the present, payment was intended to be delayed until the end of service.

We think, therefore, that the appeal fails and the judgment should be affirmed.

All concur.

Judgment affirmed.

PEOPLE, *Resp't*, v. BUDDENSIECK, *App'l't*.

November 23, 1886.

CRIMINAL LAW — MANSLAUGHTER — INDICTMENT — JUROR — EVIDENCE — PHOTOGRAPHS — EXCEPTIONS.

Imperfections in the form of an indictment which do not tend to prejudice the rights of the defendant upon the merits cannot affect the indictment or the judgment thereunder. Code Crim. Pro., § 285.

On examination by the district attorney a juror testified that he knew of no reason why he could not render an impartial verdict upon the evidence. In answer to the prisoner's counsel he stated that he had read in the newspapers about the occurrence, but had formed no opinion as to the guilt or innocence of the prisoner; that his mind was free from any impression in regard thereto but that he was of the opinion from what he had read that the catastrophe was the result of culpable negligence on the part of some one, and that it would require evidence to remove the impression. *Held* a competent juror.

Another juror testified that from reading the papers he had formed an opinion as to the guilt or innocence of the prisoner which would require evidence to remove; but in substance that he could go into the jury box and render an impartial verdict upon the evidence without being influenced by such opinion. *Held* a competent juror.

Defendant was indicted for manslaughter in the second degree for negligently constructing a building with inferior materials causing it to fall and producing the death of a human being. Upon the trial the court admitted in evidence, against defendant's objection, portions of the brick and mortar taken from the fallen building. *Held*, that the evidence was competent.

A new trial ought not to be granted where an exception is well taken unless the jury could have been unfavorably influenced by the evidence admitted under it, nor when the party excepting has by his own course of examination destroyed the force of his objection.

Photographic scenes of a fallen building are admissible in evidence to aid a jury in applying the evidence in reference to it.

The court may, in its discretion, allow the jury to visit and view the premises, but it is not bound to do so.

A stipulation between counsel to the effect that a general exception should give the defendant the benefit of a particular exception to any part of the charge will not avail.

Appeal from a judgment of the general term of the supreme court, first department, affirming a judgment of the court of general sessions of the peace, held in and for the city and county of New York, rendered against the defendant on the 10th day of June, 1885, convicting him of the crime of manslaughter in the second degree.

The indictment charged defendant and three other persons with willful and felonious neglect, committed at divers times prior to the 13th day of April, 1885, in constructing a certain building in the city of New York, so that, in consequence of such neglect, the same fell upon and killed one Louis Walters.

It was claimed that the materials furnished by the defendant for the erection of the buildings were of inferior quality and that proper mortar was not used in the construction of the building.

Mr. Howe, for appellant. *Mr. Nicoll*, for respondent.

DANFORTH, J. The appellant draws in question first, the sufficiency of the indictment; second, the competency of jurors; third, the rulings of the learned recorder upon questions of evidence; fourth, his charge and his refusals to charge as requested by the prisoner's counsel, and he does so upon propositions which appear to have been presented to the learned judges at general term, and by them so fully

considered and answered as to make it apparent that a different result would have been little better than a miscarriage of justice.

The indictment is under title 9, chapter 2, section 193, subdivision 3, and section 195 of the Penal Code, and in substance charges that the prisoner, by certain culpable negligence, acts and omissions in the selection and use of materials for and in the construction of a certain building which he was erecting in the city and county of New York, and which acts are specified, killed and occasioned the death of one Walters. One crime only is alleged, manslaughter in the second degree. Both sections of the Code above referred to define a number of unlawful acts, including those set out in the indictment, as constituting that crime. The case comes within those sections, and the form of the indictment is in substantial, if not literal, compliance with the provisions of section 284 of the Code of Criminal Procedure. Neither time, place nor circumstance was omitted. The time was stated to be the thirteenth of April, and days prior thereto during the erection of the buildings, the place within the jurisdiction of the court, and the circumstances those enumerated in the statute as constituting the offense. We discover no imperfection, therefore, in it, either in form or substance, and those alleged against it by the appellant, if not wholly unfounded, do in no respect tend to his prejudice, so far as substantial rights upon the merits are concerned, and hence they cannot affect either the indictment or judgment. Code of Crim. Pro., § 285. It follows that the trial court did not err in denying the defendant's motion in arrest of judgment. Upon such a motion only two objections are available: first, to the jurisdiction of the court over the subject of the indictment; second, that the facts stated do not constitute a crime. Code of Crim. Pro., §§ 467, 331. The first was not presented to the trial court, nor are either now relied upon. The other objections are unimportant on such a motion.

It is next argued that the trial court erred in overruling the challenges to three jurors: first, John Bloom, on examination by the district attorney, testified that he knew of no reason why, if sworn upon the jury, he could not render an impartial verdict upon the evidence, and in answer to the prisoner's counsel he said that he had read in the newspapers about the occurrence in question, but had formed no opinion as to the guilt or innocence of the prisoner; that his mind was free from any impression in regard thereto, or the charge contained in the indictment, but was of the opinion from what he had read that the catastrophe was the result of culpable negligence on the part of some one, and that it would require evidence to remove the impression; second, the condition of Meyers' mind was disclosed in substantially the same way, while, third, Weil said that from reading the papers he had formed an opinion as to the guilt or innocence of the defendant which would require evidence to remove. The challenge was upon the ground of actual bias existing in the minds of those proposed jurors, but he also testified in substance that he could, nevertheless, go into the jury box and render an impartial verdict upon the evidence submitted from the witness stand, without being influenced by the opinion or impression derived or formed from what he had read. There remained, therefore, no sufficient ground of challenge, or reason

why the trial court could not in the exercise of a sound discretion determine that these several persons could try the issue impartially and without prejudice to the substantial rights of the party challenging. They were, therefore, competent within the letter of the Code of Criminal Procedure relating to such questions, and the defendant's objections were properly overruled. *People v. Otto*, 101 N. Y. 690; *People v. Crowley*, 102 id. 234; S. C., 4 East. Rep'r, 763; *People v. Carpenter*, 102 N. Y. 238; S. C., 5 East. Rep'r, 75.

There are many exceptions to evidence. The first noticed by the appellant relates to the admission in evidence of a piece of brick and mortar produced by the witness D'Oerich. He was inspector of buildings for the fire department, and testified as to the condition of the fallen wall, its want of solidity, the materials of which it had been constructed, and, among other things, produced in evidence specimens of the mortar taken from the buildings, some of it between two bricks, part of the fallen walls. The case of the people turned in part upon the inferior quality of the materials, and any thing to show how they, in fact, differed in their characteristics from good, sufficient and suitable substances in general, and approved use for like purposes, was competent. That the mortar, in fact, used by the defendant in the construction of the walls was of "a poor and inferior quality, and chiefly composed of loam," was a distinct and important allegation. That it is the admixture of clear grit, sharp sand with lime, which gives it the character of cement, was proven. That the last is binding, while the other is not; that bricks laid with mortar of lime and sand will resist the influence of the rain, while a composition of lime and loam will be washed out, was established so far as it could be by opinion and the result of observation and experience. The testimony came from one qualified to speak upon that subject, but the conditions illustrated by the various specimens of mortar and mortar and bricks taken from the ruins, and the specimen from another building, were some evidence of the truth of his assertion, and they could properly be received, not only as confirming his opinion, but to enable the jurors the better to understand and appreciate the difference in effect between the mortar used by the defendant and that properly prepared. That one was strong and solid, the brick firmly imbedded in the mortar, and the other disjointed and with no coherence, was some evidence that the differences pointed out were substantial. The evidence as to the quality and component parts of the mortar used by the defendant was indispensable as part of the accusation, and the evidence as to the proper ingredients of mortar used by others, and in other buildings, and its quality and effect, was not less competent as tending to show the cause of the falling of the walls. The defendant's mortar the expert pronounced bad; the other good. The object of using the mortar was the same in both cases; the specimens tended to prove the truth of his assertion. Indeed, the argument of the appellant rather goes to the weight of the evidence than its admissibility. The learned counsel states that if the witnesses had explained and pointed out the difference between the two specimens, the reason why one was good and the other bad, "the specimens might have been shown to the jury

as illustrating the testimony of the witnesses." If there was any lack of such testimony — and it seems to us there was not — it would only show that further use might have been made of the pieces of brick and mortar, but would in nowise support the general objection that their exhibition to the jury was "incompetent or inadmissible for any purpose." The cases cited by the appellant upon this branch of the case have been examined, but we find none in point.

During the cross-examination of this witness — D'Oerich — at the request of defendant's counsel, he stated that he superintended the general work of the office of inspectors of buildings, and that official examiners were his subordinates, and their duty to make reports, among other things, of the condition of buildings, the violation of building laws and unsafe buildings, and also if improper materials were used in construction, to notify him; that they did report the buildings in question as unsafe. He was then asked by defendant's counsel: "What are those reports you have in your hands?" and answered: "Unsafe reports" "in reference to those buildings." They bore date January, 1885, and were read in evidence as defendant's exhibit No. 1. Five other reports relating to buildings adjoining that mentioned in exhibit No. 1 were, upon like request, received in evidence, and marked "defendant's exhibits Nos. 2, 3, 4, 5 and 6," showing the buildings at the time of the reports to be unsafe.

Upon re-direct examination the district attorney offered in evidence certain other reports made subsequently, and in successive weeks, up to the thirteenth of April, concerning the same buildings and their safety. The defendant's counsel said: "Before they are put in evidence, I have a right to examine this witness upon them," and, doing so, he showed that the reports exhibited the condition of the buildings on the day the reports were made, whether they had remained unsafe or had been changed, and, calling attention to one, he said: "What do the words 'nothing done' on that report mean?" and received for answer: "That nothing has been done; that the order of the department has not been complied with." He also showed that there was no record of any unsafety save that reported in January. The general contents of these reports, and a condition of the buildings substantially as therein stated, was also disclosed by parol evidence, coming either upon examination by defendant's counsel or upon examination by the district attorney in answer or explanation of that so obtained. It is manifest, therefore, that their admission could in no respect tend to the defendant's prejudice, and, while it is important in all cases that evidence should be free from exception, a new trial ought not to be granted, even where one is well taken, unless the jury could draw from evidence admitted under it, some unfavorable influence — Code of Crim. Pro., § 542 — nor when the party excepting has, by his own course of examination, destroyed the force of his objection. Both rules apply here.

The next exception brought to our attention is the use in evidence of a photograph of the premises. It was taken during the trial, but it appeared that the part represented was in the same condition as when first seen by the witness on the 25th of April, or soon after the structure fell. No objection was made that the person taking the picture was not competent or skilled in his art, nor that the then condition of the ruins was

unimportant as throwing light upon the manner of the construction of the buildings. It exhibited the surface condition and state of the wall, and no doubt carried to the minds of the jurors a better image of the subject-matter, concerning which negligence was charged, than any oral description by eye-witnesses could have done. Its accuracy as a faithful representation of the actual scene was proven, and in such a case it must be deemed established that photographic scenes are admissible in evidence as appropriate aids to a jury in applying the evidence, whether it relates to persons, things or places. *Cozzens v. Higgins*, 1 Abb. Ct. of App. Dec. 451; *Cowley v. People*, 83 N. Y. 464; *Durst v. Masters*, L. R., 1 Pro. Div. 373, 378. No doubt the court might, in its discretion, have allowed the jury to visit and view the premises, as it was asked to do by the prisoner's counsel, but it was not bound to do so. Code of Crim. Pro., §411.

There are many other propositions submitted by the appellant in relation to rulings upon evidence. They are less important than the foregoing. They seem indeed, in view of the general course of the trial and the conclusive character of the testimony unobjected to, and which justified the conviction, to have no merit, even if the exceptions upon which they are submitted were technically, well taken. We do not think they were, nor do they seem to involve any question which requires discussion.

The next point brings before us several allegations of error in the instructions under which the evidence was given to the jury. The record does not show that any exception to the charge was in fact taken, and there is, therefore, no question for us to review. We find in the printed brief of the appellant a statement that a stipulation was made by counsel to the effect "that a general exception should give the defendant the benefit of a particular exception to any part of the charge." This will not avail. *Briggs v. Waldron*, 83 N. Y. 582. An exception is not alone for the benefit of the litigant, but is required for the sake of justice and fair dealing, and in order among other things that the attention of the trial judge being called to the supposed error, he may, if he thinks proper, correct it before the jury are called upon to consider their verdict. There were, however, numerous requests to charge, some were refused, and the exceptions to the refusal are now said to have been "well taken." No argument is presented in support of that assertion, and our own examination discloses no error. The learned recorder so conducted the trial as to give the defendant the benefit of every doubt, his instructions to the jury were confined to the testimony, and their attention directed to the very right of the case as it might appear to them upon the evidence. His rulings have been approved by the general term after a most deliberate and minute examination of the law and the facts, and that the case has been in both courts well and properly decided we find no reason to doubt. The result necessarily follows that the judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

PHOTOGRAPHS AS EVIDENCE. See Abb. Trial Brief, 71-2; 26 Am. Rep. 319; 38 id. 464; 45 N. Y. 213; 56 Md. 84; 88 N. Y. 458; 13 W. Dig. 570; 20 Alb. L. J. 4; 76 Penn. St. 340; 46 Iowa, 109.

STEREOSCOPIC VIEWS. 64 Iowa, 736.

VIEW BY JURY. See Abb. Trial Brief, 72-4.

GARDINIER, *Resp't*, v. N. Y. CENT., ETC., R. R. Co., *Appl't*.

November 23, 1886.

NEGLIGENCE — RAILROAD ACCIDENT — WHAT EVIDENCE MUST SHOW TO JUSTIFY RECOVERY.

In order to sustain an action against a railroad company for negligently causing the death of plaintiff's intestate, the evidence must show, not only that the defendant was negligent, but that such negligence was the cause of the accident.

Appeal from a judgment of the general term, third department, affirming a judgment entered upon the verdict of a jury in favor of the plaintiff, and denying motion for a new trial on the minutes.

The evidence tended to establish the following facts. A bridge was constructed on the highway, between the villages of Fonda and Fultonville, over the defendants' road-bed, at an elevation of about eighteen feet, the approach from the north being at a slight ascending grade. Most of the travel between the villages named were over this bridge. There was a passage-way for foot passengers along the easterly side, protected by a railing, on which they usually crossed although one witness stated that they sometimes crossed on the main bridge, adding that they did so "as frequently as on the foot-path." There was a fence along the west side of the approach to the bridge, leading up to the top of the abutment; which fence lapped a little over beyond the arch of the bridge, leaving, however, an open space of fourteen inches between it and the bridge. The last panel of the fence that ran thus to the bridge, or to a point fourteen inches away from it, had no fastening at its bridge terminus. The width of the bridge was about twenty-four feet. The deceased was familiar with the highway, and with the bridge and its approaches. It was claimed by the plaintiff that the deceased while on his return home in Fultonville, probably about nine o'clock in the evening of December seventeenth — the night being dark — passed into the opening above described and fell therefrom to the defendants' road-bed, at the base of the abutment, receiving injuries from which he died within a few hours thereafter. There was no proof of the particular circumstances attending the accident.

R. B. Fish, for respondent. *C. D. Prescott*, for appellant.

DANFORTH, J. We have evidence from one side only, and on that it is not difficult to find that the defendants failed in their duty to restore the highway, across which their track was constructed, to such a state as not unnecessarily to have impaired its usefulness, or to make the passage to its bridge safe for the public. But we do not discover, from the record or the argument of counsel, that plaintiff's intestate was affected by their negligence, or that his injuries were caused by any default on their part.

The complaint states that he was on the evening of the 17th of December, 1881, at Fonda, "and started to go from thence to Fultonville, where he resided, and in attempting to approach and cross the bridge in the night-time fell over the wing wall of the bridge and was killed." The evidence shows that he was found between eleven and twelve o'clock of the night of that day, lying on the track, under and near the bridge, badly hurt. The physician, who was soon in attend-

ance, discovered slight, superficial scalp wounds, no broken bones, but "he was suffering from shock-concussion," and from this cause soon after died. He was hardly able to make a sound, soon became unable to speak, and gave no explanation of the circumstances which led to his condition. The same witness testified that the injury was such as might have been caused by falling from the abutment of the bridge on the railroad track, or from a car, or by a blow, "but the probability was, from the general condition of the man, that it was a fall."

It is evident that the jury supplied an important but unproven fact by mere surmise, and not on inference. They assumed that the deceased was at the wing wall going toward, or was on the bridge, when the accident occurred. But of this there is no evidence. He was not seen at the bridge, or upon or at its approaches. The record does not show that he was, during the evening, even going toward the bridge or his home, which lay beyond the bridge, or that he was intending to do so. There was literally no evidence to show how the deceased came to the place where he was found. He was seen at the "Montgomery hotel," in Fonda, between five and six o'clock in the afternoon; at eight or half-past eight he was at "Snell's hotel," in Fonda, "which," the witness says, "was on the road going from Fonda to Fultonville, by the street railroad." Another witness says, "about eight or half-past eight, I saw him up street, in the village of Fonda. . . . I saw him go down street toward the Montgomery hotel." And on the same evening, about a quarter before nine, he was seen "at the meat market at Fonda." Nothing more appears as to the whereabouts or the intentions of the deceased on the evening or night of his death.

We find, therefore, the appellant's counsel is right in the assertion that there is no evidence that the deceased was "on the bridge that night, or that he was seen going in that direction." It could, therefore, only be conjectured that the intestate was upon the wall or bridge, but there was no basis in the evidence to support the conclusion, and without that fact established the condition of the bridge becomes unimportant.

The judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

BLAKE, *Resp't*, v. GRISWOLD, *App'l't*.

November 23, 1886.

EVIDENCE — CORPORATE RECORDS — AS AGAINST STOCKHOLDERS.

Corporate books are not only evidence of the corporate acts when those need to be proved, but are to some extent evidence against the stockholders who are chargeable with a knowledge of their contents.*

Appeal from a judgment of the general term affirming a judgment in favor of the plaintiff.

W. C. Holbrook and *M. H. Grover*, for appellant. *A. Pond* and *R. L. Hand*, for respondent.

FINCH, J. A recovery was had in this case against the defendant

*See 20 Eng. Rep. 755, note.

under section 10 of the manufacturing act upon the ground that in making the annual report required by that act he had asserted a falsehood. The plaintiff sought to establish that the statement in the report that the whole capital of \$2,000,000 had been paid in was not only untrue, but that the defendant knew it to be untrue when he signed the report, and so was guilty of actual falsehood. The defense pleaded was that the whole capital stock of the Iron Mountains Company had been issued to Remington in payment for a mining property bought by him of the Kingdom Ore Company; since that purchase was claimed by the plaintiff to have been made for a far less amount and to have been of very much less value, the issue raised involved necessarily the corporate acts of the two companies, of which their records were the natural and proper evidence.

The defendant was shown to have been a trustee or director in both companies. In the original certificate of the Iron Mountains Company he is named as one of the trustees. That he accepted the office is fairly to be inferred from his own statement of the reason for the appointment, from the fact that he received from Remington \$10,000 of the stock to enable him to act; and that at the meeting in December he was present and serving as one of the trustees. His only denial in the answer is of the allegation that he remained a trustee after August, 1870, and his sworn assertion in the report of January, 1870, that he was such trustee justified the inference to which we have referred. He was not named as a trustee in the certificate of the Kingdom Ore Company, but while at first denying his official connection with that corporation, he afterward, as he says, "on reflection," admitted that he was a stockholder in it. It is not necessary to resort to or rely upon the similar admission in the answer the proper effect of which was somewhat discussed.

It seems to be the rule that the corporate books are not only evidence of the corporate acts when those need to be proved but are to some extent evidence against the stockholders who are chargeable with a knowledge of their contents. The books to which objections are taken on behalf of the defendant were the book of certificates, the stock ledger, and the minutes of the two companies. The stock ledger contained the names of the stockholders, the number of shares held by each, and a record of the transfers made. While not in all respects accurately complying with the requirements of the statute, it did so substantially, and is made by the law presumptive evidence of the facts recorded. The objection of the defendant was aimed principally at the book of minutes of the Iron Mountains Company. The material contents of that were the proceedings of the initial meeting of the trustees at which the purchase of Remington was determined, and the full capital stock issued to him, and the action of the meeting held December 15, 1869, at which the defendant was present. Nothing else in the minutes appears to be material. These records were admitted by the court as showing the corporate action, and without deciding that the defendant was to be charged with actual knowledge of what transpired in his absence. To this extent at least they were admissible, and the ruling was correct. Two facts were to be established by the plaintiff. First,

that \$2,000,000 were not in truth paid for the mining lands; and, second, that the defendant had actual and not merely constructive knowledge of the fact. The records furnish some evidence bearing upon the first issue, and their correctness, so far as they described the action taken at the organization of the company, was explicitly proved by Burleigh who was present and participated in the meeting; while as to the proceedings in December, the defendant admits his presence and in no manner denies the correctness of the record.

There remained, therefore, in the case the question of fact whether the defendant had actual knowledge that the two millions issued to Remington was a sham price founded upon a large false estimate of the lands. The defendant had seen the property; he had been over it with his father and others; he knew that it was undeveloped and that the character and extent of its ores was an unsolved problem; he knew that the whole capital stock was issued to Remington as vendor of the lands; he knew that with unexplained liberality Remington had given him without consideration \$10,000 of the stock; he must have known also that the same vendor had given back to the Iron Mountains Company a large quantity of the stock since we find him seconding his father's resolution to pledge one thousand shares with seventy bonds for a loan to the company and to give five hundred shares to the officer who negotiated the loan, as a commission, and from no other source than the free gift of Remington was it possible for him rationally to trace that ownership of the company. It is not quite easy to believe that he could have advised giving a mortgage on the property and \$70,000 of the corporate bonds and \$100,000 of the stock for a loan of \$35,000 if he was honestly convinced that the stock at par represented real dollars and full value. At all events what he did know tended to establish the second issue that he was guilty of actual falsehood when, in the report he signed, he declared that the full capital stock had been paid in. There was, therefore, a substantial basis in the evidence for the finding of the trial court and we are bound to accept it as correct. In this respect the case differs from *Lake Superior Mining Co. v. Drexel*, 90 N. Y. 87. There, upon facts somewhat similar, the verdict of the jury established good faith and honest judgment. Here the finding of fact is exactly the reverse.

The plaintiff's proof as to the comparatively small value of the mining property was very material and was the subject of further objection on the part of appellant. One of the witnesses was Burleigh. He was a trustee of the Iron Mountains Company. He testifies to a large and valuable experience in the development of iron mines, in the transportation of the ore, and in the difficulties and uncertainties of determining its extent and quality. Doubtless that experience and knowledge led to his selection for the office he held. At all events he was competent to testify as to the value of the property, having examined it so far as was at the time possible. When asked as to that value, he expressed the difficulty of a just answer by saying that such value was speculative, by which he plainly meant that as a mining property and for mining purposes its value in the result was uncertain. But it had a value nevertheless and beyond that belonging to it as land and for

agricultural purposes, but affected by the uncertainty both as to the quality and extent of the veins. In the end he valued the furnace at \$10,000 and the mining property at \$50,000 or \$60,000. That estimate he expressed by saying: "I might on speculation have paid that amount for it." This answer the defendant moved to strike out, but the request was refused, the court saying it understood him to mean that the property was not worth more than that amount. Such undoubtedly was his meaning, and he made no objection to the construction put upon it. It is said that he examined only a part of the property. That is true, but he examined it where the work was going on, and the ore was being taken out, and seems to have had all the opportunity that was really useful.

Another witness was Merrian. He had been a manufacturer of iron and bought and sold ores for a period of twenty-seven years. He had owned mineral lands and sold them but reserving the mines. He knew the property of the Kingdom Ore Company and had owned land for a long time in its vicinity. He said that the lands in question in August, 1869, when there was a good deal of speculation going on and "with the attraction he had seen might have been sold for \$40,000 or \$50,000." On cross-examination he explained that he had been over a part of the land with a mining compass with a view to discovering minerals, and found the same vein of ore cropping out that was on his own land. Of course he answers that the value was speculative from the necessity of the situation. We do not think there was error in receiving the testimony of these witnesses. Its force was, perhaps, intensified by the fact that the mining engineers called for the defense, while speaking quite favorably of the property, do not venture to put a value upon it, and by the circumstance that the Kingdom Ore Company sold it to Remington on the 12th of August, 1869, for ten thousand shares of stock and \$200,000 of bonds of the Iron Mountains Company, and that Remington in his deed to the latter company expressed the consideration at \$600,000.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Sims, Resp't, v. U. S. TRUST Co., App't.

November 23, 1886.

BANKS AND BANKING — VERBAL DIRECTIONS TO AGENT MAKING DEPOSIT — CUSTOM.

Plaintiff's testator delivered to one Crowell his check on the People's Bank of N. Y., payable to the order of the defendant for \$5,000, with verbal instructions to Crowell to deposit the same to his credit with the defendant. Instead of doing so, Crowell delivered the check to the defendant, and, at his request, received from it a certificate of deposit payable to himself as trustee, and afterward drew the money and converted it to his own use. In an action by the executor to recover of defendant the amount of the deposit, *held*, that the defendant, after receiving the testator's money, represented in the check payable to its order, had no right to pay it out except upon his direction, and that payment to Crowell as trustee, without any authority from the testator upon which the defendant was justified in acting, and in the absence of any custom of the kind among banks, did not relieve the defendant from liability for the amount of the deposit.

Appeal from a judgment entered upon an order of the general term, first department, affirming a judgment for \$6,038.51, in favor of the plaintiff, entered upon the verdict of a jury, after trial at circuit, and affirming an order denying a motion for a new trial upon the judge's minutes.

The action was brought to recover a deposit of \$5,000 alleged to have been made with the defendant by the plaintiff's testator. The opinion states the facts.

Wm. A. W. Stewart, for appellant. *J. Alfred Davenport*, for respondent.

RUGER, Ch. J. On the 15th of November, 1882, the plaintiff's testator, J. Marion Sims, delivered to one Crowell his check on the People's Bank of the city of New York, payable to the order of the defendant for \$5,000, with verbal directions to deposit the same to his credit with the defendant. Instead of doing as directed, Crowell delivered the check to the defendant, but requested and received from it a certificate of deposit payable to himself as trustee for Dr. Sims, and shortly thereafter drew the money thereon, and converted it to his own use. The defendant collected the money from the People's Bank upon Dr. Sims' check, and the main question in the case is, whether it had authority to make the payment it did to Crowell?

It claims to have acted in so doing upon the strength of an alleged custom among banks authorizing such a payment. Upon the trial, however, the proof in relation to such custom was conflicting, and the question as to its existence was submitted to the jury, and found against the defendant's claim.

Upon the transaction with this feature eliminated, there would seem to be no doubt of the defendant's liability. The check upon its face imported the ownership of the moneys represented in it by Dr. Sims, and his desire that its custody should be transferred from the People's Bank to the defendant. This certainly did not warrant the defendant in supposing that Dr. Sims thereby intended to pay \$5,000 to Crowell, or place him for any purpose in possession of the fund. If he had so intended the check would have been made payable to Crowell's order, and there would have been no need of the agency of the defendant in the transaction. The use of the defendant's name as payee of the check indicated the drawer's intention to lodge the moneys in its custody and place them under its control, and nothing further than this was inferable from the language of the check. The check by its terms authorized the defendant to withdraw from the People's Bank a certain sum for a purpose not disclosed but fairly inferable from the nature of the defendant's business.

The defendant could have refused to receive the deposit or act as Dr. Sims' agent in transferring the funds from one custodian to another, but having accepted the office of so doing, it was bound to keep Dr. Sims' moneys until it received his directions to pay them out. The language of the check, making the funds payable only upon the order of the defendant, imposed upon it the duty of seeing that they were not, through its agency, improperly disbursed after it had received

them. They could not safely pay out such funds except under the direction of their lawful owner. This they have never received unless the proof hereafter referred to shows such authority.

On the trial the defendant offered in evidence a power of attorney from Dr Sims to Crowell, which, so far as appears, had always remained in the custody of the People's Bank, and never came to the knowledge of the defendant until after the transactions in question. This evidence was objected to by the plaintiff and excluded by the court, to which ruling the defendant excepted. This exception presents the principal question in the case.

The power of attorney reads as follows :

"Know all men by these presents, that I, J. Marion Sims, of the city of New York, have made, constituted, appointed, and by these presents do make, constitute and appoint Gilbert L. Crowell, of the same place, my true and lawful attorney for me and in my name, place and stead, to collect and receive all sums of money now due or hereafter to become due to me, whether from rents, accounts, bonds and mortgages or otherwise, and upon payment thereof to give good and sufficient receipts or other discharges therefor.

"Also to transact all my ordinary bank business at the People's Bank in the city of New York, to draw checks on said bank, and to indorse checks, promissory notes, drafts and bills of exchange for collection or deposit, this power of attorney to remain in force until said bank is notified of its revocation, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done, by witness hereof. In witness whereof I have hereunto set my hand and seal, the fifth day of April, in the year one thousand eight hundred and seventy.

{ 50 c. Internal
revenue stamp. }

"J. MARION SIMS. [L. S.]"

"Sealed and delivered in }
the presence of }

"CHARLES L. BUSHNELL."

We are of the opinion that the exception was not well taken. At the time of this transaction Crowell made no claim of acting as the general agent of Sims, and the defendant had no reason to suppose that he was acting in such a capacity. It dealt with him solely upon the faith of the apparent authority inferable from his possession of the check and if it was mistaken in supposing that that fact gave him authority to dispose of the fund, there is no reason in equity or justice why it should not be held to the consequences of its error.

Assuming for the present that the power of attorney gave Crowell authority in fact to withdraw the deposit from the defendant, yet the defendant did not rely upon or act on this authority. It is by no means certain if the bank had required Crowell to show his authority

to dispose of Dr. Sims' moneys, an examination of the power would have led to a refusal to pay them out on a stale paper antedating the transaction by upwards of twelve years, and couched, to say the least, in ambiguous language. Further inquiry would immediately have led to a discovery of Crowell's abuse of his employment, and the danger threatening the security of the fund intrusted to him to deposit. The loss of the moneys in question is directly traceable to the defendant's act in paying Crowell upon an unwarranted assumption of his authority to receive them, and their neglect to investigate the extent of his power.

But however this may be, we are of the opinion that the power did not, in fact, authorize Crowell to withdraw the deposit.

The defendant is not even entitled to invoke the benefit of the rule requiring the language of a written instrument to be construed most strictly against its maker, for it did not pay the money upon a consideration of its provisions, and it stands now upon the authority which the power in fact gave to Crowell. If we regard the authority intended to be conveyed by the first paragraph of the power alone, it would hardly seem that it embraced within its terms authority to withdraw deposits or change investments, but when considered in the light of the rule restricting the meaning of general words by the signification of those associated with them, it seems such authority was still further removed from the intention of the parties. The clause itself imports a general power to collect and receive all moneys due and to become due upon "rents, accounts, bonds and mortgages or otherwise," and evidently refers to such collections of moneys as would be within the ordinary duties of a collecting agent of a business man.

Under well-settled rules the words "or otherwise" are limited in their meaning by the words "rents, accounts, bonds and mortgages" preceding them, and refer to debts and liabilities of a similar character, and cannot reasonably be held to extend to the collection of moneys already received and deposited in a solvent institution, subject to the immediate disposition of the owner. To say that the removal of a deposit with a solvent trust company, under the claim that the agent was thereby engaged in the business of collecting his principal's credits, would seem to be in violation of the clear meaning and intent of an authority to transact only collecting business.

Familiar illustrations of the application of the rules of *noscitur a sociis* occur in *Mangan v. City of Brooklyn*, 98 N. Y. 595; *McGaffin v. City of Cohoes*, 74 id. 389; *Cummings v. McCulloch*, 1 id. 47, and fully authorize the construction which we have given to this power.

When, however, this clause is considered in connection with the subsequent provisions of the power, all serious doubt of its meaning would seem to be removed. The last clause specially treats of the powers intended to be conferred upon the agent in dealing with banks in the name of his principal. If such duties had been supposed to be included in the first paragraph, then the last one has no office to perform. If the authority "to collect and receive all sums of money now due or hereafter to become due," gave Crowell power to transfer and remove trust deposits placed by way of investment or otherwise in banking institutions, certainly the special provision authorizing him

to transact such business with the People's Bank was unnecessary and useless. Its insertion indicates unmistakably the understanding of the parties that the authority was not supposed to be embraced in the first clause of the instrument, and was specially required to be inserted in order to enable him to transact any banking business. Well-settled rules of construction require us to give effect to every part of the instrument, and this can be done only by holding that the last clause was intended to embrace all of the authority designed to be conferred upon Crowell to deal with banks in Dr. Sims' name. This view is also strengthened by the application of the rule requiring grants of power to be so construed as to exclude the exercise of a power in any other form or manner than that specially authorized. The clause of the power conferring authority to transact business with the People's Bank, and with that bank alone, impliedly prohibited such transaction with any other banking institution.

We, therefore, think that the evidence in question was properly excluded.

The circumstance that it was the custom of the trust company to require the signature of a customer to accompany a deposit was one adopted for the safety and protection of the bank, which they were at liberty to enforce or omit as it deemed best under the circumstances. It could not affect its liability to the real owner for moneys actually received by it, or the legal effect of a transaction by which it came into the possession of another's property.

We think the evidence of ratification by Dr. Sims of the act of Crowell in making the deposit in question as he did, was not sufficient to authorize the submission of that question to the jury.

On the whole case we are of the opinion that no error was committed on the trial, and that the judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

*SUPREME JUDICIAL COURT OF MASSACHUSETTS.***SHOE AND-LEATHER BANK v. WOOD ET AL.**

October 23, 1886.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE NOT IN KENTUCKY — DEFENSES — CONSTITUTIONAL LAW.

Promissory notes made and signed by the makers in Kentucky, where they resided, were made payable at the Kentucky National Bank, in that State, and then sent by mail to the payees in Massachusetts. *Held*, that they were Kentucky contracts, to be governed by the laws of that Commonwealth.

By the laws of Kentucky promissory notes are not negotiable paper, and such contracts are subject to any defense, discount or offset that the makers might have against the original payees or any intermediate assignor before notice of the assignment.

There appears to be no constitutional provision forbidding such a statute.

Action of contract to recover upon three promissory notes, dated Louisville, Ky., May 10, 16 and 24, respectively, 1883, each being for \$1,624.22, and as follows: "Six months after date, we promise to pay to the order of Macomber & Greenwood sixteen hundred and twenty-four 23-100 dollars, without defalcation, value received, negotiable and payable at the Kentucky National Bank." The notes were each signed "Geo. F. Wood & Co." and indorsed "Macomber & Greenwood."

The plaintiff is a national bank, organized under the United States banking laws and located at Boston, Mass. The defendant is a firm, composed of George F. Wood and William C. Caye, both residing at and carrying on business in Louisville, Ky., as auctioneers and commission merchants. The Kentucky National Bank is a bank organized in Kentucky under the United States banking law. The firm of Wallace & Macomber was composed of George Wallace and G. B. Macomber, and carried on the boot and shoe business in Boston for a number of years, but dissolved in the early part of 1883, and was succeeded by the firm of Macomber & Greenwood, composed of the aforesaid G. B. Macomber and A. Greenwood, as general partners, and George Wallace, as special partner.

At the trial in the superior court there was evidence tending to show that before the making of the notes in suit Wallace & Macomber had received three notes signed by the defendants, amounting in all to the sum of \$5,667.15, which had been discounted by the plaintiff bank for Wallace & Macomber, and fell due on several dates in the month of June, 1883; that Wallace & Macomber had sent out certain goods to the defendants to be sold, the proceeds to be applied toward paying the notes, but the proceeds not being sufficient for that purpose, the defendants, in said June, drew on Wallace & Macomber for several thousand dollars with which to pay said notes; that said drafts were honored and said notes paid thereby; that in the month of June, 1883, G. B. Macomber wrote to the defendants from Boston that there were some goods on hand belonging to Wallace & Macomber, of which Mr. Wallace had control; that Mr. Wallace was settling the affairs of the old concern and wished some notes; and that he would forward the goods when the time came.

Three notes, corresponding in every respect with the three in suit, except that the payees were Wallace & Macomber, were sent by the defendants by mail from said Louisville to Mr. Macomber in response to his letter. Mr. Macomber then returned these notes, saying he did not wish to indorse them as the concern had dissolved, and requesting that they be made payable to the order of Macomber & Greenwood. The present notes in suit were then made and signed by the defendants in Louisville, and mailed to Macomber & Greenwood in Boston and by them received; and one of them, to the amount of \$1,624.22, was discounted by the plaintiff bank for Macomber & Greenwood, at six per cent, and passed to their credit, they keeping an account with the plaintiff bank, on the 19th day of June, 1883. The other two notes were discounted by the plaintiff bank for Macomber & Greenwood on the 29th day of June, 1883, at six per cent, and passed to their credit. Mr. Wallace and the firm of Macomber & Greenwood subsequently sent to the defendants to be sold a part of the goods, in accordance with their agreement, the net proceeds of which amounted to but \$1,128.07, which the defendants have paid on account of said notes. In the month of August, 1883, Macomber & Greenwood failed, and were unable to deliver the remainder of the goods to meet said notes, although the defendants were ready to receive them; and the defendants were informed of said failure, and were informed some thirty days before the notes in suit fell due, that the said notes had been discounted by the plaintiff bank. So far as the evidence admitted by the court went, the sole consideration of said notes was the agreement to deliver said goods, and if the defendants had paid said notes according to their tenor, then there would have been due to defendants from Macomber & Greenwood the amount sought to be recovered in this action.

The plaintiff offered to prove that Macomber & Greenwood in June, 1883, on the days of or the days following the discount of these notes in suit, furnished to Mr. Wallace the amount of discount of these notes, to enable Wallace to take up for Wood & Co. their notes that fell due in said June, which had been discounted by the plaintiff bank for Wallace & Macomber, and that said money was never repaid. This evidence the court rejected, to which the plaintiff duly excepted.

The defendants offered in evidence as the law of the State of Kentucky: General Statutes of Kentucky, chap. 22, §§ 6, 21.

The court ruled that the notes signed and payable in Kentucky and mailed in Kentucky by defendants to Macomber & Greenwood in Massachusetts were governed by the laws of Kentucky, to which ruling the plaintiff excepted, claiming that the notes were governed by the laws of Massachusetts and that the said statutes of Kentucky were in contravention of public policy, in violation of the Constitution of the United States, and were not applicable to a national bank, and should not be enforced by a Massachusetts court.

At the close of the evidence the court, at the request of the defendants, ruled, on the whole evidence, that there was no consideration except for \$1,128.07, which had been paid for these notes and ordered a verdict for the defendants, and the plaintiff alleged exceptions.

H. D. Hyde, for plaintiff. *A. Hemenway* and *D. F. Kimball*, for defendants.

GARDNER, J. 1. The defendants contend that the notes in suit were made in Massachusetts and that the laws of this State are to govern the contracts. The defendants, the makers of the notes, resided in Kentucky. They made and signed the notes at Louisville in that State, and then sent them by mail to the payees in Massachusetts. By their terms, they were payable at the Kentucky National Bank, a bank organized in Kentucky under the United States banking law. Under our decisions, these various circumstances determine the place where the contract was executed and where it was to be consummated. It was clearly a Kentucky contract and is to be governed by the laws of that Commonwealth. *Pine v. Smith*, 11 Gray, 38; *Carnegie v. Morrison*, 2 Metc. 381; *Orcutt v. Nelson*, 1 Gray, 536; *Milliken v. Pratt*, 125 Mass. 374.

2. The defendants put in evidence the General Statutes of Kentucky, chapter 22, section 6, which provides that all bills or notes for money or property shall be assignable, so as to vest the right of action in the assignee, but except in the case of bills of exchange, this shall not impair the right to any defense, discount, or offset that the defendant has and might have used against the original obligee, or any intermediate assignor, before notice of the assignment. At the argument the defendants, without objection on the part of the plaintiff, cited Kentucky cases, for the purpose of showing that promissory notes are not commercial paper in Kentucky. *Schooling v. McGhee*, 1 Mon. 232; *The Sharper v. Eccles*, 5 Monr. 69, 72; *Caldwell v. Cook*, 5 Littell, 181; *Prather v. Weissinger*, 10 Bush, 117, 126, 127; *Hyatt v. Bank of Kentucky*, 8 id. 193, 199; *Lockett v. Triplett*, 2 B. Monr. 39; *Clay v. McClanahan*, 5 id. 241; *True v. Triplett*, 4 Metc. (Ky.) 57; *Thomson v. Moore*, 4 Monr. 79.

The bill of exceptions does not find that these cases were not before the court at the trial. The superior court ruled in substance that the notes in suit are subject to any defense, discount or offset, that the defendants might have and might have used against the original obligees, Macomber & Greenwood, or any intermediate assignor before notice of the assignment in accordance with the provisions of the General Statutes of Kentucky, chapter 22, section 6. An examination of the cases above cited shows that the ruling of the superior court was in accordance with the decisions of the courts in Kentucky upon this subject-matter. But independent of these decisions, we cannot say that the ruling of the superior court was incorrect.

3. After the construction put upon the statute by the court, it remained to determine whether there was any failure of consideration of the notes in suit. The sole consideration of the notes was the agreement to deliver certain goods. The payees, Macomber & Greenwood, failed "and were unable to deliver the remainder of the goods and meet said notes." The court ruled that there was no consideration except for \$1,128.07, which had been paid for the notes. This ruling was correct. The notes were not negotiable promissory notes, and failure of consideration could be set up as matter of defense thereto.

4. The evidence offered by the plaintiffs and excluded by the court, relative to the transactions between Macomber & Greenwood and Wal-

lace and Macomber was properly rejected. It related to matters concerning which neither the plaintiffs nor the defendants had any knowledge. They were clearly *res inter alios*.

5. The plaintiff finally contends that this Kentucky statute is in contravention of the Constitution and laws of the United States. We see no reason why Kentucky may not enact a law making the liabilities of signers of commercial paper made and payable within its limits entirely different from the laws of other States respecting such liabilities and by statute change absolutely the operation of the law merchant so far as it affects contracts made and to be performed within the State. The Constitution of the United States presents no obstacle to the exercise of such a power by the several States. The plaintiff has not referred us to any authorities or decisions in support of his claim that the statute of Kentucky is in conflict with any law of the United States. Upon the rulings of the court there remained no undisputed facts. *Kline v. Baker*, 99 Mass. 253, 235. There was nothing in dispute which entitled the plaintiff to go to the jury.

Exceptions overruled.

HOLMES v. TURNER'S FALLS LUMBER CO.

October 23, 1886.

GRANTOR AND GRANTEE—MORTGAGOR AND MORTGAGEE—LANDLORD AND TENANT.

Plaintiff's grantor had acquired his title to the premises in question by entry under a mortgage which had been assigned to him as collateral security. The defendants claimed that this sale was invalid on the ground that the holder of a mortgage as collateral security could not alone execute the power of entry and sale thereunder. *Held*, that as against the defendants, who were tenants and showed no title, it was immaterial whether the sale was good or not, inasmuch as the deed to the plaintiff operated as an assignment to him of the mortgage under which the entry was made.

When a line runs across a road and then runs "by the said road on the easterly and northerly side thereof," the boundary is the easterly and northerly side of the road, unless a contrary intention appears on the face of the deed.*

The relation of landlord and tenant is not created between a mortgagee and the lessee of the mortgagor by the mortgagee entering under his mortgage for condition broken; and the rule that a tenant cannot dispute his landlord's title does not, therefore, apply in such a case.

Writ of entry against the Turner's Falls Company and the Turner's Falls Lumber Company to recover possession of and try the title to a strip of land lying upon the easterly side of Connecticut river, at Turner's Falls. The case was tried in the superior court, on a plea of *nul disseizin*.

There was a verdict for the demandant, and the tenant alleged exceptions to rulings and refusals to rule of the presiding justice.

S. T. Field and *F. G. Fessenden*, for demandant. *G. M. Stearns* and *A. De Wolf*, for tenant.

FIELD, J. It is difficult to deal with these exceptions, because they are, in parts, obscure, and it is impossible to apply all the deeds put in evidence to the land. The "demandant had no other title, excepting such as he acquired by the sale under the mortgage." The tenants asked the court to rule that this sale "was invalid and the deed under

* See 6 East. Rep'r, 116.

it invalid." The court ruled that "the sale was a good sale and the deed valid." This mortgage was given by Holmes and Wood to Timothy M. Stoughton, on April 10, 1869. Stoughton released two tracts of land from the mortgage, and afterward, on May 22, 1877, assigned the mortgage, with others, to Peleg Adams. The tracts released apparently did not include any part of the land demanded. The assignment of the mortgage was made as "collateral security." On February 28, 1882, Adams duly made entry upon the land for breach of the conditions of the mortgage, and duly made and recorded a certificate of such entry, and, having pursuant to the power of sale contained in the mortgage advertised the premises for sale, excepting the two tracts which had been released, he, on said February 28, 1882, after he had made entry, sold the premises advertised in parcels, selling the last parcel to the demandant and giving him a deed. The tenants claim that this sale was invalid, because, as they say, Adams held the note and mortgage as "collateral security," and Stoughton still had an interest in it, and Adams alone could not execute the power, and because the sale and the deed given in pursuance of the sale, included the whole of the old road, while the mortgage only conveyed the land to the central line of the road. It is immaterial, we think, whether this sale was good or not. If it was not a good sale, the deed of Adams to the demandant operated as an assignment to the demandant of the mortgage, under which an entry upon the land had been made, and such a mortgage, title would support the action against these tenants, who show no title. *Haven v. Adams*, 4 Allen, 80, 93; *Brown v. Smith*, 116 Mass. 108.

The tenants also claimed "that the location of the 1764 road was such that if the demandant was restricted to the easterly side of said road and did not acquire title to any part of said road westerly of the 'easterly and northerly side,' then none of the premises occupied by the tenants and described in the demandant's writ would be included or touched," and they asked the court to rule that "no part of the road along the line, described as aforesaid, passed by the Smalley deed, and that the premises, conveyed by said deed on said line, extended only to the easterly and northerly side of the road." The court ruled that "the deed conveyed to the center of the road, and passed, by the intermediate conveyance, title to the said center to the demandant, provided Smalley owned to the center of the road." This Smalley deed is the deed of quit-claim of William Smalley to Reuben Shattuck, dated February 24, 1795, and the premises are described as "beginning on Connecticut river at the head of the falls, at the south-west corner of the lot No. 47, recorded to Stephen Williams; thence running east 45 degrees north, across the road, leading to Pendell's ferry; thence by said road, on the easterly and northerly side thereof, to Fall River, by the bridge; thence," etc.

If this deed conveyed the land to the center line of the road, it may be conceded that the subsequent deeds conveyed to this center line. We think that the ruling of the court upon the construction of this deed was wrong. When a line runs across a road and then runs "by the said road on the easterly and northerly side thereof" the boundary is the easterly and northerly side of the road, unless a contrary intent

appears on the face of the deed, and we can find nothing in the deed which shows any intention to convey to the center line of the road. The words are express that the boundary is not on the road, but on the easterly and northerly side of it. *Sibley v. Holden*, 10 Pick. 249; *Phillips v. Bowers*, 7 Gray, 25; *Smith v. Slocumb*, 9 id. 36; *Brainard v. B. & N. Y. C. R. R. Co.*, 12 id. 410; *Boston v. Richardson*, 13 Allen, 146; *Peck v. Denniston*, 121 Mass. 17.

In 1764 a road was laid out, which, as claimed by the tenants, ran through the land named in the writ. The demandant claimed that no part of the 1764 road ran through said land. The tenants claimed that the road "to Pendell's ferry" named in the Smalley deed was the road of 1764, but this was disputed by the demandant.

The demandant contends that this request asked the court to rule that the road laid out in 1764 was the road mentioned in the Smalley deed, and that this was a fact in controversy, but the exception is to the ruling as well as to the refusal to rule, and the ruling is erroneous, whether or not it be held to imply that the road mentioned in the deed is the road as laid out in 1764.

The demandant also contends that this ruling became immaterial by reason of the verdict. The jury found for the demandant, as to that portion of the demanded premises which lies easterly of the brown line, marked by the jury on a plan, which brown line "is the center line of the old road and is the westerly boundary line of the demandant's land." The demandant contends that the old road, mentioned in the verdict, is not the road as laid out in 1764, but the road actually traveled when Timothy M. Stoughton conveyed the premises to Holmes and Wood by deed dated April 10, 1869, and that the center line of this road was easterly of the easterly side of the road as laid out in 1764. It is not distinctly stated whether the tenants admitted or denied that there was a road actually traveled from 1805 to 1870, which lay easterly of the road as laid out in 1764. If there were and this is the road mentioned in the verdict, and if the center line of it lay easterly of the easterly side of the road, as laid out in 1764, and the road as thus laid out was the road referred to in Smalley's deed, then it is immaterial whether this deed conveyed to the center line of this road or only to the easterly and northerly side of it. It was a question of fact, however whether there was such a road easterly of the location of 1764, and also a question of fact, where, on the ground, the road of 1764 was located, and whether this location was included in the demanded premises, or any part of them, and we cannot see that the tenants conceded that the contention made by the demandant, in these respects, was true, or that it necessarily follows from any conceded facts that this contention was true, and, therefore, we cannot say that the ruling of the court, which we have held to be erroneous, were rendered immaterial by the verdict. There is no suggestion in the exceptions that the court considered that it was or had become immaterial.

The exceptions state that "the case was tried on plea of *nul disseizin* alone." This put in issue the title of the demandant. The demandant put in evidence a lease from Holmes and Wood, duly recorded and dated May 11, 1872, whereby a tract of land was demised by them to

the Turner's Falls Lumber Company, one of the tenants in this action, for a term of twenty years from October 3, 1867, and he claimed "that the premises described in said lease were the same sought to be recovered in this action." The court, upon the request of the plaintiff, ruled, as matter of law, that the tenant, the Turner's Falls Lumber Company, could not dispute the title of the landlord in this action, to so much of the demanded premises as were included in said lease, while occupying the same under said lease, and that in order to enable the lessee to dispute the landlord's title to the premises included in said lease, the tenant must either surrender said lease, or disclaim to hold under it, or show that it was induced to enter into it through fraud or mistake." The demandant's claim of title was as follows: Two deeds of William Smalley to Reuben Shattuck, both dated February 4, 1795.

The title conveyed by these deeds passed by mesne conveyances to Timothy M. Stoughton on or before June 15, 1839. Stoughton conveyed the premises to Holmes and Wood by deed dated April 10, 1869, and the same day Holmes and Wood conveyed the same premises in mortgage to Stoughton, who, on March 22, 1877, assigned the mortgage to Peleg Adams, and Adams, on March 18, 1882, sold the same under a power contained in the mortgage to the demandant, and on April 1, 1882, delivered a deed to him. Holmes and Wood executed a lease to the Turner's Falls Lumber Company on May 11, 1872. At this time Holmes and Wood were mortgagors and Stoughton was mortgagee, and the demandant has Stoughton's title. The demandant is Julian Holmes, a different person from Nathaniel Holmes, who was one of the lessors. The demandant in bringing this writ of entry to recover possession of the land, if it is included in the lease, must deny that the lease is good against him, on the ground, probably, that a lease by a mortgagor does not convey an interest in the land as against a prior mortgagee. There is no evidence that the demandant has ever recognized the Turner's Falls Lumber Company as his tenant, and the demandant by his suit elects to treat the tenant as a disseizor. The lessee is not by virtue of the lease and by occupying under it a tenant of the demandant, nor is the demandant his landlord. The demandant claims by a title paramount to that of the lessee, and the lessee cannot set up the lease as a defense to this suit, and it is not estopped by the lease from disputing the demandant's title.

If the lessor, or any person claiming under the lessor by a title subsequent to the date of the lease, had brought suit against the lessee to recover the rent, the lessee, while occupying under the lease, could not dispute the sufficiency of the plaintiff's title. A prior mortgagee might enter and the tenant might attorn to him and this would be a good defense to an action by the mortgagor, or those claiming under him, for rent accruing subsequently to the entry. The lessee would thus become the tenant of the mortgagee, but until such an entry and until the lessee attorns to the mortgagee, or until the mortgagee requires the lessee to pay rent to him, the mortgagee and lessee are strangers. This ruling cannot be sustained. *Smith v. Shepard*, 15 Pick. 147; *Welch v. Adams*, 1 Metc. 494; *Haven v. Adams*, 4 Allen, 80, 93; *Russell v. Allen*, 2 id. 42; *Ellis v. B. & H. R. R. Co.*, 107 Mass. 1, 36; *Mass. H. L.*

Ins. Co. v. Wilson, 10 Metc. 126; *Cook v. Johnson*, 121 Mass. 326.

Exceptions sustained.

GAYLORD v. KING.

October 22, 1886.

GRANTOR AND GRANTEE — PUBLIC WAY — SHADE TREES — LICENSE.

Grants of land bounding on a way of which the grantor is the owner will not be held to extend to the center of the way when a clear intention to the contrary is to be gathered from the language of the deed construed in the light of existing circumstances.

The fact that shade trees planted by the plaintiff in a public way in front of her premises had remained there sixteen or seventeen years without objection, and that plaintiff had mowed the grass there for nearly thirty years, does not raise a conclusive legal presumption that the trees were planted pursuant to a license from the municipal officers.

Action of tort for removing shade and ornamental trees, the property of plaintiff, standing in front of her residence in East street in Amherst, without license, and for breaking and entering her close and converting the same trees to defendant's own use. The answer was a general denial and that defendant was one of the selectmen of Amherst, who had care of said street, under the authority of the town, and caused the traveled road and path to be widened; that he, acting as highway surveyor and one of the selectmen, and under the authority of the board of selectmen, caused the trees to be removed, and also that Amherst was the owner of the land and soil upon and within which the trees were standing. It was admitted that plaintiff owned the premises and residence, in front of which on East street three valuable shade trees stood for sixteen or seventeen years, and that defendant in October, 1883, without notice to or leave from the plaintiffs, caused the trees to be taken away by a person, who used them for wood.

The case was referred to an auditor, who reported that the plaintiff, at the time of setting out the trees in question, had no authority or license, either verbal or written, to do the same from the selectmen, road commissioners, or any municipal officer of Amherst. But it was admitted that no objection was made to planting or maintaining the trees by any officer of Amherst, or the public, or any one. The trees in front of the plaintiff's premises, removed by the defendant, stood in a grass plot, from which she had mowed the grass since she occupied them in 1854.

The plaintiff's land in 1789 was owned by Ebenezer Mattoon, and in conveying said land in 1830 he bounded the same west on East street. In November, 1787, Amherst voted to sell some part of the town highways and chose a committee to dispose of said highway, or any part thereof, as they might think proper. On January 14, 1788, the committee reported at a meeting of the inhabitants, that they had, pursuant to the instructions of the town, laid out and surveyed certain new ways, had measured out and bounded the several pieces in the front, rear or sides of each man's lot, bounded on the new surveyed ways, which pieces of land the town would sell to the respective owners of the lots, if they thought proper. The committee also appraised each lot, giving the

quantity of land in acres and rods and the amount of land for each man to purchase. The report contained one hundred and forty-three pieces of land.

The town voted to accept the report of the committee, that the tracts of land laid out and described to the persons respectively named in said report "be and hereby are granted in fee to the said persons and their heirs respectively," on condition that they pay the sums at which the several tracts were respectively appraised to the town treasurer, or give security, and that whenever said payment should be made or security given, the town way in each tract respectively should be discontinued.

East street was by said proceedings narrowed at the place in question and afterward was still further narrowed to its present dimensions.

In November, 1809, Ebenezer Mattoon, then owner of plaintiff's premises, and two others petitioned the selectmen of Amherst to insert an article in the next town meeting warrant, to see if the town would allow them to straighten their fences on the east side of the highway from Mattoon's garden fence to the land leading to Clapp's house, by extending them a few feet into the highway and make such order thereon as might be thought proper. At a meeting of qualified voters December 7, 1809, it was voted that a committee be appointed to view the premises where the alteration was prayed for, and report to the town at a future meeting. A committee was chosen, which at the March meeting, 1810, recommended to the town to grant the petitioners and others named in their report, the lands in front of their respective lots, as described in a plan exhibited, on payment of certain sums, which were affixed to each person's name, Ebenezer Mattoon being one of the persons so named, the amount of land to be granted to said Mattoon being thirteen rods at the price of \$13.

At a legal town meeting April 2, 1810, it was voted to accept the report of the committee appointed at the last December meeting, on the petition of Ebenezer Mattoon and others, and allow them, with certain other persons named therein, to inclose each a strip of town land in front of their possessions, particularly described and laid down in the same report. The way was accordingly narrowed.

In June, 1883, the selectmen by vote of the town represented to the county commissioners by their petition that the boundary lines on East street had been lost or become uncertain and prayed them to determine and establish the highway by suitable and permanent monuments. The commissioners accordingly, after due proceedings, adjudged that the highway at the place in question "is laid" a certain ascertained number of rods wide, expressed in their decree, and located permanent bounds to indicate the limits of the highway. The location thus ascertained or determined covered the three grass plots, and left the place where said trees stood on plaintiff's side of the highway.

At the trial in the superior court without a jury, the plaintiff requested the following rulings:

If the trees in question were planted by plaintiff sixteen or seventeen years ago in the same line with ancient trees, which had become decayed and which were removed for the purpose of planting the new ones in front of her premises on her side of the center of the street,

between her house and the sidewalk on her side of it, and were kept there without objection by any officer of Amherst or the public till removed by the defendant, a license to plant them would be presumed.

If Amherst owned the fee in the soil of the highway forty rods wide in 1787, when it voted to sell some part of the highways and sold to plaintiff's predecessor more than one-half of the width of the highway in front of his lot, as it then existed, the vote of November 12, 1787, the report of the committee of January 14, 1788, and its acceptance by the town in April, 1788, whereby it granted the same in fee to said predecessor and his heirs, the same would convey the fee to the center of the highway; and the subsequent conveyances of the lot, as thus enlarged, bounding the same on said highway, would convey the fee to the center to the successive grantees. But if said votes and proceedings did not pass the fee to the center, and if the fee was still in Amherst thereafter, the vote of April, 1810, granting to Ebenezer Mattoon thirteen rods of land in the highway, in front of his land, passed to him the fee to the center of the road, and the subsequent conveyances of it through several parties to the plaintiff, on said street, passed the fee to the plaintiff.

The petition of selectmen of Amherst by vote of 1883, setting out that the boundary lines of the highways in question had been lost, or become uncertain, praying the commission to establish the road, and whereby they obtained an adjudication, establishing the way in question, covering the *locus* where the trees stood, estops the town and the defendant in this action from claiming that the town owns the fee in the soil under said road.

The court refused to give these rulings and found for the defendant, and the plaintiff alleged exceptions.

W. G. Bassett, for plaintiff. *T. G. Spaulding*, for defendant.

C. ALLEN, J. The first question which we have considered is, whether the plaintiff has shown a title in herself to the soil of that part of the highway where the trees stood; and we think she has not. She relies primarily upon the grant by the town in 1788 and upon the rule of law, now well established and familiar, that grants of land, bounding on a way, will be presumed to extend to the center of the way, if the grantor owns the soil thereof, and if a clear intention to the contrary is not to be gathered from the language of the deed construed in the light of the existing circumstances. In the present case such clear intention to the contrary sufficiently appears. It is assumed throughout the discussion that prior to the proceedings of 1787 and 1788 the town owned the whole street in fee. The street was then wide and the whole purpose of the proceedings was to narrow it. The land conveyed was not independent land, bounding on the street, but was a part of the street. It is nowhere in the grant itself expressed in terms to be bounded on the street or way. Those words are used only in the report made to the town by its committee. We look in vain for any indications of an intention on the part of the committee, or of the town, to change the nature of the title of the town in the soil of the ways, as newly laid out. The town was a continuous corporate body, having perpetual

succession and no heirs. Owning the whole street, no reason can be conjectured why, in carrying out its plan of narrowing it, an intention should be inferred to convey the soil to the center. If in any place the street were narrowed by taking a small strip on each side, and the street should afterward be discontinued, the construction contended for would lead to the result, that the town's title would then be only in separate, isolated lots. As a part of the vote granting the land, it was provided that "the town way in each tract respectively should be discontinued," words which throw a strong light upon the intention and understanding of the parties at the time. On the whole, without at all departing from the general rule for the construction of grants bounding upon a way, it is manifest that the intention of the town was merely to grant the land, over which the town way was to be discontinued. See *Phelps v. Webster*, 134 Mass. 17.

The proceedings and votes of the town in 1809 and 1810 afford no ground for inferring an intention to grant the soil to the center of the street, for reasons which are covered by what has been said in reference to the proceedings and vote of 1787 and 1788.

The plaintiff contends that the town is estopped to deny her title, by reason of the proceedings in 1883; but the town thereby lost no title which it already had to land included in the street. It is quite probable that by far the larger portion of the land included in the highway, as laid out by the county commissioners, was clearly and without dispute included in the way as already existing, and there is nothing to show that the place where the trees stood was then for the first time taken into the highway. Indeed it is plain that it was not so, nor could the proceedings of the commissioners deprive the town of land which it owned in fee. The essential elements of an estoppel are wanting.

It thus appearing that the plaintiff did not own the land on which the trees stood, that portion of Public Statutes, chapter 54, section 6, re-enacting General Statutes, chapter 46, section 6, applicable to "shade trees standing," does not apply, and the only remaining question is, whether these trees are shown to have been planted pursuant to a license, or authority of the selectmen, or other proper municipal officer. The plaintiff contends that there is a legal presumption of such license, or authority, arising from the facts that they were planted, and had remained sixteen or seventeen years without objection, and that she had mowed the grass there for nearly thirty years. Such presumption, in order to be effectual for the plaintiff's purposes, must be a conclusive presumption, since the auditor's report, which there were no facts to control, states explicitly that the plaintiff had no such authority, either verbal or written. But there is no such conclusive legal presumption. The mere absence of expressed objection is not sufficient to meet the requirement of the statute. There must be enough to show by inference or otherwise, an actual license or authority, which are negatived here.

Exceptions overruled.

MILLER v. MORGAN.

November 4, 1886.

VERDICT—TITLE OF CASE OMITTED.

The paper signed by the foreman of the jury was as follows: "June 8, 1886, Verdict for plaintiff in the sum of \$421.73. W. T. George, Foreman." *Held*, a sufficient verdict; that the omission of the name of the case was supplied by the court records.

Action of contract to recover a balance of \$400 and interest upon a promissory note, made by the defendant, payable to the order of the plaintiff. At the trial in the superior court, the jury, after being charged by the court, retired with the papers, and were furnished with two printed blanks, in the ordinary forms, required by the rules of court, and they subsequently came into court and passed a paper to the clerk, of which the following is a copy:

"FIRST JURY, June 8, 1886.

"Verdict for plaintiff in the sum of four hundred twenty-one and 73-100 dollars.

"\$421.73.

"W. T. GEORGE, *Foreman*."

The verdict was affirmed by the court, and the defendants thereupon filed a motion in arrest of judgment for the reasons that, by the record, the paper filed in said cause and called a verdict has nothing upon its face to indicate that it belongs to this case; that said paper does not purport upon its face to be a finding of the jury in this cause, or in any cause, and that said paper, neither upon its face, nor elsewhere, indicates in any manner that the jury assessed damages in this cause, nor any other cause. The court overruled the motion, and the defendant alleged exceptions.

W. A. Pew, Jr., for plaintiff. *C. Sewall*, for defendants.

By the COURT. The paper signed by the foreman of the jury cannot be understood as any thing else than a verdict for the plaintiff. Although it does not mention the name of the case in which it was rendered, the record of the court supplies this omission, as it shows that it was rendered in open court, as the verdict in this case, and was filed in the case as such verdict. The exceptions are frivolous.

Exceptions overruled.

COMMONWEALTH v. ANDREWS.

November 4, 1886.

CRIMINAL LAW—EVIDENCE.

The application made by the defendant for a license to sell liquors at the place described in the complaint is competent evidence to show that he kept the place.

Complaint to the police court of the city of Gloucester against the defendant and one John A. Kennison, for keeping and maintaining on March 26, 1886, a tenement in Main street, in said Gloucester, used for the illegal keeping and sale of intoxicating liquors. At the trial in the superior court the defendant, Andrews, only was arraigned. The Commonwealth, for the purpose of proving that the defendant,

Andrews, kept and maintained said tenement as alleged, called the city clerk, who produced certain applications purporting to be signed by said defendant, Andrews, for licenses to sell intoxicating liquors at said place. The witness testified that he thought the signatures were those of said Andrews, but upon cross-examination said that he would not swear that they were.

The defendant objected to the admission of these applications, but the court admitted the evidence. The defendant introduced in evidence a lease of the premises made August 1, 1885, by Albert C. Andrews to George H. Andrews, for the term of one year, which lease was signed by the defendant. The district attorney argued to the jury that the signature to the applications and lease were in the same handwriting. The applications and lease were taken by the jury to their room when they retired to consider the case. The jury returned a verdict of guilty, and the defendant alleged exceptions.

E. J. Sherman, attorney-general, for Commonwealth. *H. N. Woods* and *F. L. Evans*, for defendant.

By the COURT. The applications by the defendant for licenses as a common victualler and to sell intoxicating liquors at the premises described in the complaint were competent. They tended to show that he kept and maintained the premises at the date of the application, and at the time named in the complaint, if the jury were satisfied from all the evidence that there had been no change in the meantime. The city clerk, who it must be assumed, on the bill of exceptions, was shown to be familiar with the handwriting of the defendant, so as to be competent to testify on the subject, testified that he thought the signatures to the application were in the handwriting of the defendant. This is all he could testify to, unless he saw the defendant sign them. The fact that upon cross-examination he stated that he could not swear to the signatures went to the weight of his testimony, but did not make it incompetent.

The lease, the signature of which by the defendant was admitted, furnished a standard of comparison which was properly submitted to the jury, and the testimony of the city clerk in connection with this lease was properly submitted to the jury upon the question whether the defendant signed the application.

Exceptions overruled.

COMMONWEALTH v. DEXTRA.

November 12, 1886.

SUNDAY—KEEPING OPEN A SHOP OR WORKHOUSE ON.

Keeping open a shop or workhouse on Sunday for the purpose of doing business with the public indiscriminately is an offense in itself. Pub.Stat., chap. 98, § 2.

The fact that the business performed therein is "work of necessity or charity" does not justify the keeping open of a shop or workhouse on the Lord's day.

So held in reference to a barber shop.

Complaint under Public Statutes, chapter 98, section 2, charging the defendant with keeping open his shop on July 25, 1886, the same being the Lord's day, for the purpose of cutting hair and shaving beards, the

same not being a work of necessity or charity. At the trial in the superior court for Worcester county, evidence was offered by the government in proof of the charge made in the complaint. At the close of the evidence the defendant claimed that it was a question for the jury to say whether, on the evidence introduced in the case, the purpose for which the shop was kept open was a work of necessity or charity or not.

The court ruled that, there being no dispute about the facts, the question whether the acts done by the defendant were works of necessity or charity was a question of law, and instructed the jury that if the defendant kept open his shop for the purpose mentioned in the complaint, namely, to cut hair and shave beards for all such persons as might make application therefor, the defendant should be convicted.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

E. J. Sherman, attorney-general, for Commonwealth. *J. E. Sullivan*, for defendant.

GARDNER, J. The laws of Massachusetts colony prohibited both the transaction of any business and the indulgence in diversions on the Lord's day. See Revision of Mass. Col. Laws, 1672, p. 132. By the Province Laws of 1692-3, chapter 22, the justices of the peace, constables and tything men were to take effectual care and endeavor to restrain all persons from "keeping open their shops or following their secular vocations and recreations in the evening preceding the Lord's day, or on any part of said day or evening." The act made no reference to works of necessity or charity as limiting the prohibition of the statute.

In the Province Laws of 1760-1, chapter 20, the several acts then in force relating to the observance of the Lord's day were repealed, and more effectual provision was made for the due observance of the day. Section 2 enacted: "That no person whatever shall keep open their shops, warehouses or workhouses, nor shall upon the land or water do or exercise any labor, business or work of their ordinary calling, nor any sport, game, play or recreation on the Lord's day or any part thereof — works of necessity and charity only excepted — upon pain," etc. Section 9 of the same chapter provided "that no person shall keep open any shop, warehouse or work-house, or have or sell any provisions in the streets or lanes of any town or district, or be present at any concert of music, dancing or other public diversion on the evening next preceding the Lord's day, on pain," etc. In this section there is no exception; the prohibition is made absolute as to keeping open shops, warehouses and workhouses on Saturday evenings. It was not contended that the evening preceding the Lord's day was more sacred than the time called in some of these statutes the "Christian Sabbath." The preamble to section 9 recites the reason of its enactment as follows: "And, whereas many persons are of the opinion that the Sabbath, a time of religious rest, begins on Saturday evenings; therefore, to prevent all unnecessary disturbance of persons of such opinion, as well as to encourage in all others a due and seasonable preparation for the religious duties of the Lord's day," be it enacted, etc., etc.

Looking at the two sections together, it would seem that the exception of works of necessity and charity did not refer to keeping shops open on the Lord's day, but that it was limited, in accordance with its own language, to work and labor. If the qualification in section 2 extended to keeping open shops on the Lord's day, we should expect to find the same qualifications in section 9 as to keeping open shops on Saturday evenings. Not finding it in section 9, the inference is strong that the phrase "works of necessity and charity" was not intended to qualify or refer to keeping open shops in section 2. The provisions of section 2 remained unchanged until after the adoption of the Massachusetts Constitution. In Statute 1791, chapter 58, section 1, it was enacted "that no person or persons whatever shall keep open his or their shop, warehouse or workhouse, nor shall, upon land or water, do any manner of labor, business or work — works of necessity and charity alone excluded."

In the Revised Statutes, chapter 50, section 1, and the General Statutes, chapter 84, section 1, and the Public Statutes, chapter 98, section 2, the prohibition was enacted in substantially the same language and manner. In the several statutes in force under the Colony, Province and the Constitution, there is nothing to indicate that there was any law which provided that shops, warehouses or workhouses were to be kept open on the Lord's day for the transaction of ordinary business. There is no statute during these periods from which we can infer that the exception as to works of necessity and charity extended to the keeping open of shops, warehouses and workhouses for the purpose of transacting business on the Lord's day.

The statute under which this complaint was drawn is as follows: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity." Pub. Stat., chap. 98, § 2.

This portion of the section provides for the punishment of two distinct and separate offenses, viz.: 1, keeping open a shop, warehouse or workhouse on the Lord's day; 2, doing any manner of labor, business or work on that day, except works of necessity or charity. *Commonwealth v. Has.*, 122 Mass. 40.

Section 2, in that part of it which is quoted, is in substance the same as those previously enacted under the Province, and since the acceptance of the Constitution. The exception in each statute, save that of 1760-1, follows the words "doing any manner of labor, business or work," and qualifies them. The phrase "except works of necessity or charity" has no reference to the first offense of keeping open a shop, warehouse or workhouse, and qualifies only the second offense of "doing any manner of labor, business or work." *Commonwealth v. Nagel*, 117 Mass. 142. The object of the statute, and of each of the preceding statutes, was to prohibit the opening of shops and warehouses on the Lord's day, for the purpose of the transaction of the ordinary business carried on during the week. *Commonwealth v. Collins*, 2 Cush. 556.

Keeping open a shop or workhouse on the Lord's day for the purpose of doing business with the public indiscriminately is an offense in

itself. The legislature intended by this statute to keep the ordinary places of traffic, business and work closed on this day, so that those persons who desired to relax from labor and business, and attend to private and public worship, might not be disturbed by those who chose to pursue their worldly business and avocations in open shop. This statute is substantially the same as that enacted in 1791, chapter 58. The preamble to that statute sets forth at length the reasons of its passage, and is applicable to the statute now in force, as well as to the several laws enacted upon this subject since that time.

The complaint alleges that the defendant kept open his shop on the Lord's day "for the purpose of doing business therein, namely, cutting hair and shaving beards, the same not being works of necessity or charity." The offense is fully set out by omitting the words "the same not being works of necessity or charity." They can, therefore, be stricken out as surplusage, and the complaint will be complete.

We are not called upon to pass on the question whether it is a work of necessity to cut hair and shave beards on the Lord's day. This question does not arise in the present case. We construe the statute to mean that the law prohibits the keeping open a shop, warehouse or workhouse for the purpose of doing business therein on the Lord's day; and that it is immaterial what that business may be.

Exceptions overruled.

SUPREME JUDICIAL COURT OF MAINE.

NUTTER v. TAYLOR.

November 30, 1886.

REFERENCE — PRACTICE — EXCEPTIONS — AGREEMENT OF PARTIES.

When exceptions are taken to the ruling of the court in overruling objections to the acceptance of a report of referees, they should show that the facts upon which the objections were based — if they do not appear of record — were proved to the court.

An agreement between the parties to a reference, as to the manner and place of a hearing by referees to be appointed under a rule of court, will not be binding if it is entered of record and made a part of the rule of reference.

The referees may determine the time and place of hearing when the parties disagree.

The determination of referees, as to the necessity of a view, is final when honestly made.

Referees are not authorized to allow the charges of a surveyor appointed by the court, but their report will not be rejected on that account when there is no suggestion that the allowance was unreasonable in amount.

D. R. Hastings and David Hammons, for plaintiffs. *Bisbee & Hersey*, for defendants.

LIBBEY, J. When the report of the referees was offered in court for acceptance, the defendants filed their objections thereto in writing,

assigning three reasons therefor. The objections were overruled and exceptions taken.

The first objection is, in substance, that prior to the commencement of the action the reference was agreed upon by two of the plaintiffs and one of the defendants; that a part of the agreement was that the "referees in determining the same" — the case — "should view the premises and hear the parties at Byron," and that the defendants were induced to agree to refer by the agreement as to view and place of hearing. They allege that after the rule was delivered to the referees the plaintiffs refused to carry out this part of the agreement, and that the referees, to whom this question was submitted, appointed and held the hearing at Bethel. They further allege that the referees did not view the premises although they requested them to do so.

This objection is based on alleged facts outside of the record, and to sustain the exceptions to the ruling of the court the case should show that the facts were proved or admitted. Neither appears, nor does it appear that any evidence was offered. We think this is a good answer to the exception on this point.

But assuming that the facts were proved as alleged, we think the ruling right. The agreement was executory; it was made before the action was commenced. It was not brought to the knowledge of the court when the reference was entered, but the reference was entered of record without regard to it. If the defendants wished to avail themselves of its benefits it should have been entered of record, and embodied in the rule, that the action of the referees might be governed by it. In the absence of it, it was the duty of the referees, if the parties did not agree, to fix the time and place of hearing. It was also their duty, after hearing the evidence and the parties, to determine whether a view was required, or would give them further light in regard to the merits of the case. In the absence of fraud or improper conduct on the part of the referees, in discharging those duties, their determination is final and conclusive. No fraud or improper conduct on the part of the referees is alleged or claimed in argument.

The second objection is that the evidence was not sufficient to prove a joint conversion by the defendants. This was an issue for the determination of the referees and their decision is final.

The third objection is that the referees awarded that the plaintiffs recover the amount paid the surveyor for his services and expenses in surveying the lines in dispute for the parties. He was appointed and commissioned by the court for that purpose. Regularly his compensation should be fixed by the court after the return of his commission, and taxed as a part of the costs of court. But it was in the power of the referees to award in regard to the costs of the court — Rev. Stat., chap. 82, § 120 — and they have stated in their report the amount awarded as paid the surveyor, in separate items. This part of the award might have been rejected without affecting the rest of it, if it had been alleged or claimed that the amount allowed was excessive; and the amount would then have been fixed by the court. But there is no suggestion that the amount allowed is excessive. If it is not,

and was paid by the plaintiffs, it is immaterial whether it be fixed by the court or determined by the referees. It does not appear that the defendants were aggrieved by the ruling on this point.

Exceptions overruled.

PETERS, Ch. J., WALTON, DANFORTH, VIRGIN, EMEY and HASKELL, JJ., concurred.

ANDREWS v. DYER.

November 29, 1886.

DEED — NAME OF GRANTEE — PRESUMPTION.

The production of a deed by *Melissa A. Andrews*, from her deceased husband and running to *Mercy A. Andrews*, raises no presumption that it was delivered to her as her deed by the grantor.

Charles E. Littlefield, for plaintiff. *True P. Pierce*, for defendant.

LIBBEY, J. This is a writ of entry. The plaintiff, whose name is *Melissa A. Andrews*, claims title to the demanded premises by virtue of a deed from *James Andrews*, her husband, to *Mercy A. Andrews*, dated July 3, 1875.

The defendants claim the possession of the premises under a lease from *James Andrews*.

The plaintiff claims that the discrepancy in the name of the grantee in the deed arose from a mistake made when the deed was written, that she is, in fact, the grantee, and that it was delivered to her, as the grantee, by the grantor.

On the other hand the defendants claim that *James Andrews* did not intend to convey to the plaintiff; that the difference in the name was intentional on his part, and that he never delivered the deed to her to take effect as his deed to her. There was evidence tending to support the position of each side.

On this point the court instructed the jury as follows: "Now was the deed made to her and delivered to her as her deed? She has it and produces it here, and the presumption, therefore, is that it was delivered to her."

We think this was error. True, it is well settled that in the absence of any evidence or circumstances to the contrary, the production of the deed by the grantee is *prima facie* evidence of its delivery. 2 Greenl. Ev., § 297; *Maynard v. Maynard*, 10 Mass. 456; *Hatch v. Haskins*, 17 Me. 391.

But this rule prevails only when the deed is produced by the grantee. Here, by the deed alone, the plaintiff does not appear to be the grantee. It can only be made to appear that she is by evidence *aliunde*. The rule given to the jury by the court required them to find that the deed was delivered to the plaintiff, as her deed, without evidence identifying her as the grantee. If the instruction has required the jury to find that she was in fact the grantee before they could infer a delivery to her from the production of the deed by her, it would have been correct; but to make out a *prima facie* case she was required only to produce and put in evidence the deed from *James Andrews* to *Mercy A. Andrews*. This was undoubtedly, an inadvertence of the presiding

justice, but it was calculated to mislead the jury. We know of no authority to sustain it.

Exceptions sustained.

PETERS, Ch. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

HANSON, IN ERROR, v. WOOD.

November 29, 1886.

DEFAULT — WRITS OF ERROR — PETITION FOR REVIEW — PRACTICE.

A default admits all facts well pleaded in a declaration.*

Where judgment is rendered on default, if the defendant would deny the facts declared his remedy is by petition for review and not by writ of error.

To sustain a writ of error for an error in law, the error must appear by an examination of the record.

Where judgment on default has been rendered in an action in the name of an assignee, a writ of error to reverse the same will not be granted on the ground that no assignment of the claim sued was filed in the action.

Writ of error. The writ contained the following assignment of errors :

First. That judgment was rendered on default upon accounts claimed to have been assigned to said Franklin Wood by one C. W. Taggart and Sumner Soule for \$30.17 damages and \$10.87 costs of suit.

Second. That said C. W. Taggart and Sumner Soule never had or held any legal account against the said Mary and Ivory C. Hanson; that they were not indebted to them, or either of them, at the time of the commencement of said action.

Third. That there never was any legal assignment of any claim against said Mary and Ivory C. Hanson to said Franklin Wood on which said judgment was rendered.

Fourth. That said pretended assignment on which said judgment was rendered was illegal and fraudulent.

Fifth. That there was no promise, contract or agreement between said parties on which said judgment was rendered, nor any allegation of the same in the said action.

Sixth. That no bill of particulars was filed in said action, but judgment was rendered on a gross sum.

Seventh. That no assignment of said claim was filed in said action as by the statute required.

Bean & Beane, for plaintiffs in error. Service by one unauthorized is no service. So the original judgment was on default, without legal notice. *Graves v. Smart*, 75 Me. 295; *Hart v. Huckins*, 6 Mass. 400; *Penobscot R. R. Co. v. Weeks*, 52 Me. 457, and cases cited. When an action is brought by an assignee in his own name upon a contract not negotiable, the statute requires the assignment or a copy of it to be filed with the writ. This is absolutely necessary to show any privity or connection between the parties to the suit; and this should become a part of the record; should be entered of record, and be incorporated into it. This the statute contemplated. Herein lies the reason of its enactment. No assignments were filed or entered in this case. In this the proceedings were erroneous. R. S., chap. 82,

* Moak's Van Santf. 753.

§ 130; *Littlefield v. Pinkham*, 72 Me. 369; *Kirby v. Wood*, 16 id. 81; *Piper v. Goodwin*, 23 id. 251; *Valentine v. Norton*, 30 id. 194; *Paul v. Hussey* 35 id. 97; *Starbird v. Eaton*, 42 id. 569; *McArthur v. Starret*, 43 id. 345; *Leach v. Marsh*, 47 id. 548. The record discloses an error of omission and for this cause the judgment should be reversed. *Short v. Pratt*, 6 Mass. 496.

J. H. Potter, for defendant.

PER CURIAM. The judgment which the plaintiffs seek to reverse was rendered on default. The default admits all the facts well pleaded in the declaration.

The first, second, third and fourth assignments of errors are errors of fact and deny the existence of facts averred in the declaration, which though not a part of the record is in evidence, and, if true, are not the foundation of the writ of error, but might properly be addressed to the court in a petition for review.

The fifth and sixth assignments allege legal errors in the record. If true they might sustain a writ of error, but they are not supported by an examination of the record.

The seventh assignment alleges a fact which cannot sustain a writ of error. It could be taken advantage of only by motion or plea in abatement. *Littlefield v. Pinkham*, 72 Me. 369.

Judgment for the defendant.

HANSON v. HELLEN.

November 30, 1886.

LANDLORD AND TENANT — VARYING CONTRACT FOR RENT — CONSIDERATION.

It is competent for a landlord and tenant to vary the contract for rent, and the use and occupation by the tenant under the modified contract makes a good consideration for it.

This was an action of *assumpsit* on account annexed.

Defendant's counsel asked the court to instruct the jury that there was no consideration for the contract declared upon, and to direct a verdict for the defendant. The presiding justice refused to give this instruction, and to so direct, and instructed the jury as follows:

First. Now, the fact having been proved that in April the defendant agreed to pay the plaintiff the sum of \$8.33 per month for the use and occupation of this house, that rate per month continues until the parties agree upon a different rate per month; that is, it once being proved that in April last an agreement existed between the plaintiff and defendant, whereby the defendant was to pay the plaintiff the sum of \$8.33 per month, for the use and occupation of the house, that rate will continue until it appears from the testimony that a different rate per month was agreed upon between the parties.

Second. Now, the plaintiff in this case claims that in September or October of last year a different rate for the use and occupation of the premises was agreed upon, and it is for this increased rate that she brings this action. She claims that in October last, after more or less conversation, the defendant agreed to pay her a larger sum than \$8.33

per month. She has alleged that in her writ, and the burden rests upon her to prove it. The defendant denies it, and that is the only question of fact which I propose to leave to you.

Third. The plaintiff says that the defendant did agree in October to pay a larger sum, but that no specific sum was named. The defendant denies that he agreed to pay any thing more than \$8.33 per month, and claims that he paid that sum for the time he occupied the premises, and that he owed the plaintiff nothing. It is for you to determine whether such an arrangement as the plaintiff claims was made. Did the defendant agree to pay the plaintiff in October a greater sum per month than \$8.33? You are to take all the testimony into consideration and determine this fact.

Fourth. It is not claimed here that at that time any specific sum was agreed upon between the plaintiff and defendant. The plaintiff simply says that the defendant agreed to pay more than \$8.33 per month for the occupancy of these premises from October twelfth to November twelfth. So if you find that the plaintiff is entitled to recover, she would be entitled to a fair reasonable sum above the sum of \$8.33 for the use and occupation of the premises during that month. Taking all the testimony into consideration, what would be fair and reasonable for the plaintiff to recover for the use and occupation of these premises above the \$8.33, which the defendant had already paid? Whatever you find that sum to be the plaintiff is entitled to recover it.

Fifth. If you find that an increase of rent was agreed upon, the plaintiff would be entitled to recover what would be a reasonable sum for the use and occupation of the premises for that month in excess of \$8.33.

To all which rulings and instructions, and refusals to instruct the said defendant excepted.

Elliott F. King and George C. Hopkins, for plaintiff. *F. V. Chase*, for defendant.

PER CURIAM. The defendant was occupying the plaintiff's premises as tenant at will, paying an agreed rent of \$8.33 per month. The jury found that early in October, 1885, the parties agreed that for the next month from October twelfth to November twelfth, the plaintiff should not be limited to \$8.33 rent, but that the defendant should pay a larger sum. It was competent for the parties to so vary the contract, and the use and occupation of the defendant under it so modified was a good consideration for it.

We see no error in the rulings excepted to.

Exceptions overruled.

BUCK v. RICH.

December 7, 1886.

EXECUTOR AND ADMINISTRATORS — NOMINAL PARTY — TROVER — CONTRACT.

In an action of trover by an executor for the value of certain personal property belonging to the estate of the testator, the fact that the plaintiff is a nominal party only can be shown by the probate records.

After a demand and refusal, trover may be maintained, though the defendant

had given the plaintiff a written agreement to keep the property in controversy free of expense, "and to deliver to him on demand such . . . as I admit to be" his property, and to keep the balance "until such time as the question of title is settled."

Trover for certain articles of furniture, clothing and jewelry which belonged to the deceased wife of the plaintiff, who brought the action as executor of her last will. The defendant was the mother of the deceased.

The following is a copy of the paper referred to in the head-note and in the opinion :

"BANGOR, Oct. 11, 1882.

"I hereby acknowledge that I have in my possession the following described personal property claimed by Horace E. Buck, as administrator of the estate of Susan H. Buck, late of Bangor, deceased. (Here follows a list of articles sued for.) The above property has been in my possession since the decease of Mrs. Buck, and there being some questions as to the title of a part or whole of it—I claiming a portion of it as mine—I hereby agree to keep said property free from expense to said Buck, and to deliver to him on demand such of the above-described property as I admit to be the property of the estate. It being distinctly understood that by this instrument I waive no right whatever, but reserve all title to any of the above-described property which I now possess.

"MARY F. RICH."

Barker, Vose & Barker, for plaintiff. *A. W. Paine*, for defendant.

DANFORTH, J. This is an action of trover to recover the value of certain personal property claimed to have been owned by the plaintiff's testatrix at the time of her death. The admissions by the defendant make out a *prima facie* case for the plaintiff; but the defense is a gift of the property after the execution of the will.

The case is before us upon exceptions to certain rulings of the justice presiding at the trial.

To prove the alleged gift the deposition of the defendant was offered. This was objected to and was excluded. The defendant not denying the correctness of this ruling under the general provisions of Revised Statutes, chapter 82, section 98, claims that the deposition is admissible by reason of the third exception under that section on the ground that the plaintiff, as executor, as representative of the estate, is a nominal party only. To show this the will and inventory, which are in the case, are relied upon, and testimony was offered to prove, that at the decease of the testatrix, she was entirely free from debt, and that no liability existed against her estate at any time; that she was buried under the direction of her husband, the plaintiff, and that the monument provided for in the will had already been erected without any expense to the plaintiff or the estate. This testimony, on objection, was excluded, and the deposition still refused admission.

The kind of testimony offered does not appear, but whatever it was it was incompetent. It was clearly not the probate court records. And that is the only evidence provided by law as competent to prove

the settlement of an estate, especially the outstanding debts. Who is to be the judge as to the existence of debts? If any are claimed an issue may be involved in which the parties interested are entitled to be heard, and in this very case there are legatees who would be entitled to a hearing upon whatever account the executor might render.

Nor would the testimony be sufficient if received. The inventory is far from being conclusive as to the amount of property belonging to the estate, and upon this too the legatees would have a right to be heard before the probate court. Then the will, which is relied upon as the foundation of the defendant's claim, does not give this specific property to the plaintiff. The legacy is not a specific, but a general one of a given sum of money. The plaintiff was not, therefore, by virtue of the will or when coupled with the fact that his legacy was more in amount than its value, the owner of this particular property, a portion or all of it might be needed to pay the expenses of administration. The law requires that he should account for it to the probate court. True, he is interested personally and may, either as expenses of administration, or by virtue of his legacy, in the end receive the whole. He may possibly violate the law and appropriate it without a settlement of the estate and find no one sufficiently interested to call him to account. But this would not change the law or the fact that in the management of this property he is acting for and is the representative of the estate. It may be that he might have maintained this action in his own name, but if so, it would be by virtue of his special title as executor, and not as general owner, and even then he would be under a legal obligation to render an account for the proceeds. He would hold such proceeds under the same trust as the property itself. He is not, therefore, a nominal party within the meaning of the law. *Ring v. Andrews*, 59 Me. 508; *Brooks v. Goss*, 61 id. 314.

The testimony offered, to prove the manner in which the defendant and the testatrix and her husband had lived and the situation of the property in question, might have been admissible as tending to give credit to the defendant's deposition or other testimony tending to prove the alleged gift, if any such had been in the case; but as the deposition was properly excluded and there was no such other testimony in the case, this also was properly excluded. It was not competent for the jury to consider, as bearing directly upon the gift, and certainly it would not authorize a verdict for defendant.

The defendant put in the written instrument of October 11, 1882, and claimed that by itself alone, or as supported by the evidence offered, it was a defense to this action.

This defense rests upon two grounds. First, that the action was prematurely commenced; and second, if any action could be maintained it should be in *assumpsit* and not *trover*.

The first point is attempted to be sustained by an alleged agreement in the writing, that the property, except such as the defendant should acknowledge belonged to the estate, should remain in her possession until the title should be settled, and then, and not until then, is there any promise on her part to deliver the property and only such as shall be found to belong to the estate. The claim is that the title to the

property is to be settled as a condition precedent to any action for it or its value. If this is a condition binding upon the plaintiff to be performed by him, however unreasonable it might be, the argument of counsel and the authorities cited by him would be entitled to grave consideration, perhaps decisive of the case.

But if this part of the writing is to have the force of a contract it is still not a condition to be performed by the plaintiff alone. The obligation at best is mutual, resting equally upon both parties. It can hardly be supposed that one party can settle a disputed title. Still if it is a binding contract it would preclude this or any other action for the purpose of settling the title. That must be done in some other way, what way is not provided for, but as it cannot be by litigation, it must be by mutual agreement or arbitration which involves a mutual agreement. Giving then this writing the force contended for, it has the effect not only to oust the court of its jurisdiction, but is a contract, which either party may obey at his election. In fact no contract at all as has been many times decided by different courts and upon which the decisions have been uniform. *Robinson v. Ins. Co.*, 17 Me. 131; *Hill v. More*, 40 id. 515; *Stephenson v. Ins. Co.*, 54 id. 55; 2 Pars. Cont. 707, and cases cited.

But if valid, the defendant could avail himself of it in defense only by plea in abatement, as in *Small v. Thurlow*, 37 Me. 504. By setting up title in herself she must be considered to have waived it.

We think, however, that by a proper construction of the writing, even by its terms, no obligation whatever is imposed upon the plaintiff. It appears from it that the property in question was in possession of the defendant when it was made, and had been so from the death of the testatrix. It does not appear to have been taken at the plaintiff's request, or kept for his benefit. There was no consideration received by him, no benefit accruing to him from the transaction. On the other hand the defendant was not only in possession but claiming a portion of the property as her own. What portion does not appear, but from the previous statement that there was "some question as to the title of a part or the whole of it," we may well understand that the defendant herself did not then know what portion she would eventually claim.

In this condition of things the defendant gave the writing which she now puts in evidence, agreeing to keep the property free of expense to the plaintiff, and to deliver on demand such of it as she *admits* to be the property of the estate and so much of the balance on demand after the question of title is settled, as is found to be the property of the estate. It does not appear that any third person has ever made any claim to any part of this property. Furthermore, in the closing sentence it is provided that by the instrument she waives no right whatever, but reserves all title to any of the property which she then possessed.

Thus it seems to be clear that the writing shows a mere indulgence on the part of the plaintiff to enable the defendant to satisfy herself as to her own title. She assumes the burden, she desires time to make clear that which was then dark — she has had her time — she has satisfied herself, for although she then at least had a doubt about a part, she

now unhesitatingly claims the whole, and puts her defense upon that ground.

In the mind so far as we can judge from the developments of the case "the title was settled" before the commencement of the action. And the title she insists upon had its origin before the writing was made, and thus comes within its concluding clause as not to be waived.

These views settle the question of conversion. The plaintiff has made out a title, and the right to immediate possession. This with the demand and refusal, especially with the claim of title by the defendant, is amply sufficient.

This too disposes of the claim that the action should have been upon the written instrument. Whatever may be the force of that it neither changes nor purports to change the title to the property, or the right to the possession under the title. The two must go together.

Exceptions overruled.

Judgment on the verdict.

PETERS, Ch. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

ANDROSOGGIN SAVINGS BANK v. McKENNEY.

December 8, 1886.

MORTGAGES — PAYMENT.

A mortgagee held two mortgages, one of real and the other of personal estate, to secure the payment of the same debt. He foreclosed the chattel mortgage and took possession of the property converting it to his own use. The property so converted exceeded the amount of the debt. *Held*, that there was no longer an existing debt to uphold the mortgage on real estate.

Suit to release and cancel mortgage. The opinion states the case.

Frye, Cotton & White, for plaintiff. *Savage & Oaks*, for defendant.

LIBBEY, J. This is a bill in equity praying for a decree requiring the respondents to release and cancel a mortgage given by Roland E. Patterson to Frank W. Dana, held by him as assignee. The case comes before this court on bill, answer and proofs.

The facts material to the determination of the case are as follows: On the 4th day of April, 1883, said Patterson mortgaged the land in controversy to said Dana to secure the payment of \$1,760; on the same day he mortgaged to him certain personal property to secure the payment of the same debt.

On the 6th day of April, 1883, the complainant commenced an action of *assumpsit* against Patterson and attached his real estate, and prosecuted its action to judgment, and within thirty days from the rendition of judgment duly levied its execution on the land embraced in said mortgage.

On the 2d day of November, 1883, William Lydston bought of said Patterson the personal property embraced in the mortgage to Dana, subject to the mortgage, "which said Lydston assumes and agrees to pay."

On the eighth day of said November Lydston paid to Dana the balance then due on the debt secured by said mortgages, amounting to \$1,465.78, and took from him an assignment of both mortgages. Before

the assignment Dana had taken the necessary steps to foreclose the personal mortgage, and the foreclosure became absolute soon after. At the time of the assignment and foreclosure the personal property was worth more than the amount due on the mortgage debt. It came into the possession of Lydston and was converted by him to his own use.

On the 15th day of September, 1885, Lydston assigned the mortgage of the land to the respondent.

We are of opinion that, upon these facts, the mortgage debt had, in law, been fully paid, and that the respondent took nothing by the assignment. Lydston, by the terms of his bill of sale of the personal property, assumed the debt and agreed to pay it. He did pay it to Dana. But the respondent claims that it was agreed, *verbally*, between Patterson and Lydston, at the time of the purchase of the personal property, by Lydston, and that this agreement was a part of the transaction at the time, that Lydston should have an assignment from Dana of both mortgages. Dana was not a party to this agreement. Now if this be so we cannot see that it changes the result. The respondent by the assignments from Dana to Lydston and from Lydston to him can stand no better than Dana would, on the same facts.

When a mortgagee who holds two mortgages, one of real and the other of personal estate, to secure the payment of the same debt, forecloses the personal mortgage, takes possession of the property and converts it to his own use, if its value exceeds the debt secured, it operates as a payment or satisfaction of it. There is no longer an existing debt to uphold the real mortgage, and it is as effectually extinguished as if the debt had been paid in money.

Before the assignment to the respondent, Lydston had received the personal property mortgaged of a value not only sufficient to pay the mortgage debt, but the \$300 also, which by the contract with Patterson he was to pay him as fast as he should receive it after the payment of the mortgage. The mortgage debt having been paid the respondent took nothing by the assignment. There must be a decree that the respondent execute and deliver to the complainant a discharge of the mortgage held by him, with costs for complainant. R. S., chap. 90, § 15.

Decree accordingly.

PETERS, Ch. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

STEVENS v. KELLEY.

December 7, 1886.

WATER AND WATER-COURSE — MILL-POND — ICE.

The owner of a mill-dam across an unnavigable stream has a qualified interest in the water flowed, but none in the ice formed upon it. The ice is the property of the riparian owner in such case. Where the owner of such a dam maliciously and unnecessarily draws the water from the pond and thus destroys the ice formed upon it, he is liable in damages to the owner thereof.*

Thompson & Dunton, for plaintiff. *William H. Folger*, for defendant.

* See *Moak's Underhill Torts*, 351; 12 How. Pr. 218; 14 Chicago Leg. News, 183; 16 W. Dig. 218; 24 Alb. L. J. 516; 25 id. 106; 108 Ill. 646; 5 Am. Rep. 224; 38 id. 255.

DANFORTH, J. This action is reported upon the allegations in the writ, and for the purposes of this hearing such allegations must be taken as true.

It appears that the parties are respectively riparian owners upon a fresh-water unnavigable stream; the defendants owning a mill below with a privilege, and a dam which flows the water back upon the plaintiff's land, thereby creating a pond which is useful and profitable for cutting ice in the winter season. The defendants' dam has been accustomed thus to flow for more than thirty years. By what title the defendants obtained this right to flow does not appear, and perhaps it is not material. They have it, and as it does appear that the plaintiff is not only a riparian owner, having a title to both the banks, but to the bed of the stream also, it necessarily follows that the defendants' right in this respect is one of flowage only.

It is alleged in the writ that the defendants have not for several years used their mill, but that they have flowed the water in the summer and early winter, but that when the "ice was forming and being cut and harvested," they let the water out of the dam by opening the gate and sluiceway, thus causing the ice to fall into the mud and become spoiled; and this is the act complained of. The allegation that by flowing in the summer the plaintiff is prevented from building a dam for his own use cannot be taken as a substantive cause of action, as is plainly shown by the context. It may be put in to show the motive of the defendants or as an aggravation of damages, but whether it subserves any useful purpose is not material now, as it cannot be a foundation for or even an element in the cause of action.

The result of the case must depend upon the rights of the respective parties in the property involved.

The defendants' right of flowage, whether obtained by grant or under the mill act, having been used for more than thirty years with the mill and, so far as appears, for no other purpose, must be understood to be for the benefit of the mill. As such, their right to the use of the water thus flowed must be limited by the wants and requirements of the mill, at least, in kind. It might, perhaps, be more or less extensive in quantity as changes in the mill from time to time might require more or less water, but it could be used for no other purpose. As was said in *Crockett v. Millett*, 65 Me. 195, "the mill is the principal. The dam is subservient to it." So, too, this use of the water is not unlimited. There are owners above and below whose rights and whose interests are to be regarded. The owner of such an easement is not at liberty to consult his own interests or whims only as to when or in what quantity he shall let out the water thus accumulated. Even when rightfully accumulated he must exercise ordinary care in regard to the interests of riparian owners both above and below in letting it out. *Frye v. Moor*, 53 Me. 583; *Phillips v. Sherman*, 64 id. 174.

The plaintiff as riparian owner above has fixed and well-defined rights. Among others, not necessary to be noticed in this case, is that of taking ice from the stream where it flows over his land. Whether this right could have been profitably exercised without the flowing is not a question involved here. With the flowing it can be, and the plaintiff has

the right to avail himself of all the improvements made to his property even by the defendants, nor can the defendants avail themselves of such a right though created by them. It is not a purpose recognized by law for which a person's land can be appropriated by another, but is a privilege attached to and becomes the property of the plaintiff.

This right to take the ice is not a new one, though perhaps a greater importance has become attached to it within the last few years than formerly. It results from and grows out of the title to the bed of the stream, and such right to the use of the water as results therefrom. This right is well settled by authority as well as by principle. Gould Waters, § 191; *Ham v. Salem*, 100 Mass. 350; *Paine v. Woods*, 108 id. 172. The plaintiff's title to the ice must be the same as in the water before it is congealed, and that is so well settled that it needs no further discussion. *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191. The plaintiff, therefore, has the sole right to take the ice from the water resting upon his land, with the single qualification that it is not to be taken in such quantities as to appreciably diminish the head of water at the dam below. *Cummings v. Barrett*, 10 Cush. 186. If this diminution could ever take place from such cause as is doubted in the case last cited — see pages 189–90 — there can be no such claim in the case at bar, for the mill was not in use and the water was not needed. Thus, at the time the water was drawn off, the title of the plaintiff to the ice was virtually absolute.

From this view of the rights of the several parties it would seem to follow as a self-evident proposition, that the defendants' interference with the plaintiff was unjustifiable, and that damages having resulted they would be liable. But it is said that having raised the water it was their privilege to let it down. It may be true that they were under no obligation to keep up the dam any longer than their interest, or whim even, might dictate. But the dam was not removed nor abandoned. It was kept up, and by an affirmative act on the part of the defendants the water was drawn off when it was of no use to them, but a serious injury to the plaintiff. This cannot be said to be consistent with their qualified right to the use of the water, and the reasonable care which they are legally bound to exercise in that use. It is rather a wanton use, a disregard of the rights of others which the law condemns, and which the writ alleges to be malicious and for the purpose of injuring the plaintiff. In *Phillips v. Sherman*, *supra*, on p. 174, it is said: "A wanton, or vexatious, or unnecessary detention, would render the mill-owner so detaining liable in damages to those injured by such unlawful detention." If the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it to the injury of owners above or below. In *Frye v. Moor*, *supra*, it was held that where water is accumulated wrongfully, the party so doing in letting it out must do so at his peril. In this case, so far as appears, the defendants had the right to flow the water for their mill only. It was not raised for that purpose, for the mill was not used, nor does it appear for what purpose it was raised, except as alleged in the writ, to injure the plaintiff.

The case of *Chesley v. King*, 74 Me. 164, in the principles

involved, is substantially like this. There the defendant, in digging a well upon his own land, destroyed the plaintiff's spring by drawing from it the water which percolated through the earth and thus supplied the spring. In that case it was held, after much consideration and a careful review of the authorities, that the defendant, though in the exercise of a right, would not be liable to an action so long as he acts in good faith and with an honest purpose, yet he would be liable if he dug the well for the sole purpose of inflicting damage upon the party who has rights in the spring. The case at bar would seem to be a stronger one for the plaintiff. In this the defendants have only a qualified interest in the water, a right to use it for a specified purpose only, and in that use bound to exercise due care in regard to the rights of others. Yet in the act complained of they were not in the use of the water for their own legal purposes, nor were they in the exercise of due care, by which an injury happened to the plaintiff.

This result is reached from a consideration of the facts alleged in the writ alone. What title to the water the defendants may show, or what excuse for their act, can only appear upon the trial.

Action to stand for trial.

PETERS, Ch. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

STATE v. DODGE.

December 7, 1886.

CRIMINAL LAW — INDICTMENT — NUISANCE — INTOXICATING LIQUORS.

An indictment for liquor nuisance, under a statute declaring places "used" for illegal sale common nuisances, is not sufficient when it charges the defendant with keeping a building "resorted to" for illegal sale.

Orville D. Baker, attorney-general, and *R. W. Rogers*, county attorney, for State. *William H. Fogler*, for defendant.

DANFORTH, J. This case presents the question as to the sufficiency of an indictment founded upon Revised Statutes, chapter 17, section 1. If sustained, it must be under the first clause of the section, which so far as necessary for the case reads as follows, viz.: "All places used . . . for the illegal sale or keeping of intoxicating liquors" are common nuisances. By section 12 the keeper or maintainer of such nuisance shall be punished by fine or imprisonment.

The material part of the indictment charges that the defendant "did keep and maintain a common nuisance, to-wit: a certain building . . . occupied by the said Manley Ellis Dodge as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," etc.

The statute declares buildings used for illegal sale or keeping, etc., nuisances. The indictment alleges that the building was resorted to for that purpose. It is claimed that the two expressions mean the same thing. This cannot be. Neither word has any technical meaning attached to it. Both must, therefore, be construed in their ordinary and usual signification. The building may be and is used by the occupant or keeper. It is resorted to by other persons. If used for sale it

must be understood that sales are made by the keeper, or under his authority. If resorted to for that purpose, sales may or may not be made, and if made are supposed to be made by the persons so resorting, and here is no other allegation that any sales were made, or, if so, that they were made by the consent, or knowledge even, of the defendant. He is charged with keeping a saloon and shop. Other persons are charged with resorting to it for the purpose of illegal sales. If such sales are made, the evil may be as great as though made by the keeper. But that is not the offense provided by the statute. Besides he is not charged with keeping the building for any such purpose, and should not be punished for the wrong of others. *Com. v. Stahl*, 7 Allen, 304.

The case of *State v. Lang*, 63 Me. 215, relied upon in support of the indictment, is not in point. It does not hold that the phrases "resorted to" and "used for" are of the same meaning, but rather that the proper construction of the statute, under which that indictment was found, required the insertion of the words "used for" before the words "illegal sale" and not the words "resorted to," and hence the words "used for" were properly used in the indictment as more accurately expressing the intention of the statute. Since then the statute has been changed so as to leave no doubt that the construction then given is the true one, and the indictment in the case at bar should have followed that. *Com. v. How*, 13 Gray, 26.

Exceptions and demurrer sustained.

Indictment adjudged bad.

PETERS, Ch. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

SUPREME COURT OF PENNSYLVANIA.

APPEAL OF ANNIE L. LOWRY, TRUSTEE.*

October 4, 1886.

TRUST AND TRUSTEE — ACCOUNT — CHARGE — EXCEPTION — PAROL TRUST — ORPHANS' COURT — JURISDICTION.

A., who was trustee for C. of a fund of \$10,000, under the will of B., filed an account in which she charged herself with certain securities as held by her as trustee aforesaid. C. filed exceptions to the adjudication, and sought to establish a further parol trust of a fund of \$10,000, created by A. and D. after the death of B., in accordance with a suggestion of B. made in her life-time, and further sought to establish that the money paid for such securities belonged to such parol trust, and that other securities had been set apart for the trust under the will of B. *Held*, C. was without footing to except, unless he established the existence of the parol trust. *Held*, also, the orphans' court had jurisdiction to administer full relief.

Appeal from the decree of the orphans' court of Philadelphia county.

By the will of Mary Lane Davidson, who died on the 13th day of April, 1883, which was admitted to probate at Philadelphia on the 23d day of April, 1883, she provided, *inter alia*, as follows:

"I give, devise and bequeath unto my sister, Annie Louisa Lowry, the sum of ten thousand dollars (\$10,000) in trust, to keep the same invested in safe securities, at interest, and hold the same in trust for Richard Arthur Carden, Jr., adopted by and now residing in our family. I further direct that the income arising from the said sum of ten thousand dollars (\$10,000), so as aforesaid invested, be paid to the said Richard Arthur Carden, Jr., semi-annually, for his own benefit, but the principal sum of ten thousand dollars (\$10,000) shall be kept safely invested until the death of the said Richard Arthur Carden, Jr.; and I then direct that the same shall be divided equally between my sisters Sarah Kenworthy Davidson and Annie L. Lowry, share and share alike, if both are then living, but if either of my sisters have died, the survivor is to have the whole sum. If neither of my sisters are living at the time of the decease of the said Richard Arthur Carden, Jr., I direct the said sum of ten thousand dollars (\$10,000) to be equally divided between the four (4) named institutions, as follows," etc.

"She named as executrices of her will her two sisters Annie Louisa Lowry and Sarah K. Davidson, to whom letters testamentary were duly granted.

"Mrs. Lowry filed her account as trustee under the will of Mary Lane Davidson for Richard Arthur Carden *et al.* in the month of April, 1884. In it she charged herself with the sum of \$10,000 received from the estate of Mary Lane Davidson on the 22d day of May, 1883, and asked credit, under date of 22d May and 24th May, 1883, for an investment of \$10,000, in three securities, one a bond and mortgage of Alexander M. Smith on number 1,742 North Sixteenth street for \$5,000; another a ground-rent of \$150 per annum issuing out of number 2,640 North

* Reported by Ovid F. Johnson, Esq., of the Philadelphia bar.

Eleventh street, and the third a ground-rent of \$150 per annum issuing out of number 2,642 North Eleventh street. The mortgage had been assigned on the 22d day of May, 1883, by an assignment recorded 24th May, 1883, to 'Annie Louisa Lowry, trustee for Richard Arthur Carden, Jr., under the last will and testament of Mary Lane Davidson.'

"The ground-rents were conveyed to Annie Louisa Lowry, widow, on the 24th day of May, 1883. These were accompanied by her declarations of trust dated 7th July, 1883, setting forth that they had been purchased with moneys bequeathed to her in trust by her sister, Mary Lane Davidson, and that they were held by her as trustee 'named in and appointed by the last will and testament of Mary Lane Davidson.'

"At the audit of the said account before Judge PENROSE, Carden objected to the investments, as the judge reports: 'Not because of any insufficiency of the securities, but because it was alleged that the securities themselves had previously been set apart for another trust created for the said Richard A. Carden, Jr., and that to permit them now to be transferred to the present trust involved a violation of the principles of equity applicable to cases of this description.'"

A part of the history of this case can be best told in the words of the adjudicating judge:

"Richard A. Carden, Jr., testified that soon after the death of the testatrix he had been informed by Mrs. Lowry, and also by her co-residuary legatee and executrix, that the testator had requested them to increase the trust mentioned in her will by the addition of \$10,000, and that they had promised her to do so; that in pursuance of such promise, the mortgage and ground-rent, for which credit is now claimed in the account, had, as they told him, been set apart from the general assets of the estate for the parol trust so created; and that two mortgages, one for \$8,000 on premises 1,822 North Fifth street, and one for \$2,000 on 225 Jacoby street, had been set apart for the trust arising under the will.

"The witness further testified that payments of income from these securities had been actually made to him under the parol trust.

"Richard A. Carden, Jr., as it was shown, was taken by the testatrix and her sisters, Mrs. Lowry and Miss Sarah K. Davidson, when he was a child of three years of age and brought up as one of their own family. He had no means whatever of his own, but was fed, clothed and educated at their expense. No son could have been treated with more affection and indulgence. The ladies whom he was taught to call 'cousin' had the most implicit confidence and trust in his goodness and integrity; and they fully believed that their love for him was entirely deserved, and that it was fully reciprocated.

"The testatrix was ill for about two weeks, during the greater part of which time she lay in a state of unconsciousness. A day or two before her death, however, she rallied, and as the exceptant relies upon what then occurred as given rise to the trust which is the ground of his exceptions, it is better that it should be told in the language of the witness, Miss Sarah K. Davidson, whose testimony is in entire accord with that of her sister, the accountant.

"On Wednesday at three o'clock,' said the witness, 'when all the

family and Mr. Carden were at dinner, I was alone with her. She was very ill indeed, but still she had intervals of reason, and she said to me, 'Sarah, I have been thinking a great deal about Dick; I have loved him very much,' as we all had, for he had earned our best affections. 'I feel that I would like to add a little to his trust, if you are willing. I have left you and Louisa, after a few legacies to friends, the residuary part of my estate; it is all yours, and I have thought, since I have been on my sick bed, that if you were willing, and if he remains with you, and is a good boy, I should like to add \$5,000 or \$10,000, whichever you please, to his trust, when you please.' I said, 'Mary, certainly, your words should be as your will, as regards your instruction. Have you spoken to my sister Louisa about it?' She said, 'I have, this morning. I have told her just what I told you.' I said, 'you may rest assured that what you wish shall be done.' Had it been a bequest to any one else, I would have doubted if her mind was clear; but we all loved him, and we were perfectly willing to give him the largest amount, provided he was true to us. There was nothing more said about it until after her death, when Louisa asked me if she had said anything to me about it, and I repeated what she had said. She then said, 'would you be willing to give him \$10,000?' I said, 'if he complies with the conditions.' I said, 'nothing will give me greater pleasure than to see him have every thing that this world can give, if he is true to us. We have had him from his infancy, and we have loved him as our own life.' I agreed then to give it to him, provided these conditions were complied with, and as regards the interest on the money, I had not the slightest objection to paying it to him when my sister asked me about it. It was a mere gift and we did not want him to be without means; he never worked, and therefore we kept him as a gentleman, as well as we could.'

"After the death of the testatrix, Mrs. Lowry told the exceptant, who was then a young man of about twenty-three or twenty-four years of age, what had been said, and with the assent of her sister, but without making any transfer, set aside two mortgages, intending to give him the interest, and in point of fact actually paying it to him, in addition to that given by the will.

"On the evening of the 10th of December, 1883, a robbery of the most extraordinary character was perpetrated at the residence of the accountant and her sister, of which the exceptant was still an inmate. It was clear that it could only have been done by some one in the house.

"At this time the ladies still believed implicitly in the exceptant; but a letter written by him to a third person was placed in their hands, and they were thus shown, by evidence which admitted of no contradiction, that he had fallen into evil courses, and that he was false, unprincipled and utterly base.

"It is unnecessary to go into the details of this robbery. It is enough to say that it became clear that the servant had been greatly wronged by the suspicions; and that the facts with regard to it have been disclosed incidentally in the course of the settlement of the present account, instead of by prosecution in the court of oyer and terminer, is accounted for only by the forbearance of the victors and their unwillingness to

bring to ruin and public disgrace one whom they had for so many years loved and protected.

"The trust which had been voluntarily assumed was a conditional one. It was not intended to last if the beneficiary proved unworthy, and it was terminated because, as the accountant stated, 'his life and character were found to be such that if the testatrix were now here, she would not only withdraw her bequest, but commit her will to the flames.'"

The judge allowed the credits as proper investments of the trust fund.

Nine exceptions to this adjudication were filed by Carden's counsel, which claimed error in not deciding that a bond and mortgage of McConnell for \$8,000 and another of Gardner for \$2,000 which had belonged to Mary Lane Davidson at her decease, had been set aside and held by Annie Louisa Lowry, as trustee for Carden under the will; in deciding that the Smith mortgage and the two ground rents were investments of the fund bequeathed by the will; in deciding the question of the validity of the parol trust; in deciding that the parol trust was a conditional one voluntarily assumed; in deciding that the parol trust was not intended to last if the beneficiary proved unworthy; in deciding that the parol trust was terminated because of the bad character of Carden; in admitting evidence of the robbery; in admitting as evidence tending to affect Carden's character, a letter in his handwriting; in confirming the trustee's account.

The exceptions were sustained in the court below, and the adjudication was modified by disallowing the credits claimed by the trustee for said investments.

HANNA, presiding judge, held "the existence of the parol trust alleged to have been declared by testatrix and assumed by accountant cannot be determined in this proceeding, nor by this court." He assumed that it was conceded the investments claimed had not been investments of the trust created by the will, and that there had been a prior setting apart of the investments for which credit was claimed as investments of the so-called "parol trust" fund; asserted that investments thus set apart for another trust could not be claimed as belonging to the one before the court, and that the court had no jurisdiction to determine the issue raised by the accountant, viz., that there was no such trust, and, therefore, no investments of the same. He decided: "*The cestui que trust* may, with good reason, hold the trustee liable for the investments of each fund, especially where, as here, the trustee accounts for and recognizes one trust, but repudiates the other. Without disputing the right of the trustee as to the latter, it seems but reasonable that the investments of the trust, accepted and recognized, be produced. And upon failure so to do the trustee should be charged with the trust fund in cash as remaining uninvested. After a careful consideration of the subject, we are of opinion this course should be adopted in the present case. This in no wise prejudices the right of the trustee to contest the enforcement of the parol trust."

In his concurring opinion Judge ASHMAN assumed that the trustee

had set apart distinct securities for the two separate trusts, and rested his concurrence upon such assumption. He said: "If it be true that a trustee who has set apart distinct securities for two separate trusts can, at her discretion, appropriate the investments interchangeably for the purposes of either trust, the beneficiary had no reason to complain in this instance, and the decree of the auditing judge might well be sustained." He conceded that the presiding judge denied, viz., that the court, having the matter within its grasp, had a right to pass judgment upon the validity of the "parol trust."

He held that there had been a trust created by the sisters who survived, out of their own money, without any limitation and without any power of revocation. 'It was manifested by more than a mere declaration to the *cestui que trust*, although that would have been sufficient. The declaration was preceded or accompanied by an actual setting apart of securities, and was followed by a payment of the interest. . . . Could the trustees vacate a trust which, without any qualification, they had created? . . . Equity will not interpose when the trust rests in a mere engagement to create it; but where nothing remains, as here, to be done by the trustee, the court will take jurisdiction."

Judge PENROSE adhered to his adjudication, maintaining that inasmuch as it had been asserted that the securities in controversy had been appropriated to another trust, the court whose duty it became to pass upon the truth of such assertion, had the requisite power to pass upon all the facts involved in the decision. He argued that the parol trust was conditional upon Carden's being a good boy and remaining with the surviving sisters, and that before the securities, which the latter intended to set apart, had been transferred from the general estate, the discovery of his inability to meet the requirements of the conditions had been made. He contended that equity would not enforce a parol trust in favor of a volunteer, where any thing remained to be done to complete the transfer of title, if it appeared that the parol execution had taken place under a mistake of fact. He stated that the evidence showed that even if certain other securities had originally been intended to be transferred to this trust, "the securities referred to never were in point of fact assigned."

John G. Johnson, Lewis D. Vail and Edward Shippen, for appellants. In *Rice's Appeal*, 79 Penn. St. 182, it was held: "Jurisdiction having attached, equity comprehends within its grasp all incidental matters necessary to enable it to make a full and final distribution, and therefore to terminate litigation, 'while it affords a perfect remedy.'" Many authorities in support of the proposition were cited by Judge AGNEW, especially *Bull's Appeal*, 12 Harr. 288. The distinction between a promise to give money, which cannot be enforced, and a declaration that money is held in trust for a volunteer which, possibly, may be enforced, is one not very apparent to the uneducated mind. We have seen it nowhere better stated than by Sir W. PAGE WOOD, in *Richardson v. Richardson*, L. R., 3 Eq. 686: "The real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instru-

ment which affects to pass every thing independently of the legal estate."

There are cases in which an assignment has been sustained as passing the title to property not therein described, and in which the legal title has been ordered to be conveyed to the assignee though a volunteer. This at times, as in *Morgan v. Malleson*, L. R., 10 Eq. 475, has been put on the ground that the assignment operates as a declaration of trust. We can also find cases in which a delivery of choses in action without actual assignment has been held efficacious to pass to a volunteer the whole right therein. Delivery is always held essential to the validity of a gift. As was said in *Crawford's Appeal*, 61 Penn. St. 52, "when a gift is not executed by delivery, but the determining act remains 'in fieri,' there is no force in the intention to do it. A trust is essentially different from a contract, and will be enforced when a contract is not." In a very liberal dictum — the most liberal perhaps to be found in the decisions of this court — in *Helfenstein's Estate*, 77 Penn. St. 331, it was said: "There is no prescribed form for the declaration of a trust. Whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient."

William Mintzer and *Thomas J. Diehl*, for appellee. Jurisdiction is undoubtedly vested in the orphans' court to decide all questions relating to the distribution of a fund which is properly before it, but in this case the auditing judge assumed jurisdiction over a fund which was not before the court at all. This was the account simply of a testamentary trustee, and the trustee did not pretend to account for any other fund than that derived from the will of Mary Lane Davidson. The trust which had been declared upon the \$10,000 in cash by Mrs. Lowry and her sister, Sarah K. Davidson, must be considered as a matter entirely apart and distinct from the testamentary trust under the will of Mary Lane Davidson, to which latter class of trusts the jurisdiction of the orphans' court is limited. See *Fretz's Appeal*, 4 W. & S. 433. The testimony taken before the auditing judge shows conclusively that Mrs. Lowry had in her possession \$10,000 in cash, which had been set apart for the benefit of Carden by herself and sister, Sarah K. Davidson, for the parol trust. That this was a complete and binding declaration of trust is shown by the following authorities. In *Ex parte Pye*, 18 Vesey, Jr., 149, Lord Chancellor ELDON says: "The court will not assist a mere volunteer, yet if the act is complete, though voluntary, the court will act upon it. It has been decided that upon an agreement to transfer stock this court will not interpose, yet if the party had declared himself the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon." "A clear declaration or direction by a party that the property shall be held in trust for the objects of his bounty, though unaccompanied by a deed or any other act divesting himself of the legal estate, is an executed trust, and will be enforced against the party himself. Hill Trustees, § 89; *Day v. Roth*, 18 N. Y. 448. That this doctrine is recognized in Pennsylvania is shown by the language of Chief Justice SHARSWOOD, in *Helfenstein's Estate*, 77 Penn. St. 328. The learned chief justice there

says: "There is no prescribed form for the declaration of a trust. Whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient."

TRUNKEY, J. On May 22, 1883, a mortgage for \$5,000 was assigned to "Annie Louisa Lowry, trustee for Richard Arthur Carden, Jr., under the last will and testament of Mary Lane Davidson;" and on the twenty-fourth of the same month, two ground-rents were conveyed to her, each \$150 per annum. For these securities the trustee paid \$10,000. She executed a declaration of trust on July 7, 1883, reciting that the ground-rents were purchased with moneys bequeathed to her in trust, and that they are held by her as trustee "named in and appointed by the last will and testament of Mary Lane Davidson."

On June 9, 1883, Annie L. Lowry, trustee, executed an acknowledgment of the receipt of \$10,000 from the executrices of the will of Mary Lane Davidson, in satisfaction of the legacy "to be held in trust, in and by the said last will and testament." The executrices have not settled their accounts. Nor did they as executrices, or otherwise, make a written declaration vesting or designating any part of the estate for use of the appellee, except the mortgage and ground-rents described in the account.

The appellee seeks to establish a parol trust created after the death of Mary L. Davidson, by Sarah K. Davidson and Annie L. Lowry, and that the money paid for said mortgage and ground-rents belonged to said parol trust. His interest in the sustaining of his exceptions, if any, arises from such trust. Failing to establish that trust, it matters not what money was used in payment for the securities. Unless he shows its existence he is without footing to except to the account. Testimony adduced to prove it may be rebutted. This involves adjudication, and if the orphans' court has no jurisdiction, the adjudication must be elsewhere before the alleged trust can be made the base for reformation of the account. At the outset the appellee testified that the accountant declared to him the existence of the alleged trust, and that she had set aside cash for that; that in the appellee's brief it is said that "a valid parol trust had already been declared for Carden's benefit, upon that \$10,000 in cash."

The learned presiding judge of the orphans' court denies its jurisdiction to determine the existence of the alleged parol trust; but he recognizes the fact that the appellee has no meritorious standing to except, unless the credits claimed actually belong to that trust, and, therefore, he says: "The *cestui que trust* may with good reason hold the trustee liable for the investments of each fund, especially where, as here, the trustee accounts for and recognizes one trust but repudiates the other." The recognized trust is created by the will; the repudiated trust is only shown by the testimony, and must be assumed to exist before money or investments may be said to belong to it. In the concurring opinion it is conceded that the orphans' court has jurisdiction to administer full relief, and it is held that the trust now sought to be invalidated is purely *inter vivos*, and though prompted by the suggestion of the testatrix, it was created by the sisters out of their own

money. This seems the true view. If, indeed, such trust was created, it was the act of the surviving sisters of the decedent, and if there was no limitation or condition, it was irrevocable without the assent of the person for whose use it was created.

Within a short time after the death of the testatrix, the mortgage for \$5,000 and the ground-rents were purchased and transferred expressly for the trust created by the will. This transaction was six months before the executrices, or trustee, had lost confidence in or affection for the appellee. It was when they intended to make an additional trust for the larger sum that had been suggested by the decedent in her lifetime. The accountant bought the securities and received them stamped with unmistakable appropriation, inconsistent with the allegation that other securities had already been placed to the same use. Afterward she executed the release dated July 9, 1883. All the writings relate to the same trust.

That the accountant and her sister intended in the future to create a trust of \$10,000 for the use of the appellee during his life is admitted; and the accountant also admits that in the meantime she intended to give him the interest or income, and did give it to him for six months. Before the intention was executed the accountant was advised not to make the transfer until the expiration of one year, the time she had for settling the estate, and to take the \$10,000 in cash under the will, which advice she followed.

The appellee relies on his own testimony to establish the trust, corroborated by the said payment of interest. He says that three days after the death of the testatrix, both sisters told him of her request, and that they intended to carry it out to the letter, and that two or three weeks thereafter, Mrs. Lowry told him that the McConnell and Gardner mortgages, which had belonged to the decedent, had been set aside as the money left him by the will, and that they had set aside cash for the extra trust. Mrs. Lowry testifies respecting the extra trust, or discretionary \$10,000, that it occurred to her, to save her trouble, that she could put the two mortgages aside, and hand the interest over to the young man; that she gave him the interest because she felt interested in him, and intended to give him the \$10,000 in trust if he was a good boy; and she positively denies that she told him the purchase of the securities was for the extra trust.

Mrs. Lowry's testimony shows that if the McConnell and Gardner mortgages were set aside at all, it was for the extra trust, not the trust under the will. The auditing judge has well shown that the credit of Carden is not such that the pivotal fact in his case can be found on his testimony alone, especially against that of the accountant. Unless it be true that the McConnell and Gardner mortgages were set aside for the trust under the will, the exceptions fall.

The auditing judge finds that the accountant, "with the assent of her sister, but without making any transfer, set aside two mortgages, intending to give him the interest, and in point of fact actually paying it to him, in addition to that given by the will." He properly omitted to find that the securities for which credit is claimed in the account were purchased for a use other than that stated in the writings; or that

said securities were purchased with money designed for another use. The findings of fact were quite as favorable to the appellee as the evidence warranted, and we think fail to show an actual creation of the alleged trust without the will, to which the securities named in the account had been appropriated.

Decree reversed, the exceptions dismissed, and the account confirmed. Appellee to pay the costs.

APPEAL OF KOONS AND WRIGHT.

October 4, 1876.

WILL — LEGACY — INTEREST.

The act of February 24, 1884, which provides that "legacies, if no time be limited for the payment thereof, shall, in all cases, be deemed to be due and payable at the expiration of one year from the death of the testator," supplies a testamentary intent; therefore, where it is claimed a money legacy shall not bear interest from the expiration of one year after the testator's death, the contention must be supported by clear evidence of an intent contrary to the act to be found in the testator's will.*

Appeal from the decree of the orphans' court of Philadelphia county.

Joseph Wright, distributing the bulk of his estate in his life-time, *inter alia*, June 24, 1853, transferred to the Pennsylvania Company, etc., personal securities amounting to \$10,000 upon the trust declared by them: First, to collect the income and pay over the same to him for life, and on his death; second, to pay certain sums of money to specified persons, with power to sell the securities necessary therefor; third, to pay certain annuities to certain other persons; fourth, to reinvest the income not required for the annuities; fifth, on the death of all the annuitants to pay all the securities remaining and accumulations of income to his executors, to be applied to the purposes of his will, with provisions for the trustees' compensation and a full power of revocation.

In 1854 he subscribed for the purchase of a lot in Frankford for a charity, subsequently incorporated as "The Industrial Beneficial Institute of Frankford," and had the lot conveyed to himself and four other trustees in trust for the purposes of that charity and such other uses as his will should declare. He erected a building on the lot, formed the association and mainly supported it in his life-time.

He died May 26, 1858, having made his will May 25, 1857, whereby he gave an annuity of \$400 to his wife, a legacy of \$4,000 payable out of the proceeds of his estate to Miss Hogeland, and a legacy of \$10,000 to the said institute, the principal thereof to be invested forever, and the income applied to the taxes and repairs upon its building, a free library and reading-room, and for fuel and support for the poor of Frankford within one mile from the building. The will, then, in terms, gave the residue of his estate, including the balance in the hands of the Pennsylvania Company under their trust to carry out the purposes and intentions therein before expressed, and finally the remainder, equally to be divided between his son and his two daughters, and, at the close of his will, he provided that, after securing the widow's

* See 6 East. Rep'r, 55.

annuity, his executors should pay the legacies, in the order of priority therein before named.

Under proceedings upon the executors' accounts \$6,700 of his personalty was set apart to meet the widow's annuity, and the balance in August, 1860, of \$1,660 was applied on account of Miss Hogeland's legacy. The widow died April 13, 1870, when the principal investments of her annuity fell in, and, on the next executors' account, that fund was distributed by awarding to Miss Hogeland the unpaid balance of her legacy, with interest from a year after the testator's death, and the residue of \$2,416.95 to the institute on account of its legacy of \$10,000.

The last annuitant under the Pennsylvania Company's trust died in 1884, and the executors having died, the administrators *d. b. n. c. t. a.*, by their account, had a balance for distribution of \$43,178.49; including the remaining principal and accumulations of income of the Pennsylvania Company's trust fund, left after the fulfillment of their trusts.

The institute was awarded by the court below the residue of the principal of its legacy, with interest thereon from the year after the testator's death.

The effect of this distribution was to divide the principal of the trust fund of \$10,000, set apart by the decedent under the trust and will, and the income thereof between the disputing beneficiaries as follows:

To the institute the principal of its legacy of \$10,000, less collateral inheritance tax, by the will to be paid in priority over the remaindermen's legacies.....	\$9, 500 00
And balance of interest thereon, at six per cent, from the year after the testator's death	12, 403 05
	<hr/>
	\$21, 903 05
And to the remaindermen, the residue of the accumulations of interest on that fund, amounting to.....	21, 201 94
	<hr/>

George Junkin and *Benjamin Harris Brewster*, for appellants. That ordinary money legacies bear interest from one year after the testator's death no one will question. They are then payable, and interest is the penalty for not paying money when it ought to be paid. But, of course, a testator may order it otherwise, either in the express terms of his will, or by his intentions to be gathered from his whole will. The rule, therefore, by which the court below has decided this case has no application to it, because the reason of it does not exist. The authorities to sustain this view are ample. *Earle v. Bellingham*, 24 Beav. 448; *Wheeler v. Ruthven*, 74 N. Y. 428; *Trippe v. Frazier*, 4 Harr. & J. (Md.) 446.

John Shallcross and *George L. Crawford*, for appellees. General pecuniary legacies, including gifts of appointment under a power, are payable at the end of a year from the testator's death. *Tatham v. Drummond*, 2 H. & M. 262. And where no time for payment is fixed, interest runs from that time, even though the legacy is

directed to be paid out of a particular fund when recovered, and it may not be recovered for a long time thereafter. *Entwistle v. Markland*, 5 Ves. 527; *Sitwell v. Bernard*, id. 534-543. A legacy given out of a fund when the same shall be recovered, when received, when got in, when laid out, etc., follows the legal presumption of carrying interest from the year after the death, to vary which requires the most plain and distinct indication of an intention to postpone the payment. *Wood v. Penwyre*, 13 Ves. 334-6; *Kirkpatrick v. Bedford*, 4 App. Cas. 104, 111; *Kerr v. Dougherty*, 17 Hun. 341. It is the general settled rule that pecuniary legacies, whether the fund out of which they are payable bears interest or not, bear interest from the year after the testator's death if there should be at any time a fund for their payment. *Pearson v. Pearson*, 1 Schoales & Lefroy, 12. The rule is not altered by the fact that the legacy is charged upon the personalty and a reversionary interest in realty, and the personalty is insufficient. *Freeman v. Simpson*, 6 Sim. 75; *Gough v. Bull*, 16 id. 323; *Earl of Miltown v. Trench*, 4 Cl. & Fin. 310, 1, 2-4, 5. In 27 Ch. Div. 676, *In re Blachford*, the property of a testatrix who died in 1869, consisted chiefly of a reversionary interest which did not fall into possession until 1881. Her will gave her estate to her executors and trustees in trust to sell and stand possessed of the proceeds in trust to pay certain legacies, and they were awarded interest from the year after the death of the testatrix, even those legatees who had received their legacies without interest, having done no act to release the estate, being held to be not barred by acquiescence. This rule is in full force in Pennsylvania. A legacy to come out of a part of the testator's estate which cannot be recovered for a long time after the year, where the testator directs the legacy to be paid, when the money which is to constitute it can be recovered, carries interest from the year after the testator's death. The general rule of giving interest to the legatee from the expiration of the year is not to be controverted upon slight inferences of intention, nor will it yield to the impossibility of getting in the estate so as to pay the legacy within the year allowed for that purpose. *Houston's Appeal*, 9 W. 477; *Martin v. Martin*, 6 id. 67. A legacy charged on realty, of which the testator held a remainder expectant on a life estate, to be used for schooling and education of a minor legatee, though the life estate did not expire until fourteen years after the testator's death and until after the minor's majority, when its declared purpose was useless, carried interest from the year after the testator's death in *Lynch's Appeal*, 12 W. N. C. 104. This case shows that the notion that the intent of the testator that the principal of the legacy should be invested and the income only yearly consumed for the charity will preclude the legatee from receiving the accumulations of years of past income unpaid in a lump is erroneous, and the rule of construction that where a fund is directed to be at once set apart from the rest of the testator's estate, it carries the income from the testator's death. *Boddy v. Dawes*, 1 Keen, 362; *Dundas v. Wolfe Murray*, 1 H. & M. 425; *Johnson v. O'Neill*, 3 L. R. Ir. 476; *Laporte v. Bishop*, 11 Harr. 152; *Cooper v. Scott*, 62 Penn. St. 139; *Page's Appeal*, 71 id. 405, would prevent such a result. And the act of assembly of February 24, 1834, § 51 —

Brightly's Purdon, 555, § 231 — providing that "Legacies, if no time be limited for the payment thereof, shall in all cases be deemed due and payable at the expiration of one year after the death of the testator," giving a statutory force to the strong legal presumption requiring clear expression of the testator's intent to postpone the running of interest, concludes the question in Pennsylvania. Among the exceptions to the rule in question, in which exceptional cases interest is also given for the first year, is the case of a legatee, though neither a minor nor in the *loco parentis* relation, but a stranger, if there be a general intention expressed in the will of providing for its maintenance out of the legacy, interest runs from the death. *Pett v. Fellows*, 1 Sw. 561. n; *Lambert v. Parker*, Coop. t. Elden, 143; *Leslie v. Leslie*, Ll. & G. t. Sug. 1; *Townsend's Appeal*, 10 Out. 268, and cases cited.

GREEN, J. The legacy of \$10,000 to the appellee was absolute without any condition as to its payment, and no time of payment was expressed in the will which gave it. Literally the case, as to the question of interest, comes directly within the words of the act of 24th February, 1834, par. 51, which provides that "legacies, if no time be limited for the payment thereof, shall in all cases be deemed to be due and payable at the expiration of one year from the death of the testator." This legislation supplies a testamentary intent, and hence where it is claimed that a money legacy shall not bear interest from the expiration of one year after the testator's death, the contention must be supported by clear evidence of an intent contrary to the act to be found in the will of the testator. This doctrine was long ago asserted and has ever since been followed by this court. Thus in the case of *Huston's Appeal*, 9 Watts, 472, we said: "The general rule of giving interest to the legatee from the expiration of the year is not to be extended or controverted upon slight inferences of intention, nor will it yield to the impossibility of getting in the estate so as to pay the legacy within the year allowed for that purpose. And even though the legacy is to come out of a part of the testator's estate which cannot be recovered for a long time after the year, and the testator directs the legacy to be paid when the money which is to constitute it can be recovered, still the payment of interest, if practicable, or at least the computation of it, will commence from the end of the year after the testator's decease." Citing *Wood v. Penoyre*, 13 Ves. Jr. 325.

The case cited was a very well and carefully considered case and is sustained by kindred authorities. The master of the rolls having said that his first impression was that the words "when the same shall be recovered," postponed the time of payment and consequently the right to interest until the mortgage debt out of which the legacies were payable should have been actually received and got in, declared that a further examination of the cases had changed his mind, and he stated his ultimate conclusion thus: "Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid until the money due upon such securities is actually got in; but by a rule that has been adopted for the sake of general convenience this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground

interest is payable upon legacies from that time unless some other period is fixed by the will. Actual payment may in many instances be impracticable within that time; yet in legal contemplation the right to payment exists and carries with it the right to interest until actual payment."

The rule of general convenience thus stated is with us a mandatory statute rule by the act of 1834. The reasons for its adoption do not in England, and cannot with us, prevent its application to a given case merely because they do not happen to concur with the facts of such case. Hence we hold that the direction of the statute must prevail unless there is a clearly expressed contrary intent. In the present case there is no such contrary intent actually expressed. The injunction of the statute is peremptory and it is founded upon the one fact only that no time is limited for the payment of the legacy. While we do not say that the mere absence of a limitation of the time of payment shall not of itself alone, regardless of the language of the gift and of all the circumstances attending a given case, suffice to bring the statute into application, we feel bound to say that the reason for not applying it must be of the clearest and most convincing character. There must be language or circumstances apparent upon the face of the will showing that the testator could not have intended the legacy to be payable at the end of the year. This was the case in *Earle v. Billingham*, 24 Beav. 448, where the fund out of which alone the legacies were to be paid did not come into existence for the purpose of the legacies until after the death of the life-tenant. Substantially the same reason existed in *Wheeler v. Ruthven*, 74 N. Y. 428; S. C., 30 Am. Rep. 315; and in *Trippe v. Frazier*, 4 H. & J. 446. In the case of *Lord v. Lord*, L. R., 2 Ch. App. 782, the master of the rolls fully admitted the principle that a legacy bears interest from the end of the year though payable in the future, and that in the case he was considering the legacy would have borne interest if it had been given directly payable when the litigation was over, and based his decision entirely upon the ground that the legacy was given by way of a trust and that no trust arose or could arise until after the mortgage was collected.

In the case at bar it was not even the fact that the legacy of the appellee was payable *by the terms of the will* out of the trust funds in the hands of the Pennsylvania Company, etc., though under the decisions if it had been so payable that circumstance would not alone have sufficed to prevent the application of the statute. In reality those funds constituted the chief, though not the only source of the means for paying the legacy, but the gift of the legacy was absolute and without condition that it should come from that source. Had there been the estate sufficient for the purpose, the existence or the non-existence of the trust funds would have been irrelevant, in fact as well as in theory. The circumstance that they were essential to the full liquidation of the legacy is adventitious only and not virtually essential to the right of the legatee to have the legacy. The surplus of the trust funds not needed for the trust comes to the executors as part of the residue of the estate, and is only made applicable to the payment of the appellee's legacy by the residuary clause. But the legacy itself was completely given by the

preceding clause of the will, and the legal right to have it exists by virtue of that clause and not necessarily by virtue of the residuary clause at all. The mere fact of the precedent and independent gift, followed by a bequest of the residue, presupposes that there would be a residue after the legacy was paid. The devotion of such part of the residue as might come from the trust fund to the payment of the legacy was at the best but a cautionary though not a necessary provision for the payment of the legacy. The legacy would have been payable as well without as with that part of the residuary clause which relates to the trust fund. In other words, the right to have the legacy is not made to depend upon whether there was a surplus of the trust fund or not. Legally the legacy was payable out of any part of the testator's estate. If it was actually paid out of the surplus of the trust fund it was because that fund was part of the residuary estate and as such was necessary for the purpose, but that circumstance does not affect the legal status of the legatee.

Decree affirmed.

APPEAL OF THE PENNSYLVANIA CO. FOR INSURANCE ON LIVES, ETC.

October 4, 1886.

COLLATERAL SECURITY — APPROPRIATION OF PAYMENT.

Personal property pledged specifically as security for a certain loan cannot be held as security for subsequent advances without an agreement to that effect.

One who owes money upon several distinct securities or accounts has a right to apply his payment to either as he pleases; but if he makes a payment generally and without specifically appropriating it, the creditor may apply it as he pleases. If neither debtor nor creditor makes any specific application of the money so paid, the law will appropriate it according to the equity and justice of the case. But this principle applies only in cases of voluntary payments. It has no place in payments where the money to be applied is the proceeds of a judicial sale of real estate. In such cases the law applies the proceeds in order of their priority to such liens as are divested by the sale.*

Appeal from the decree of the court of common pleas, No. 1, of Philadelphia county.

On the 16th day of October, 1880, Lauber borrowed from the Pennsylvania Company the sum of \$35,000. To secure this he gave a mortgage upon certain premises in Philadelphia and assigned certain policies of insurance worth some \$6,000 or \$7,000. In this assignment it was provided "that the said company holds the said policies only as collateral security for the payment of the said mortgage debt of \$35,000, and that, upon payment and discharge of said mortgage debt, the Pennsylvania Company for Insurances on Lives, etc., shall and will reassign and transfer all the said mentioned policies of insurance."

On the 21st day of December, 1881, the company made an additional loan of \$20,000 to Lauber, and as security therefor took a second mortgage on the premises. On the 18th day of November, 1884, judgment was entered in an action of *scire facias* upon the first mortgage in the sum of \$38,250.62, and in an action of *scire facias* upon the second mortgage in the sum of \$21,857.05.

On the 19th day of November, 1884, in consideration of the sum of \$400 loaned to Lauber, and as collateral security therefor, he

* See 16 Eng. Rep. 273.

assigned the policies "now held as collateral security by the Pennsylvania Company for Insurance on Lives and Granting Annuities" to Clausen & Son. At that time the policies were in the possession of the company, to whom they had been assigned on the books of the various insurance companies.

Under a writ of *levari facias* the mortgaged premises were sold by the sheriff on the first Monday of January, 1885, for \$41,000. The value of the policies and the proceeds of the sale were insufficient to satisfy the two debts owing to the said company.

The proceeds of sale were received from the sheriff by the said company and were applied by it toward payment of the debt last created, whilst the policies of insurance were applied *pro tanto* in payment of the one first created.

Clausen & Son thereupon filed a bill to compel the transfer of the policies to them, and the court below decided that this transfer must be made.

John G. Johnson, for appellant. We submit four propositions:

I. The sheriff's sale discharged the lien of the two mortgages, but did not satisfy the debt thereby secured. The debtor was entitled to an appropriation of the proceeds in payment of his indebtedness, and nothing more.

II. The receipt of said proceeds by the Pennsylvania Company obliged it to appropriate the same not to the payment of the debt first created, but in accordance with the principles of equity.

III. A creditor is entitled to appropriate funds in his hands in payment of the least secured debt, unless some person discloses a paramount equity.

IV. The complainants disclosed no such equity.

I. As to the effect of the sheriff's sale, *McDevitt's Appeal*, 20 P. F. S. 373; *Bank v. Winger*, 1 Rawle, 302; *Adams v. Heffernan*, 9 W. 529; *Knoigmark v. Brown*, 2 H. 269; *City v. Cooke*, 6 C. 56; *Canal Co.'s Appeal*, 2 Wr. 516.

II. The law did not apply the proceeds of the sheriff's sale to the first created debt to the prejudice of the one least secured. The application, therefore, was to be made in accordance with equitable principles.

III. Equity appropriates a fund in the hands of a creditor to whom two debts are owing, to the one last secured, unless some one else discloses a paramount equity. The citations we have given previously render it unnecessary to do more than state this proposition which, over and over again, has been sustained.

IV. The complaints disclosed no such paramount equity.

They took an assignment of policies, which, as was stated in the assignment itself, were then in possession of the appellants. Not only were they charged with constructive notice of the existence of some other right by reason of the policies being missing, but actual notice was given to them. They stood in the shoes of Lauber and acquired no rights which he did not at that time possess. In fact, as to all over \$400, they are still merely but trustees for him. Was Lauber clothed

with any equity to demand that the moneys realized by the sheriff's sale should be applied in such way as to entitle him to demand a reassignment of the policies, though his debt to the extent of upward of \$18,000 remained unpaid? All he could demand was that these proceeds should be credited upon his indebtedness generally, not that they should be credited upon the one most secured. So far as he was concerned, he could have made no complaint if the company had receipted to the sheriff upon the second mortgage and had declined to collect any thing on account of the first. As has been held in the cases we have cited, the holder of the first lien may waive his right to receive any thing on account thereof in favor of the second. How can the lien debtor be harmed so long as the amount received by the sheriff is appropriated in relief of what he owed? It was impossible for Lauber, by an assignment made more than three years after the equity of the appellants had vested, to give to his assignee what he did not possess himself. Suppose that the appellants had sold the policies prior to the sheriff's sale, and had appropriated the proceeds in part satisfaction of the first created debt, could Lauber or his assigns have objected? Will it be held that the equity of the creditor depends on the order in which conversion takes place? The effect of the sheriff's sale was simply to convert the pledged land into money, subject to the same pledge and to the same equities. With \$44,000 in cash pledged for both debts and with proceeds of insurance policies in hand worth some \$6,000 more, which had been pledged specifically for one, the court below took the policies from the creditors — appellants — to whom \$60,000 was owing, and gave them to the appellees, who, after reimbursement of the \$400 which they loaned to Lauber, will be obliged to turn over the residue to the debtor. It was expressly held in *Dela-ware and Hudson Canal Company's Appeal* that subsequent judgment creditors as against the prior pledgee had no rights superior to those of the debtor.

C. W. McKeehan, for appellees. By the foreclosure and sale under this mortgage the amount at which the property sold, viz., \$44,000, being largely in excess of debt, interest, and costs, this mortgage debt was paid. It would seem superfluous to cite authorities for such a proposition when, as is well known, at every sheriff's sale counsel appear to bid up the price of property upon foreclosure sales to the amount of the bond in order that the debt thereon may be thereby paid. Since appellants deny this a few authorities are respectfully submitted. *Pierce v. Potter*, 7 Watts, 475; *Thomas v. Jarden*, 57 Penn. St. 331; *Hood v. Adams*, 124 Mass. 481; *Howard v. Ames*, 3 Metc. 308; *Southworth v. Schofield*, 51 N. Y. 187; *Jones Mort.* 950, 953; *Westmoreland Bank v. Rainey*, 1 W. 26. No principle of law is better settled than this one. Coming down to us from the civil law and modified by the common law, it is established by a multitude of decisions in Pennsylvania that a debtor who owes several debts to his creditor and makes a payment to him has (1st) the right to direct to what particular indebtedness his payment shall be applied, and (2d) the debtor having failed to give such direction, the creditor may apply the payment to any part of the indebtedness, and to the least secured debt. But this principle

only applies to cases of voluntary payment, and not where the payment is enforced by process of law. The simple statement of the principle shows that the debtor must have had an opportunity to direct the application. All the cases upon the subject in the reports are cases of voluntary payments; and it was expressly decided in the case of *Blackstone Bank v. Hill*, 10 Pick. 133, as follows, in a case very similar to this: The policies were never pledged as security for the second mortgage, and the appellants have no right to apply them to that debt. *James' Appeal*, 89 Penn. St. 54. The doctrine of equity, referred to in the opinion in the above case — 1 Story Equity, § 1034 — is said by Judge STORY to have no application as against creditors or against subsequent purchasers. *Jarvis Adm'r v. Rodgers*, 15 Mass. 395. "When securities are specifically pledged to a broker or banker to secure the payment of a particular loan or debt, he has no lien upon such securities for a general balance, or for the payment of any other claim." *Duncan v. Brennan*, 83 N. Y. 487. "Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance." "Nor can it be so held although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general account cannot be invoked." *Fridley v. Bowen*, 103 Ill. 633. Schouler Bail. 228, says: "Nor can any pledgee claim to retain the pledge, in order to secure new debts or so as to apply it to different objects than those for which it was confided to him." *Post v. Tradesmen's Bank*, 28 Conn. 420. Schouler Bail. 229: "Pledge may be extended to cover future as well as present liabilities. This rule is subject to some qualifications in favor of subsequent parties acquiring rights *in rem*; and the better opinion is that as to them in the absence of positive evidence showing that the pledge was intended by the pledge parties to serve as collateral security for future loans or engagements the pledgee must restore the thing upon receiving full satisfaction of the original debt or engagement." Citing 2 Kent, 584; *Jarvis v. Rodgers*, 15 Mass. 389; *Pettebone v. Griswald*, 4 Conn. 158; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540; *Robinson v. Frost*, 14 Barb. 536. It was decided in *Drake v. White*, 117 Mass. 10, that "a creditor who gives a receipt for a chattel held by him as collateral security for the payment of a debt in which he promised, on payment of the debt, to deliver the property to the debtor, or its equivalent in money, is liable for the value of the chattel if without fault on his part it perishes in his possession." *Van Blarcom v. Broadway Bank*, 37 N. Y. 540.

STERRETT, J. It will be apparent, we think, from a brief statement of the facts, that the decree from which this appeal is taken was rightly entered.

In October, 1880, Philip J. Lauber borrowed from the company appellant \$35,000, and gave as security therefor a mortgage of certain real estate in the city of Philadelphia. About a week thereafter, in accordance with his agreement to do so, he assigned to appellant as additional security the policies of insurance amounting at their face value to

\$40,000. The purpose of this assignment and its conditions are clearly expressed in the paper contemporaneously executed and delivered by the company to Lauber, in which it covenants and agrees that it "holds the said policies of insurance only as collateral security for the payment of the said mortgage debt of \$35,000, and that, upon the payment and discharge of said debt, the Pennsylvania Company for Insurances on Lives and Granting Annuities shall and will reassign and transfer all the said nine policies of insurance, amounting to \$40,000, to him, the said Philip J. Lauber." About a year thereafter appellant loaned to Lauber the further sum of \$20,000 upon the security of a second mortgage of the same premises. The policies of insurance were not pledged as security for this loan, nor is it alleged by the appellant that they were.

In November, 1884, Lauber applied to the company appellee and obtained from it a loan of \$6,000, secured by an assignment of same policies of insurance subject to the prior assignment to appellant. Shortly afterward appellant, having obtained judgment on each of its mortgages, issued a *levari facias* on the first, sold the mortgaged premises, and in January, 1885, purchased the same at sheriff's sale for \$44,000, a sum more than sufficient to pay the first mortgage debt, but not enough to pay both in full.

The appellee, claiming that the first mortgage debt was fully paid and satisfied by the proceeds of sale, and the conditions of the first assignment thereby fulfilled, demanded the policies of insurance, and appellant refused to surrender them. Thereupon the bill, reciting substantially the foregoing facts, was filed, praying among other things that the appellant be ordered to assign, transfer, and deliver the policies of insurance.

The ground of appellant's refusal to surrender the policies is disclosed by the answer wherein it says, after referring to the two loans: The second "loan was made by us in the belief that we could apply the collateral then in our hands in such manner as would give us the full benefit of the margin of value of the premises mortgaged a second time with the least possible diminution by reason of the first loan and the collateral we then held." . . . "We are advised that the first loan was not fully paid by said sale; but that it was our right to first appropriate the proceeds of said sale in payment of the second loan, which was least secured. We have done this, and we have appropriated said proceeds toward the payment of said second and least secured loan, and have appropriated the policies of insurance toward the payment of the loan first made."

The court below rightly concluded that the defense thus set up was wholly insufficient, and accordingly decreed that the mortgage debt, for which the appellant held the policies of insurance as collateral security, had been paid and discharged, and directed appellant to assign, transfer, and deliver said policies to the appellee.

It is a principle too well settled to require the citation of authorities that personal property, pledged specifically a security for a certain loan, cannot be held as security for subsequent advances, without an agreement to that effect. It is not even claimed that there was any

such agreement in this case. The sheriff's sale under the first mortgage discharged the lien of both, and there being no prior lien creditors, the law appropriated the proceeds, first to the payment and satisfaction of the first mortgage debt, and the residue on account of the second mortgage debt. The legal effect of this was just the same as if Lauber, the debtor, had voluntarily paid the first and taken up his bond. The general rule undoubtedly is that one who owes money upon several distinct securities or accounts has a right to apply his payment to either, as he pleases; but, if he makes a payment generally and without specifically appropriating it, the creditor may apply it as he pleases. If neither debtor nor creditor makes any specific application of the money so paid, the law will appropriate it according to the equity and justice of the case. But this principle applies only in cases of voluntary payments. It has no place in payments *in invitum*, or where the money to be applied is the proceeds of judicial sale of real estate. In such cases the law applies the proceeds in order of their priority to such liens as are divested by the sale.

Decree affirmed, and appeal dismissed at the costs of appellant.

BOYD v. "INSURANCE PATROL OF THE CITY OF PHILADELPHIA" ET AL.

October 4, 1886.

MUNICIPAL CORPORATION — EMPLOYEES — NEGLIGENCE OF INSURANCE PATROL — NONSUIT — PROOF — RESPONDEAT SUPERIOR.

A municipality, in the performance of certain public functions delegated to it by the sovereignty of the State, is an agent of the government, and is not liable for the malfeasance or negligence of its officers or employees; the officers are *quasi* civil officers of the government, although appointed by the corporation; they are themselves personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation liable; in order to charge the corporation for negligence in the performance of a public work, the law must have imposed a duty on it so as to make that neglect culpable.

An association of individuals conducted not for private gain but as a public charity, rendering gratuitous service to the public for the public good, is not liable for the negligence of its servants.*

It is not the object alone of a corporation which makes it charitable within the meaning of the law, it is the mode in which that object is sought to be attained, as well as the purpose for which it is pursued.

The Insurance Patrol of the City of Philadelphia, an incorporated body acting as a salvage corps in conjunction with the regular city fire department, sent A. and B., two of its employees, to take away a number of tarpaulins left on the upper floor of a building that had been damaged by fire. They took with them a patrol wagon, which A., the driver, backed against the curb in front of the injured building, then stationing himself at the horse's head. B. in the meanwhile went up to throw the tarpaulins out of the windows to the sidewalk. Whilst engaged throwing them out in bundles, one lot struck C., a passer-by, and caused such bodily injury as to result in his death, whereupon his widow and child brought suit against the Insurance Patrol and A. and B., to recover damages. On the trial there was no evidence that A. had been stationed below to give notice of the danger to passers-by, or that A. and B. had divided the danger between them. Neither was there any proof that the Insurance Patrol had been invested with a public function which it exercised for the public good as a public agent, and not for private gain. The lower court entered a nonsuit as to A. and also as to the Insurance Patrol, and the jury rendered a verdict in \$25,000 against B. The court refused to take off the nonsuits entered, where-

* See 29 Eng. Rep. 13.

upon the case was carried to the supreme court, and the refusal to take off the nonsuits was assigned for error. *Held*, the lower court was right in refusing the motion as to A. *Held*, also, that if the Insurance Patrol claimed to be such a public agent as was exempt from liability for the negligence of its servants, it was bound to exhibit and establish the ground of its exemption.*

Error to the court of common pleas, No. 1, of Philadelphia county.

On the 3d of May, 1883, a fire took place in Philadelphia, in the building No. 29, situate on the east side of Water street, directly south of a three-foot-wide alley. In order to protect the property therein from injury by water, tarpaulins were spread in the upper stories and on the roof of the building by the employees of the Fire Insurance Patrol. On the sixth of May, after the extinguishment of the fire, a wagon of the patrol was driven down Water street, and backed up against the curb of the pavement in front of No. 29. Hutchinson, one of the employees of the patrol, went into the third or fourth story of the building to get the tarpaulins which had been left there, in order that they might be placed in the wagon and conveyed back to the building of the Insurance Patrol; while Koockogey, the driver of the wagon, remained with the wagon on the pavement below, one or two bundles of tarpaulin were then safely thrown down on to the pavement. While this was going on Boyd came up Water street on the west side and crossed over to his store, which was a few doors above No. 29 on the same side. After an interval of about five minutes he came back, but before he got on to the pavement of No. 29, he veered off into the middle of the street, as if to go on to the west side of the street; but on getting to the middle of the street, he returned to the north curb of the alley north of No. 29, stepped on to the stone, hesitated a second, glanced up, and then with his head down ran on to the pavement of No. 29, when a tarpaulin in its descent struck him on the back of the neck and inflicted injuries of which he shortly after died. His widow and son then instituted an action for damages against the Insurance Patrol and against Koockogey and Hutchinson. On the trial the court granted a nonsuit as to the patrol and Koockogey, which the court *in banc* refused to take off.

George Junkin, for plaintiffs in error. It may be that in some instances the doctrine of *respondet superior* is a severe rule, and that it had its doctrine in the Roman law, because usually a man's servants were his slaves, who had no property with which to compensate the injured party. The reason for the rule exists just as much now as in the days of slavery. The great mass of employments, in the conduct of which injuries are inflicted from the negligence of the persons actually carrying them on, are really performed by persons who have as little pecuniary ability as the Roman slaves had. Ninety-nine hundredths of the torts and injuries done, for which suits are brought and recoveries obtained, are the results of what employees or servants have done or caused; and if the injured party had no remedy against their employers, and only against them, the injuries would practically go without redress. But, apart from the reason for the rule, it has been the common law of England and of this country for centuries—Whart. Neg., § 157—

* See 4 East. Rep'r, 615.

and nothing but legislation can change it. And it requires no gift of prophecy to say that such change will ever take place. The indisputable facts in this case show that Charles S. Boyd was killed by the negligent and careless manner in which Hutchinson and Koockogey performed work, for which they were employed by the Insurance Patrol; and that this negligence and carelessness occurred whilst they were acting in the scope or course of their employment, and for their acts the corporation is liable. Whart. Agency, §§ 475, 129-157; Whart. Neg., §§ 157, 161, and cases cited. There is a class of cases, some of which are cited in the opinion of the court below, which are relied upon as establishing that this corporation is a charitable one. They are, *Thomas v. Ellmaker*, Pars. 98; *Magill v. Brown*, Brightly, 346; *Humane Company's Appeal*, 88 Penn. St. 389, *Riddell v. Harmony Co.*, 8 Phila. 313; *Coruth v. Hibernia Co.*, 1 W. N. C. 187. The underlying principle of these cases is that persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal share in the mode of its performance, are exempted from liability for the negligent acts of persons employed by them. *Freeman v. Philadelphia*, 7 W. N. C. 45, recognizes this doctrine in holding that the city was not liable for the negligence of the driver of one of its fire-carts in going to a fire. Here the municipality, the public, was engaged in a public service, committed to it by its charter, for the benefit of the whole community. So also those cases which hold that a municipality is not liable for the negligences of its police and other officers, etc. *Knight v. Philadelphia*, 15 W. N. C. 307; *Alcorn v. Philadelphia*, 44 Penn. St. 348; *Elliot v. Philadelphia*, 75 id. 347, and many other cases cited in these. And, if this doctrine is maintained, then all the churches, hospitals and other charities can, in no instances, be liable in tort for any injury inflicted by any of their agents, officers, or employees, and the sufferer must be turned over for redress to an action against some irresponsible person. The only authorities cited to sustain this novel doctrine are two cases, which we will now consider. *Hospital v. Ross*, 12 Cl. & Fin. 507. Money was left by will for the establishment and support of a hospital. Ross applied to the managers for admission, and they refused, and he sued for damages. The case might have been well decided, upon the ground that the admission was a matter of sound discretion in the managers; and that they were not bound to admit any and every one, and Ross had no right to demand admission. The judges, however, did decide it upon the ground that: "To give damages out of a trust fund would not be to apply it to those objects whom the author had in view, but would be to divert it to a completely different purpose." The opinions of Lords CAMPBELL, COTTENHAM and BROUGHAM put the case upon this ground, and citing and following: *Duncan v. Findlater*, 6 Cl. & Fin. 894; and they all indulged in a good deal of loose rhetoric. The case was well decided, but upon wrong grounds; and these grounds were overruled, virtually, by the subsequently well-considered case of *Gibbs v. Mersey Docks*, L. R., 1 H. L. 93; *Macdonald v. Mass. Gen'l Hospital*, 120 Mass. 432; *Southampton Bridge v. Local Board*, 28 L. J. Q. B. 44; *Bennet v. Wyndham*, 4 De G., F. & J. 259; *Rector, etc., v. Buckhart*, 3 Hill, 193. It was attempted in the

court below to maintain that the corporation was not liable on the ground that it was performing a public duty, and to bring it within the well-known class of cases where municipalities are held not to be liable for the negligent acts of policemen, drivers of fire-carts, etc. See a collection of these in 4 Lewis Am. and Eng. Corp. Cas. 648; *Knight v. City*, 15 W. N. C. 307; *Freeman v. City*, 7 id. 45; *Elliott v. City*, 7 Phila. 128; 75 Penn. St. 347. But all of these cases were those where the public itself was doing a public duty, for the benefit of the public itself. In every instance the principal was either a municipality, whose officers were elected by the people, or the government itself. *Galvin v. Rhode Island Hospital*, 12 R. I. 411.

H. La Barre Jayne, Arthur Biddle and George W. Biddle, for defendants in error. The Insurance Patrol being a corporation created by the legislature, not for profit or private emolument, but for the purpose of performing certain public functions delegated to it by the sovereign power of the State, is a public agent of the general government, and consequently not liable for the malfeasance or negligence of employees selected by it, but who are in reality public employees or servants of the Commonwealth. It has always been held that auxiliaries or functionaries of the general government are not liable for malfeasance or negligence in the performance of public duties, unless they themselves are the tortfeasors or have personally commanded the act to be done which has occasioned the injury; on the ground that the State is the principal and the functionary merely the servant. For, as is stated in *Story Agency*, § 313: "No action will ordinarily lie against an agent for misfeasance or for the negligence of those whom he has retained for the service of his principal by his consent or authority, any more than it will lie against a servant who hires laborers for his master at his request for their acts; unless, indeed, in either case the particular acts which occasion the damage are done by the orders or directions of such agent or servant. The action, under other circumstances, must be brought either against the principal or against the immediate actors in the wrong." In other words, the liability of a servant of the public, is not greater than that of the servant of any other principal; though the recovery against the principal, the public, cannot be by action. See *Lane v. Cotton*, 11 Ld. Raym. (1701), 646; *Whitefield v. Lord Le Despenser*, Cowp. 754; *Nicholson v. Mouncey*, 15 East, 384; *Schroyer v. Lynch*, 8 Watts, 453; *Alcorn v. Philadelphia*, 44 Penn. St. 448; *Elliott v. Philadelphia*, 75 id. 347; *Patterson v. Reform School*, 92 id. 229; *Dunlop v. Moore*, 7 Cranch, 242; *Maximilian v. Mayor*, 62 N. Y. 160; *Fosole v. Alexandria*, 3 Pet. 409; *Knight v. Philadelphia*, 15 W. N. C. (1884), 307. Now the public function of preserving property from the flames in the county of Philadelphia has been legally delegated by the State, in part, to the corporation of this city, and in part to the Fire Insurance Patrol. Therefore, the patrol, being an auxiliary corporation to the city, created by the legislature, not for profit or private emolument, but for the purpose of performing the public function of protecting life and property at fires, delegated to it by the sovereign power of the State, is like the city in this respect, a public

agent of the general government, and consequently not liable for the malfeasance or negligence of employees selected by it, but who are in reality public employees or servants of the Commonwealth; for it has repeatedly been held in this State and elsewhere that the duty of extinguishing fires and saving property therefrom is a public duty, and the agent to whom such authority is delegated is a public agent and not liable for the negligence of its employees. This principle was finally affirmed after a long series of cases in the lower courts, by the supreme court in *Knight v. Philadelphia*, 15 W. N. C. 307. See, also, *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; *O'Meara v. New York*, 1 Daly, 425; *Howard v. San Francisco*, 51 Cal. 52. So it has been held that a city is not liable for injury caused by sparks emitted from a fire engine. *Hayes v. Oshkosh*, 33 Wis. 314, where the same principle has been decided. Nor for the defectiveness or insufficiency of the machinery used in extinguishing fires. *McKenna v. St. Louis*, 6 Mo. App. 320; *Wheeler v. Cincinnati*, 19 Ohio, 19. Nor for the failure in the city councils to provide a reasonable water supply for the purpose of extinguishing the flames. *Brinkmeyer v. Evansville*, 29 Ind. 187; *Grant v. Erie*, 69 Penn. St. 420. The performance of public duties may be delegated —

To municipal corporations.—As in the following cases, in which it was held that such corporation, empowered by the legislature to establish fire departments, are agents of the State, and not liable for the malfeasance or negligence of employees selected by them to perform public duties as firemen. *Knight v. Philadelphia*, 15 W. N. C. 307; *Freeman v. Philadelphia*, 7 id. 45; *McKenna v. St. Louis*, 6 Mo. App. 320; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Wheeler v. Cincinnati*, 19 Ohio, 19; *Hafford v. New Bedford*, 16 Gray, 297; *Jewett v. New Haven*, 38 Conn. 373; *O'Meara v. New York*, 1 Daly, 425; *Howard v. San Francisco*, 51 Cal. 52.

To quasi corporations, like counties.—As in *Sherbourne v. Yuba Co.*, 21 Cal. 113, where it was held that a quasi corporation, like a county, is not liable in damages to one, who, while an inmate of the county hospital, sustained injuries through the unskillful treatment of the resident physician or through the failure on the part of the officers of the hospital to supply sufficient and wholesome food.

To such institutions as houses of refuge. — As in *Patterson v. Pennsylvania Reform School*, 92 Penn. St. 229, in which the court held that the buildings were not the subject of a mechanic's lien or levy.

To several persons aggregately not a corporation. — As in *Whitefield v. Lord LeDespenser*, 1 Ld. Raym. 646, where two persons filled the duties of postmaster-general, and were decided not to be liable for the acts of their subordinates, who were also public servants.

To single individuals. — As postmasters, *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitefield v. LeDespenser*, Cowper, 754; *Schroyer v. Lynch*, 8 Watts, 453; or captains of naval vessels, *Nicholson v. Mounsey*, 15 East, 384; *Dunlop v. Moore*, 7 Cranch, 242, etc., etc. In all which cases the superior public officer was held not liable for the malfeasance or torts of his subordinates in office. On page 16 of the plaintiffs' brief it is further objected that the above exemption from the rule of

respondent superior does not apply to one who is a mere volunteer. But the city of Philadelphia is in this instance a mere volunteer, and this court decided this very point adversely to the plaintiffs' view. *Knight v. Philadelphia*, 15 W. N. C. 301. So in *Jewett v. New Haven*, 38 Conn. 379, the same rule as to volunteers is reiterated. It is also immaterial that the patrol be not established in all the towns in the State. *Id.* Or that the act was special. *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; *Wheeler v. Cincinnati*, 19 Ohio, 19. The patrol is a public charitable corporation. For, possessing the public duty delegated to it by the State, of saving life and property from the flames, and further possessing "full power" to enter any building threatened by the flames, it is a public corporation armed with high police powers; and performing the duties for the benefit of the public, and there being no provision in any part of the charter for the acquisition of private advantage or emolument, it is a charitable corporation. *Magill v. Brown*, Bright. 346, 380, 381, 406; *Thomas v. Ellmaker*, 3 Penn. L. J. 189; *Humane Co.'s Appeal*, 88 Penn. St. 389; *Riddell v. Harmony*, 8 Phila. 313; *Com. v. Hibernia*, 1 W. N. C. 187; *Borough v. Perseverance Co.*, 81 Penn. St. 445. The patrol being then a public charity, there are, therefore, no funds existing that can be legally appropriated to pay a judgment obtained in a case like the present. And entirely apart from any connection with the Commonwealth, no institution of purely public charity, possessed of no funds save such as are given it by donors for ascertained and specific purposes, can ever appropriate those moneys, or any part of them, in satisfaction of the liability of its managers or servants for torts. The funds for the support of all public charities are derived from the donors for the specific purpose of carrying out the objects of the charity, and all donations are clothed with a trust for these purposes which could be asserted at the suit either of the donors themselves, or of the attorney-general. It is obvious that an unincorporated association of people, using money contributed to them for a specific charity, could not, if a tort was committed by one of their agents, appropriate the trust funds in case of a judgment obtained against them, or any of them, by reason of the tort. A public charity, whether incorporated or unincorporated, is nothing but a trustee in the same position. This principle has been recognized since the reign of Edward V in England, and in this country, with, as far as we are aware, no dissentient case but one in Rhode Island. In the Year Book, First Edward V, 10 B., p. 4 See, further, *Russell v. Men of Devon*, 2 T. R. 672; *Feoffees of Heriot's Hospital v. Ross*, 12 C. & F. 506; *Riddle v. Proprietors of Locks*, 7 Mass. 187; *McDonald v. Mass. Gen'l Hospital*, 120 id. 432; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402; *Mitchell v. City*, 52 id. 118; *Richmond v. Long's Adm'r*, 17 Gratt. 375; *Ogg v. City*, 35 Iowa, 495; *Murtaugh v. St. Louis*, 44 Mo. 479; *Patterson v. Pennsylvania Reform School*, 92 Penn. St. 229; *Erie v. Schwingle*, 22 id. 384; *Commissioners v. Mighels*, 7 Ohio, 109; *Boalt v. Commissioners*, 18 id. 16; *Maximilian v. Mayor*, 62 N. Y. 160.

CLARK, J. The Insurance Patrol of the city of Philadelphia is a company incorporated by special act of the legislature of this State — P. L. 1871, 59; the object of the corporation, as declared in its charter, is “to protect and save life and property in or contiguous to burning buildings, and to remove and take charge of such property, or any part thereof, when necessary.”

On May 3, 1883, a fire occurred in the roof of the store of Coon Brothers & Co., No. 29 South Front street, in the city of Philadelphia. In order to protect the property therein from injury by water, tarpaulins were spread by the patrol upon the upper floor of the building. On sixth May, following, Andrew C. Koockogey and James A. Hutchinson, two of the employees of the patrol, came to remove the tarpaulins, which had remained there from the time of the fire. They backed a wagon to the curb to receive them; Koockogey stood upon the sidewalk, whilst Hutchinson pitched the tarpaulins from the window to the pavement below. One of the bundles in its descent struck Mr. Charles A. Boyd, who was at the time passing on the sidewalk, injured his spine, and from the effects of the injury he in a few days died.

It is alleged that the employees of the Insurance Patrol were negligent in the discharge of their duty; that, through their negligence, Mr. Boyd lost his life, and this suit is brought by his widow and child, not only against the employees of the Insurance Patrol, but against the patrol itself, to recover the damages which they have sustained in the death of a husband and father.

At the close of the plaintiff's case, the court entered a nonsuit as to Koockogey, and also as to the Insurance Patrol, and the jury returned a verdict in \$25,000 against Hutchinson alone. The errors assigned are to the refusal of the court to take off the nonsuit as to each of the two defendants named.

The court was right, we think, in refusing the motion as to Koockogey. He and Hutchinson, it is true, came together to remove the tarpaulins from the fourth story of the store, and it was doubtless the duty of each in so doing to exercise due diligence and care for the safety of those passing, but, unless their negligence was joint or concurrent, each was liable for his own negligence only. Koockogey was the driver — he stood at the horse's head during the entire transaction — and, although they may have together determined to throw the bundles out of the window upon the pavement, he had no reason to suppose that Hutchinson would recklessly throw the bundles upon the heads of the passers-by. There is no evidence that Koockogey was stationed below to give notice, or that they divided the dangers between them. The case is, in this respect, similar to *McCullough v. Shoneman*, 14 W. N. C. 397, and is governed by it.

It is contended, in the first place, that the Insurance Patrol is a corporation created, not for profit or private emolument, but for the exercise of a certain public function delegated to it by the State; and, in the second place, that it is, at all events, a public charitable corporation, having no fund appropriated for payment of injuries resulting from

negligence of its employees, and that for both, or either of these reasons, upon the grounds of public policy, the patrol is exempt from the rule of *respondet superior*.

It has been repeatedly decided that, as a general rule, a municipality, in the performance of certain public functions, delegated to it by the sovereignty of the State, is an agent of the government, and is not liable for the malfeasance or negligence of its officers or employees. The officers of the municipality have been held to be *quasi* civil officers of the government, although appointed by the corporation; they are themselves personally liable for their malfeasance or non-feasance in office, but for neither is the corporation responsible. The corporation appoints them to office, but does not in that act sanction their official delinquencies, or render itself liable for their official misconduct. *Prother v. City of Lexington*, 13 B. Monr. 559. In order to charge a municipal corporation for negligence in the performance of a public work, the law must have imposed a duty on it, so as to make that neglect culpable. *Elliott v. Philadelphia*, 75 Penn. St. 347; S. C., 15 Am. Rep. 591. Thus, the municipality is charged with the grading and repair of the highways, and the negligence of the officers of the municipality, in this respect, may be visited upon the municipality itself; but, unless a duty has been thus imposed, the corporation cannot be held.

Therefore in *Alcorn v. Philadelphia*, 44 Penn. St. 348, it was held that the city was not responsible for the negligence of a district surveyor, in locating the line of certain lots, by reason of which a lot-holder was compelled to rebuild his house; in *Elliott v. Philadelphia*, 75 Penn. St. 347; S. C., 15 Am. Rep. 591, it was held that the city was not responsible for the negligence of the police; and in *Knight v. Philadelphia*, 15 W. N. C. 307, that the city was not liable for injuries caused by the negligent driving of a fire engine by an employee of the fire department. The same doctrine is declared in the courts of other States. *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. City of Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196; *Jewett v. New Haven*, 38 Conn. 373; *City of Chicago v. Turner*, 80 Ill. 419; *Howard v. City of San Francisco*, 51 Cal. 52, etc.

It is true also, as a general rule, that a public officer is not liable for the negligence of his official subordinates, unless he commanded the negligent act to be done. *Schoyer v. Lynch*, 8 Watts, 453. The rule is founded in considerations of public policy — *Sawyer v. Corse*, 17 Gratt. 230 — has been long recognized and is one of general application. "The distinction generally turns upon the question, whether the persons employed are his servants, employed voluntarily or privately, paid by him, and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is that of a public officer or a private servant?" In the former case the official superior is not liable for the inferior's acts, in the latter he is. Am. Lead. Cas. 641. A subordinate officer when he is an independent officer, must stand or fall by himself; and to him, unless otherwise provided by statute, the maxim *respondet superior* does not apply. Whart. Neg. 289.

The same rule, it is argued, must be extended to the case of persons acting in the capacity of public agents, engaged in the service of the public, and acting solely for the public benefit; though not strictly filling the character of officers or agents of the government; and also, to public charitable institutions having no fund appropriated to the payment of such damages. The following cases, with others, are relied upon as supporting this view of the law. *Russell v. Men of Devon*, 2 T. R. 672-3; *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 506; *Riddle v. Proprietors, etc.*, 7 Mass. 187; *McDonald v. General Hospital*, 120 id. 432; S. C. 21 Am. Rep. 529.

To what extent this rule of exemption may be applied has not been definitely decided in this State; indeed, the precise question has not been considered in any of the cases to which our attention has been called, and there is an apparent conflict in the cases in England, and between the courts of the several States.

Upon this assumption, as to the law, however, it is contended that the Insurance Patrol, whether regarded as a public agent auxiliary to the city of Philadelphia, or to the government, or as a public charitable institution, is not liable for the malfeasance or negligence of its employees.

But the Fire Insurance Patrol is of course neither a municipal corporation, nor a public officer, nor can we say with certainty from the charter alone, that it is a public agent, auxiliary to the city government of Philadelphia, or to its fire department, or that it is even a public charitable institution. It will be observed that there is no proof whatever as to whether or not, the Insurance Patrol has any working capital; whether any, and if any what, incomes or sources of revenue it may have, as means of conducting its business, or as to the manner in which its business is, or has been conducted, whether as a general or public charity or otherwise; the only evidence on the subject is the charter, under which it is authorized to act. There is, it is true, no provision in the charter for capital stock, for dividends of profits, or for rates of charge. On the other hand the charter contains no express provision that the corporation is to be conducted wholly in the public interest or as a public charity; it is not stated that it will be supported by voluntary contribution, or by appropriation from the State or the city, or that its services will be gratuitously rendered.

In a trading corporation the amount of the capital stock and the number of the shares are sometimes fixed by the charter, with special reference to the purposes of the grant; and a sound policy to prevent monopolies and to confine the action of companies in proper bounds would suggest this should always be done. But when the capital is not restricted, and the number of shares is not defined, in the charter, these matters will depend upon the subsequent agreement of the incorporators, who may in their "rules, regulations and by-laws, for the well ordering of the business and affairs of the corporation," determine not only the amount necessary to conduct the business, and adjust the number and value of the shares, as they may deem best for their own convenience and interests, but also the rates of charge and the method of dividing the profits. The operation of a society for the protection

of life and property at fires might perhaps be regarded as exercising a public function. Such a society would certainly be the proper object of a gift for charitable uses. For as this court said in *Price v. Maxwell*, 28 Penn. St. 35, adopting the language of the late Horace Binney, whatever is given for the love of God, or for the love of your neighbor, in the Catholic and universal sense — given from these motives and to these ends — free from the stain or taint of every consideration that is personal, private or selfish, is a gift for charitable uses, according to that religion from which the law of charitable uses has been derived.

But that which is the purpose of a public charity may be the distinctive purpose of a trading corporation, out of which it is proposed to realize profits; it is not the object alone of a corporation which makes it charitable within the meaning of the law, it is the mode in which that object is sought to be attained, as well as the purpose for which it is pursued. A private corporation exercising a public function, or engaged in charitable work for private gain, can certainly in no sense be characterized either as a public agent or as a public charitable institution.

On the other hand a voluntary association of individuals who have constituted funds for a purely public purpose will be regarded as a charity. *Thomas v. Ellmaker*, 1 Pars. 98. Thus in *Humans Fire Company's Appeal*, 88 Penn. St. 389, the object of the corporation was the protection of property from fire, but the fact was assumed and the case considered upon the ground that the company was in fact not a trading corporation designed to make money for its shareholders, but a charity incorporated as a public benefaction; it was, therefore, held that the assets were held in trust for the public, and were not distributed among the members at dissolution. So in *Bethlehem Bor. v. Perseverance Fire Co.*, 81 Penn. St. 445, the charter declared the object of the corporation to be "the protection of the property of our fellow citizens from fire," but the proof exhibited the fact that the corporation was conducted as a charity, that its property had been acquired by voluntary subscription, by public entertainments, etc., and it was held that the organization was not for the private gain of its members, and the property in aid of the object was for charitable uses.

The general rule undoubtedly is that a master is liable for the negligence of his servant within the scope of his employment; if the Fire Insurance Patrol is to be exempt from the operation of this general rule of the law, it must exhibit and establish the ground of its exemption. The charter alone is, in our opinion, inadequate for the purpose. If it were shown that, although the charter is silent on the subject, the corporation was in fact conducted as a public charity, that its services were gratuitously rendered to the public for the public good, then the question, which has been so ably discussed in this case, would be raised for our consideration.

If it be true that the Insurance Patrol has been invested with a public function which it exercises for the public good as a public agent, and not for private gain, or if it has been conducted as a public chari-

table institution, the facts should appear in the proofs; and, in order that this, if it be so, may be shown and the question suggested may come properly before us for adjudication, the judgment is reversed and a *procedendo* awarded.

SPERING v. LAUGHLIN & MoMANUS.

October 4, 1886.

MARRIED WOMAN — INTERPLEADER — PROOF — FEME SOLE TRADER — ACT OF 1872 — SERVICES — EVIDENCE.

Where a married woman, who has under the act of 1872 had secured to her her separate earnings, purchases property after her husband has become insolvent, and makes the purchase on the credit of her separate estate, or pays for the property with her separate funds not derived from her husband, if she would, in a feigned issue under the sheriff's interpleader act, successfully prosecute her claim to the property, she must prove her right by evidence free from uncertainty and doubt.

Although the act of 1872 does not confer on a married woman all the privileges of a *feme sole* trader, it, nevertheless, gives her the right to engage in business, and for indebtedness contracted therein gives her creditors the right to sue her without joining her husband in the suit. While it stops short of making her a *feme sole* trader in all respects, it protects her separate earnings and property from liability for the debts of her husband. It does not permit her to buy property for him under cover of her name, nor to fraudulently conceal his property to the injury of his creditors, yet it empowers her to protect her own property against them when not acquired in fraud of their rights.

The fact that a husband assists in managing and conducting the business of the wife carried on in her name, is, on the trial of a feigned issue under the sheriff's interpleader act in which the wife is plaintiff, evidence proper for the jury to consider in determining the good faith of the wife's claim of property; if, however, her separate right to the property be found to exist, his services in conducting her business cannot defeat or destroy her title to the property.

Known integrity and business qualifications of a wife may be recognized as an element in obtaining credit, yet in the absence of separate property of the wife they are insufficient in themselves alone to protect against the creditors of her husband property which she may claim to have purchased.

In civil cases, a fact need not necessarily be proven beyond a reasonable doubt. It may generally be established by preponderating evidence; therefore, were a married woman plaintiff in a feigned issue under the sheriff's interpleader act to try the right to property levied upon as the property of the husband, to show by clear and satisfactory preponderating evidence that she purchased the property in contention on the credit of her separate estate, she would be entitled to recover.*

Error to the court of common pleas, No. 1, of Philadelphia county.

The original action here was a case on a promissory note given by Sperring, upon which judgment, for want of an affidavit of defense, was obtained, and damages were assessed at \$433. Execution was issued and the sheriff levied on certain goods and merchandise, which made up the stock of a dry goods store at the north-west corner of Eleventh and Chestnut streets, Philadelphia, as the property of Sperring. Whereupon Sperring's wife claimed the goods and merchandise as her own property, and demanded a rule for a sheriff's interpleader, which was granted and made absolute; having filed her bond, she then became the plaintiff in a feigned issue, formed by the usual *narr.*, plea and replication to test her claim of ownership in the goods and merchandise.

* See 18 Eng. Rep. 129; 48 Am. Rep. 675; 95 N. Y. 562; 15 Alb. L. J. 444; 10 Abb. N. C. 311.

John I. Rogers, for plaintiff in error. Under the act of 1848, plaintiff having acquired a separate personal estate of the value of \$1,000 by gift from another — not her husband — had a right to invest it in merchandise, buy and sell goods with its proceeds, or on its credit, and add to it the product of her services, and the property thus acquired is absolutely free from liability to her husband's creditors. *Wieman v. Anderson*, 6 Wr. 311; *Rush v. Vought*, 5 P. F. S. 437; *Welsh v. Kline*, 7 id. 428; *Brown v. Pendleton*, 10 id. 419; *Silveus v. Porter*, 24 id. 448; *Seeds v. Kahler*, 26 id. 262; *Siabes v. Bowen*, 10 Norr. 149; *Gibbs Co. v. Goe*, 1 Pennyp. 238. The employment of her husband and the contribution of his services to the common fund does not alter the principle. *Gibbs Co. v. Goe*, 1 Pennyp. 238. *Vide* an array of cases in various States cited in foot note to American Law Record for 1885, pages 130, 353, 470 under the act of April 3, 1872, Purdon, 1010. The act secures to those who claim its privileges the earnings from "property, business, or otherwise," freed from the claim of her husband, or his creditors, the same as if such married woman were a *feme sole*. The second section of the act requires, in order to prevent fraudulent practices, that she must file her petition in court, have it allowed and recorded, as notice to the commercial world, that she is to be trusted, if at all, on her own and not her husband's account. While there was for a long time doubt in the judicial mind that this act permitted her to be sued as a *feme sole* for her business debts, there were no doubts as to the immunity of her stock of goods so purchased, from the grasp of her husband's creditors, for the reason that the common-law presumption, that all goods purchased by the wife were on the credit of her husband, was rebutted by the act of 1872, altering the common law in that respect. But even the doubt alluded to was dissipated by the supreme court in *Bovard v. Kettering*, 100 Penn. St. 181, which held that while the act of 1872 did not confer all the privileges of a *feme sole* trader, it certainly did give her the right to embark in business and rendered her liable to be sued — without joining her husband — by her creditors for indebtedness in said business.

J. M. Pile, for defendants in error. Much reliance is placed upon the fact that the purchases were made by the wife, and the bills made out in her name; but this, as had been said again and again by this court, does not change the result. What a wife, during coverture, acquires as the result of her skill and industry, or on her merely personal credit, accrues to the husband, and as to creditors, it is to be taken as his. *Raybold v. Raybold*, 8 Harr. 308; *Bucher v. Neam*, 68 Penn. St. 421. Her credit is nothing in the eyes of the law; when she contracts, the law esteems her the agent of her husband. *Heugh v. Jones*, 32 Penn. St. 432; *Hallowell v. Horter*, 35 id. 375; *Gault v. Duffin*, 44 id. 307. If the wife have a separate estate commensurate with the value of the property purchased, she must show that that separate estate was the basis of the credit, and not the subject of the purchase. *Lockman v. Brobst*, 16 W. N. C. 134. If she receive a gift from a friend with which to purchase property, and afterward the gift is repaid by a mortgage of the property purchased, she cannot reclaim it against her husband's creditors. *Pier v. Siegel*, 15 W. N. C. 480.

MERCUR, Ch. J. This was a feigned issue to try the right of the plaintiff to certain personal property levied on by virtue of execution against her husband. The learned judge held the evidence of her ownership, as against the creditors of her husband, was insufficient to submit to the jury, and gave them binding instructions to find for the defendants. Inasmuch as the plaintiff purchased the property during her coverture, and after her husband became insolvent, she must prove by evidence, not uncertain or doubtful, but clear and satisfactory, that she bought it on the credit of her separate estate, or paid for it with her own separate funds not derived from her husband. The question, therefore, now is, was the evidence of such a certain and positive character that it should have been submitted to the jury to find whether she bought it under such circumstances as in law to give her a good title thereto against the creditors of her husband?

The witnesses on the part of the plaintiff testified substantially, that she had been employed for many years as a clerk in a store carried on by her husband and his father as copartners. In payment of her services, and as gifts from his father from time to time during sixteen years previous to the spring of 1880, she had accumulated about \$1,000. Some of this she had invested in building associations, and the residue otherwise. In March, 1881, she presented her petition to the court of common pleas of said county under the act of April 3, 1872, entitled "An act securing to married women their separate earnings." It was ordered to be filed on the day of its presentation, and on the following day was duly recorded in the office of the recorder of deeds of said county. Such record the act declares shall be conclusive evidence of her right to her separate earnings, whether the same be "as wages for labor, salary, property, business, or otherwise," and shall accrue to and inure to her separate benefit and use, and be under her control independently of her husband, so as not to be subject to any legal claim of her husband, or to the claim of any of his creditors, the same as if she were a *feme sole*. Some two months after this record was made, with the avails of her property and on the credit which she had, she purchased some goods, and established a small store, which she carried on for more than a year and a half. Her stock of merchandise in January, 1883, was worth about \$2,500, but she was indebted thereon some \$1,500. She then purchased of Ridgway his stock of goods, good-will and fixtures in consideration of \$14,000 to be paid therefor. She borrowed and paid down \$1,000, and gave her judgment note for the residue, payable in sums of \$1,000 each, weekly. She transferred the merchandise from the former store to the one which she acquired from Ridgway. Very soon after her last purchase the stock of merchandise was levied on as the property of her husband. Her claim of ownership in the property led to the formation and trial of this issue.

The present contention is whether all the evidence of the plaintiff, if believed, is sufficient in law to justify a verdict in her favor? It is true *Bovard v. Kettering*, 101 Penn. St. 181, decides that the act of 1872 does not confer on a married woman all the privileges of a *feme sole* trader, yet the act does give her the right to engage in business, and for indebtedness contracted therein gives her creditors the right to sue her

without joining her husband in the suit. While it stops short of making her a *feme sole* trader in all respects, it protects her separate earnings and property from liability for the debts of her husband. It does not permit her to buy property for him under cover of her name, nor to fraudulently conceal his property to the injury of his creditors; yet it empowers her to protect her own property against them when not acquired in fraud of their rights. The fact that the husband assists in managing and conducting the business of the wife, carried on in her name, is evidence proper for the jury to consider in determining the good faith of the wife's claim of property. If, however, her separate right to the property be found to exist, his services in conducting her business cannot defeat or destroy her title to the property. A husband may not only act as agent for his wife, but he has the legal right to give his wife his labor and skill in conducting her business, and his creditors cannot sell her property, produced by his labor and skill with her original property. *Seeds v. Kahler*, 76 Penn. St. 262; *Gibbs & Sterrett Manuf'g Co. v. Goe*, 1 Pennyp. 238. When a wife buys on credit, the burden of proof is on her to show that she bought on the credit of her separate estate. *Silveus' Ex'rs v. Porter*, 74 Penn. St. 448; *Seeds v. Kahler*, *supra*; *Sixbee v. Bowen*, 91 Penn. St. 149. If, however, she is shown to own separate estate, it is a question of fact for the jury whether she bought on the credit thereof. If she did so buy, her title thereto cannot be impeached by the creditors of her husband, by proving her subsequent inability to pay according to her contract. That is a matter between her and her vendor. Disappointed expectations alone will not change the legal effect of the purchase. Known integrity and business qualifications of a wife may be recognized as an element in obtaining credit, yet, in the absence of separate property of the wife, they are insufficient, in themselves alone, to protect against the creditors of her husband the property which she has purchased. *Leinbach v. Templin*, 15 W. N. C. 17.

Prior to the plaintiff's purchase of Ridgway, her separate property in the stock of goods held in her name does not appear to have been questioned. She had some money with which she started the business, and in her own name continued to buy and sell goods for a considerable length of time. The fact that she owed for some of those goods did not destroy her title thereto. Under the evidence, it cannot be held as matter of law that her title to that stock of goods could be overthrown by the creditors of her husband. With that stock on hand, and the \$1,000 which she borrowed in her own name and on her own credit, she bought of Ridgway. She did not obtain the money on the credit of herself and her husband; nor did he at any time or in any manner agree to pay the same, as the husband did in *Pier v. Siegel*, 15 W. N. C. 480, where the wife had no separate estate. In view of the property which she held in her own name, there is no legal presumption that she bought on the sole credit of the money which she borrowed.

The case of *Leinbach v. Templin*, *supra*, is urged as sustaining the court below in affirming the first point submitted by the defendant. There, however, it was admitted that the wife had no separate estate. She purchased on her personal credit only. The court below was reversed

rather on the unquestioned facts than the omission to affirm the precise words of the point.

In civil cases a fact need not necessarily be proved beyond a reasonable doubt. It may generally be established by preponderating evidence. So here, if the plaintiff show, by clear and satisfactory preponderating evidence, that she purchased the property in contention on the credit of her separate estate, the creditors of her husband had no right to levy on it by virtue of an execution against him.

The learned judge erred in taking the case from the jury. It should have been submitted to them under proper instructions. Judgment reversed, and a *venire facias de novo* awarded.

NEW JERSEY COURT OF CHANCERY.

THE STATE v. THE SOCIETY FOR THE ESTABLISHING OF USEFUL MANUFACTURES.

TAXATION — CORPORATIONS — FRANCHISE.

The act of 1868 giving to "The Society for the Establishing of Useful Manufactures" the right and power to extend its operations by condemning other lands, etc., did not change the character or attributes of the society, and it is, therefore, exempt from taxation under the law of 1884.

W. J. Johnson, for State. J. D. Bedle, for respondent.

BIRD, V. C. This being a public matter and demanding the first attention of the courts, it is proper that I should say it was not presented to the court until August third, when it was heard, although in the midst of the summer vacation.

In 1884, the legislature passed a law providing for the imposition of State taxes upon certain corporations, and for the collection thereof. Different corporations are enumerated and classified, and the imposition to be made is fixed. There is added: "All other corporations incorporated under the laws of this State, and not hereinbefore provided for, shall pay a yearly license fee or tax of one-tenth of one per centum on the amount of the capital stock of such corporations; *provided* that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations, or manufacturing companies or mining companies carrying on business in this State." The State imposed a tax on the respondent, which is resisted on two principal grounds, because it is exempt by charter, because it is a manufacturing corporation doing business in this State." This resistance seems to be fully sustained by the several decisions of the supreme court when this same corporation was asking to be relieved from similar burdens. See *State v. Flavell et al.*, 4 Zab. 370; *State v. Powers*, id. 400; *State v. Blundell*, id. 402; *State v. Powers*, id. 406. See, also, 3 Stew. 145, note.

However the State claims that these decisions are no longer of force, for the reason that in 1868, the legislature extended to the corporation the right and power to extend its operations by condemning other lands, and raising their dams, etc. There is no change in the character or attributes of the corporation by this act. The purpose is the same as before. It is like a railroad or canal company procuring a charter to lengthen its line. Yet the insistence upon the part of the State is that this is a *new* franchise, and not being exempted, it is necessarily subject to the assessment imposed under the law of 1884. By no method can I come to this conclusion.

I think the order to show cause why an injunction should not issue restraining said corporation from doing business should be discharged, and the petition dismissed. I will so advise.

SPRAGUE v. DREW.

MORTGAGE—PRIORITY OF LIEN—LATENT EQUITY.

The lien of a mortgage in the hands of an assignee thereof, who has taken the same without notice of an unrecorded lien upon the premises for the purchase-price thereof, is prior to the latent equity, notwithstanding his assignor, the mortgagee, had knowledge of the lien, and a large part of the consideration for the assignment was an existing indebtedness.

On bill for relief. The opinion states the case.

Martin & Conklin, for complainant. *Kendall & Blarcum*, for defendants.

BIRD, V. C. This bill is filed to determine whether Mr. and Mrs. Sprague, two aged people, conveyed all their real estate, and assigned all their personal, to their daughter, Mary J. Drew, upon condition that she should discharge a mortgage on the land of \$1,000, and should pay the other outstanding obligations of Mr. S., and should allow a daughter to have her home on the premises during the life-time of the parents, and should keep and maintain the parents during the rest of their lives, and, at their death, should decently bury them, and should pay to the children of Mrs. S. the sum of \$3,000; or whether the said lands were conveyed, and the said personal property assigned, upon all of said conditions being kept and performed by Mary J. D., except the last one, *i. e.*, the payment of the said \$3,000.

The parents being dead, the contest is between all of the children, except Mary J. D. and the brother, Joshua, on the one hand, and Mary J. D. and Joshua on the other.

What was the transaction between the parents and the daughter? There is nothing in writing except the deed for the land and two unexecuted bonds and a mortgage. The deed was executed by the parents; but the bonds and mortgage, which purport to have been drawn for Mary J. D. and her husband to execute, are not signed. The parents being dead, the only other persons who knew any thing about the transaction, from being present or from participation therein, are Mary J. D. and her brother Josiah. Parol testimony must be relied upon chiefly. The unexecuted papers throw some light on the question.

Although the burden is on the complainants, yet the natural order of investigation will be to ascertain, as far as possible, what took place between the parents and Mary J. D. from those who were present at the time they came to an understanding. This leads me to note what Mary says in her answer and testimony. In her answer she says her father sent for her, and spoke of the age of himself and wife, and said unless they got help he would be without means of burial, and proposed to convey to her his land, and all goods and chattels, upon the condition that Mary would agree to assume and pay a bond and mortgage on said lands of \$1,000, and pay the other debts against said Samuel, and put the dwelling-house in comfortable repair, and support and maintain her said parents during their lives, and suitably bury them, and allow their daughter, Susan, to have a home in said dwell-

ing, and keep a cow on said lands, so long as she remained single. In her testimony these things are substantially repeated. But she says that her father told her that he had offered the farm to his son, Josiah, but that he had refused to take it. Josiah had the deed prepared for the farm, had his parents execute it, and delivered it to his sister, Mary.

But Mary goes somewhat further in her testimony; she admits that she said she took the farm for \$4,000, but qualifies the force of this by saying that there was \$1,000 mortgage upon it, and that the \$3,000 was to go to the support of her parents, and added, "and that was little enough, too." She says that her mother handed her some papers during the last year of her life—which must have been during 1878, and about one year after the date of the deed—and said to her: "Take these notes and these papers and lay them away." The bonds and mortgage referred to were among the papers. Mary says that she turned them over, and saw the bonds, but did not read them—adding: "I did not read them till after her death; then I got them out and read them." She admits saying "they hadn't been signed, and should be laid away." Afterward she produced her deed, and these bonds and mortgage, and showed them to her sister, Mrs. V.

As stated, the only other person who had any personal knowledge of the transaction was the son Josiah. He was called as a witness by Mary. He says that Capt. Van Blarcum—an able and experienced lawyer—drew the deed. He says that his father told him "to have the deed made out for Mary, if I didn't want the farm; he offered it to me if I could take it at \$4,000, and take care of them, and pay his liabilities; he said it was worth \$4,000, after taking care of them and paying his liabilities; he said Mary would take it, if I didn't want it." At the request of his father, he at once had the deed prepared to Mary, had it executed and acknowledged, and delivered it to Mary, who requested him to have it recorded. Josiah had also the bonds and mortgage prepared. He says that they were prepared after the deed was executed, and adds that his parents did not know that he had them written, and says: "I had them a few days, and then gave them to mother, and she said she didn't want them signed, she said by the time they got the debts paid, and then taken care of it would be enough for them to pay." Upon cross-examination, Josiah said that his father told him that Mary was to have it for the same that it had been offered to him—Josiah.

In the next place I will present what the witnesses called by the complainants say, that Mary told them about the transaction, and what she did with reference to a settlement, which, it is urged, she would not have said and done, had not the complainants' view of the case been the true one. Mr. W. heard Mary ask his wife—a sister to Mary—to come to her house February 14, 1884, and tell her that there were \$3,000 to be divided amongst the children, but that her husband had an account to bring it down to \$864 for keeping the old folks. He also says, that on the 14th February, 1884, at such meeting these bonds were claimed, but that Mary said they were not signed, and refused to produce them; and that Mary's husband claimed that he had taken care of the old people, and would have pay for it. This witness says,

that Mary told him a few days afterward that the bonds and mortgage were to be signed, but that it had been neglected, and that after they had put the second mortgage on the place, her mother said she need not sign them. He also says that at the meeting February 14, 1884, the husband of Mary made a statement of his claim in which he charged himself with rent for the farm, and charged the old people with board, and had a balance due the heirs at law of \$864. This is the same account which Mary spoke of, and it was on this occasion presented and insisted on by her husband, in the presence of Mary. Why any charge for board, or any credit for rent, if the understanding was that Mary was to have the farm for the promise of boarding her parents, and paying their debts, and making repairs?

In 1878, the next year after the deed was delivered, Mary told Mrs. W., another sister, that she had agreed to give \$4,000 for the farm, to pay the \$1,000 mortgage, "keep the old folks," and "after their death pay the heirs \$3,000," and that she added, "there were papers to that effect." Mary told the same witness after the death of their father, "that she would stay on the place and would be able to keep it, if they didn't all call on her at once." Just prior to February 14, 1884, the witness said to Mary: "If you have papers to show that the heirs are not entitled to any thing, why don't you produce them, and that will settle it, and Mary said I haven't any, and don't want any. I want the heirs to have what is coming to them."

Mr. Welsh, a carpenter, who was in the employ of Drew after he took possession of the farm, says that while there at work, Mrs. D. told him that she was to give \$3,000, and keep her parents their life-time, and that she was to assume the debts, and pay the \$3,000 to the heirs.

W. H. S., one of the complainants, says that his sister Mary said to him in the spring of 1877, that she was to pay \$4,000 for the place, pay the debts, keep the old folks, and had given bonds for \$3,000, which was to be divided amongst the heirs; and he says that John S. D. told him the same thing before he took possession of the farm.

Mr. E. S., another complainant, corroborates what Mrs. W. says to the effect that Mary said that she had no papers to show that she was to have the place for taking care of her parents, but that she wanted the heirs to have what was coming to them.

In the spring of 1877, Mary told her sister Susan that she was to have the place for keeping her parents and giving the heirs \$3,000. Susan also says that, on another occasion, she was with her sister Mary, when the latter was searching for an insurance policy, and adds: "I said isn't that it, and she said 'no, that is them bonds,' and I said let me look at them, and then she said, 'not signed yet, but they ought to be and laid out of here; this is not a safe place for them.'"

In the third place, let other and independent facts and concurrent circumstances and events be considered. Many of these go toward sustaining the view expressed by complainants. For example the deed declares that the consideration was \$4,000. It contains full covenants of warranty and seizin, with the exception only of the \$1,000 mortgage, but Mary took the deed with the provision therein that she was to assume and pay off that mortgage as part of the purchase-money. I

am satisfied the true consideration was \$4,000. No part of that sum has been paid, unless the debts, other than the mortgage, were also to be paid as part of the said \$4,000. Mary does not pretend that she has paid any part of it, except the debts. This fact being unquestioned, the heirs, or more strictly speaking, the next of kin, are entitled to the \$3,000; for the deed, it will be observed, makes no provision for the support of the grantor and his wife, nor for the repair of the dwelling, nor for funeral charges. In plain reason then part of the consideration was \$4,000. That must stand uncontrovertibly fixed. If there was any other consideration, it must have been in addition to the \$4,000. I can imagine no ground for supposing that any element entered into the contract to diminish or exhaust the said \$4,000; for if the estimated value of the lands had been \$4,000, and the estimated value of the debts and services, care and maintenance had been \$4,000, every one making any pretensions to a knowledge of the law would have had the real contract expressed in the deed.

But the counsel understood his business. He saw that the deed was absolute on its face, and that Mary had a supreme advantage over her parents, if she chose to exercise her legal rights, should the deed go forth unaccompanied with any paper expressing the conditions upon which Mary took the farm; and hence the same counsel who drew the deed, drew also two bonds and a mortgage on the lands conveyed; the bonds for Mary to sign and the mortgage for both Mary and her husband. One of said bonds was in the penal sum of \$3,750, and the condition was that if Mary should the said Samuel Sprague keep and maintain on the farm and in the dwelling-house conveyed by him to said Mary by deed of even date with said bond, and should provide for him in sickness, and at decease of said Samuel Sprague "well and truly pay the sum of \$1,875 to the then surviving children of the said Samuel Sprague," etc., and in case of failure to perform any of said conditions in the life-time of said Samuel Sprague, should then pay the said \$1,875 to the said Samuel Sprague, then the said bond should be raised, etc. The other bond was to the mother and to secure the payment of \$1,125, but in all other particulars like the one first recited. These papers, taken together with the deed, made the transaction complete, and had they been executed, as no doubt counsel intended, this controversy would have been unknown. There can be no doubt but that it was the express understanding that these bonds and this mortgage were to have been executed. Nor can there be the least doubt but that the deed and the bonds express the agreement between the father and the daughter, Mary, although the bonds were not signed. It is absurd to suppose that the grantor would so completely uncover his head as he did by this deed with full covenants of warranty, unless his old age had brought on imbecility.

One point very different in its character remains. Josiah took a mortgage from Mary and her husband for \$700. This he assigned to the defendant Givens for value. Is this mortgage so held by Givens, prior to the lien of the \$3,000, being so much of the unpaid purchase-money? It certainly would not be prior in the hands of Josiah, for he knew that the purchase-money was not paid. But Givens paid the

\$700 and interest, and was ignorant of the incumbrance in favor of the grantor. This incumbrance or lien, not having been made manifest by any record, in other words, being unknown to Givens, either constructively or actually, it is what is known as a latent equity in favor of the next of kin of the mortgagor's grantor. It is, therefore, not an equity between the mortgagor and mortgagee, which the assignee of the mortgagee would be bound by whether he took with notice or not; but being latent, he is not bound without notice, even though his assignor had full notice.

And purchasing *bona fide*, and paying the consideration in full, even though a large part of the consideration was an existing indebtedness, his title prevails over such latent equitable title. *Traphagan v. Hand*, 9 Stew. 384.

The complainants are entitled to the \$3,000. The defendant Mary J. Drew is liable for this sum to her brothers and sisters according to the terms and condition expressed in the unsigned bonds. This amount, with interest from the date of the death of the intestate, is a lien on the lands conveyed to Mrs. Drew, but subsequent to the liens of the two mortgages given to Martin and the one held by Givens. Givens is entitled to costs from the complainants. The complainants are entitled to costs from the defendants Mary J. Drew and her husband, and from Josiah Sprague. The costs of complainants will also be declared to be a lien on the lands.

OLEINE v. ENGELBRECHT.

ATTORNEY AND CLIENT—FRAUD.

Mr. E., as solicitor, agreed with Mrs. C. to defend certain suits, for which she agreed to give him half of all the property or money that should be recovered; the defense entered failed, and the property was all rescued from Mrs. C. by judgment; Mr. E. procured Mrs. C. to execute and deliver to him a deed for one-half of other property which she owned, without question, representing to her that it was for his compensation under the agreement. *Held*, that such deed is fraudulent and void both in law and in fact.

On bill—answer and proofs.

F. Frambach, Jr., for complainant. *S. Ransone*, for defendant.

BIRD, V. C. The complainant asks to have a deed, which she made and delivered to the defendant for the undivided one-half interest in two lots of land, set aside as fraudulent and void. Although she denies all knowledge of executing the deed, she, no doubt, did so. Her claim is also that fraud and deception was practiced upon her by the defendant. She obtained her title to these lots by devise from Mr. Cox, whom she claimed to have been her husband. Mr. Cox died in 1878, leaving a will devising her these lands, and also leaving other lands. The will was admitted to probate, thus perfecting her title. She claimed that she was entitled to dower as widow in the lands not devised. To dispose of this claim and to free the estate from embarrassment the executor filed a bill against her.

The defendant is an attorney at law and one of the solicitors of this court. Mr. C. employed E., the defendant, to defend the suit brought by the executor. He entered into an agreement in writing with her, that for his services for defending said suit, she should give him "one-

half of all sums of money recovered from the estate of William Cox, deceased, either by suit or compromise," Mrs. C. was in possession of a house and lot — not one of those devised — and an action in ejectment was commenced against her to recover the possession.

An opinion was pronounced in the suit in chancery in the October term, 1884, adverse to Mrs. C., and although it does not appear definitely, yet about that time judgment was recovered against her in the action of ejectment. These events and dates are given for the purpose of adding and connecting therewith the fact that November 17, 1884, a very formal agreement, in writing, was entered into by Mrs. C. and Mr. E. in which it is recited that "there is now a suit or suits at issue and pending," etc., and in consideration of \$1 and of E.'s maintaining and defending said suits or any other which might thereafter be brought, in reference to the rights of Mrs. C., the said Mrs. C. "covenants and agrees to and with the said Anthony Engelbrecht that the said Anthony Engelbrecht shall receive as compensation for said services one-half of the properties or moneys so recovered or received in the said suits." Care was taken to have a master in chancery present to have them acknowledge the execution of this agreement. On the 4th day of the next February, 1885, Mr. E. sent for Mrs. C. to come to his office. There, in the presence of another attorney at law, a long conversation ensued respecting the suits which had been determined against Mrs. C. and respecting the propriety of an appeal. I think both solicitors agree that there was a great deal of intercourse upon that occasion between them and Mrs. C. upon these subjects. They agree that an appeal was not at all advisable. But they say that then and there the deed in question was presented to Mrs. C., that it was read over to her twice and explained to her. It is admitted that the lands described in the deed were never the subject-matter in dispute or litigation, and there is no sort of claim or pretense that they were included, or intended in any sense to be included, within either of said agreements respecting compensation.

Mrs. C. is a woman of ordinary natural capacity, but can neither read nor write, and is extremely ignorant of all matters of business. There is no proof that she ever had the slightest experience or the remotest opportunity of knowing any thing about the titles of real estate. The other solicitor who was present and took the acknowledgment of the deed says that he read the deed to her and explained its contents. It also appears that he had some interest in the suits, for he argued the one on the final hearing before the chancellor, for which he has had no compensation, and avoided answering the question as to compensation in the future, by saying that Mrs. C. was under personal obligations to him.

At the time of the execution and delivery of the deed in February, 1884, the estate of Mrs. Cox was not settled; the accounts of the executor yet not having passed. Mrs. C.'s children were interested in these accounts and she was doing what she could in their behalf. Mr. E. continued to correspond with her respecting the accounts and invited her to come to his office. According to his statements she was there in June, September, and November, and perhaps at other times, but

at the times named he says he spoke to her about his interest in these lands and told her that he intended to file a bill for partition. He says "that at none of these interviews did she deny having executed the deed or in any way question his right to an interest in the land."

Let us go back to the time when the deed was executed. When Mrs. C. went to the office of Mr. E. *the deed was all prepared for execution.* It was prepared by the master who took the acknowledgment and who, as counsel, had argued the cause before the chancellor. It was prepared at the request of Mr. E.; Mrs. C. had not given any directions about it, nor had she been consulted, she had no knowledge of it until it was about to be presented to her for execution. Mrs. C. says that she heard nothing more of it from that day until she learned that she had executed a deed for this property from Mr. Brown who told her that she had and that he had seen the deed, and also told her that she had better employ some good lawyer. I do not think it is at all material to determine whether or not Mr. E. did speak to Mrs. C. at different times before he filed his bill for partition in November, 1885, after which the interview was with Mr. Brown. I say it is not material, because he was still acting as her counsel in respect to the accounts of the executor and she was under the same influence that she is presumed to have been when she executed the deed. And the whole transaction shows that until the filing of the bill for partition, she had unbounded confidence in Mr. E.

But the defense must fall upon the testimony of Mr. E. himself. He says that when the deed was executed, "I explained to her that it was my compensation for services under the agreement." I do not see how he could make such a statement to his client. It certainly was not true in any sense. By the agreement he was to have the one-half of all that was recovered; but nothing was recovered, and the property mentioned in the deed and conveyed thereby was not, by any possibility, involved in the controversy.

I must pronounce that the transaction complained of was not only fraudulent in law but in fact. Mr. E. makes it so plain that he deceived and misled Mrs. C. that every consideration of duty requires me to say so.

Mr. E. is an attorney at law and a solicitor in this court. The courts have given him a certificate of good character, and upon this clients rely, as they have a right to. The courts, then, when called upon, must see to it that the high trust implied is not abused. The courts must meet this responsibility in a becoming spirit of firmness, or share in the odium and dishonor which is sure to follow. The reputation of both bench and bar, before an enlightened world, is so involved that nothing will save it from just reproach but the most rigid scrutiny and most exacting rules.

I will advise a decree declaring that the said deed is void, and that Mr. E. execute to Mrs. C. such a deed as she delivered to him. The complainant is entitled to costs.

SUPREME COURT OF NEW JERSEY.

STATE, EX REL. RANDOLPH, v. WOOD.

December 11, 1886.

CONSTITUTIONAL LAW — MUNICIPAL LAW — ELECTION OF MUNICIPAL OFFICERS.

A law is to be regarded as general, within the provisions of article 4, section 7, part 11 of the Constitution of 1875, when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class.

The practice in this State of employing general titles in public laws regulating municipal government has come to be so established that they ought not on this ground to be held invalid.

The act of February 20, 1883, entitled "An act concerning cities of the third class," and adjusting the terms of office of members of the common council in such cities so that one member shall be elected in each ward each year, is not in violation of the provision of the Constitution requiring legislation concerning municipal government to be by general laws.

On information in nature of *quo warranto*.

Mark Sooy, for relator. *Alfred Flanders*, for respondent.

KNAPP, J. This information, by leave granted to the relator, was filed for the purpose of trying the right of the respondent to hold and exercise the office of member of the common council of the city of Burlington. Like proceedings were instituted against Joseph R. Ivins, J. Frank Rudd, Decatur Abdell and Samuel E. Lippincott, challenging the title of each to a similar office in that city. The several informations were prosecuted upon the same grounds, and each of the respondents pleaded the same matters in vindication of their questioned right. The pleas were demurred to, and the questions presented in the briefs of counsel are upon the constitutionality of two legislative acts set out in the schedule of title presented in respondent's pleas.

The first-mentioned act was passed March 4, 1878, entitled "A further act concerning cities." It enacted that "the common council of any city of less than ten thousand inhabitants, and divided into not less than two nor more than three wards, which may now by law consist of twelve members, shall hereafter consist of thirteen members, who shall be elected an equal number from each ward and one member at large for such city, at the next annual city election therein held after the passage of this act. The member at large shall be an elector and resident of said city, and shall hold his office for the term of two years, and at the expiration thereof, and every two years thereafter, a member at large shall be so elected; the members so elected from each ward shall be electors and residents of their respective wards, and shall, at the first meeting of said common council after their election, divide themselves into two classes by lot, the first class to hold the office for the term of one year, and the second class for the term of two years.

The second was an act entitled "An act concerning cities of the third class," approved February 20, 1883, which provided as follows:

1. That in cities of the third class the terms of office of members of the common council or other legislative body shall be for as many

years as there are councilmen or members of such legislative body from each ward; and that at each annual municipal election after the next succeeding election one member of the common council or other legislative body shall be elected from each ward.

2. That at the next succeeding municipal election the members of the common council or other legislative body shall be elected as heretofore, and at the second meeting of such common council then elected, the members from each ward shall by lot divide themselves into classes, so that the term of office of one member from each ward shall expire in each succeeding year.

The respondents claim to have been regularly elected at a charter election in 1882, and that while in office by such election their several terms were extended by the legislation of 1883.

Since the adoption of the amendments to our State Constitution, in 1875, legislation regulating the internal affairs of towns and counties under the requirements of article 4, section 7, part 2 of the Constitution, must be by general laws,— private, local or special laws for municipal government no longer being within legislative discretion.

The cases in our books in exposition of the constitutional design touching this particular subject have become numerous, and it would seem at this day unnecessary to do more than cite the more important of them. *Van Riper v. Parsons*, 40 N. J. L. 123; *State v. Hanmer*, 13 Vr. 435; *Anderson v. Trenton*, id. 486; *Zeigler v. Gaddis*, 15 id. 363; *Skinner v. Collector*, 13 id. 407; *Coutieri v. New Brunswick*, 15 id. 68.

Disclaiming all intent to further define what is a general law, it will serve the present purpose to say that under these adjudications a law is to be regarded as general when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class.

The act of 1878, gauged by the rules which have heretofore been adopted by our courts as the proper basis of classification, seems to me to have chosen characteristics and incidents as marking a distinct class of too special, restrictive, and *unimportant* a character to give to the enactment the quality of a general law. The law had several purposes; these were to give to the corporations which it provided for, a councilman to be elected *at large* in the city; an election of an equal number of the other councilmen in each of the wards; a division of the members elected in each ward in two classes, one to hold for one year and the other for two years, and thereafter an election of each member for a term of two years. But the law was applicable only in such cities as had less than ten thousand inhabitants, such as were divided into not less than ten nor more than three wards, and which at the passage of the act had by law twelve members of council. A city with these several incidents was permitted to have a thirteenth member, to be elected at large, the others to be chosen equally in wards, to divide in classes and hold a two-year term.

Legislation prescribing the number of members which should compose the common council in cities of less than ten thousand inhabitants, and a different number in larger cities, would be unobjectionable. Representation bearing some proportion to the population would not be unreasonable; so, too, a legislative direction of the number of wards into which cities of different population should be divided would not, as it seems to me, differ materially from the illustration of the number of polling districts used in *Van Riper v. Parsons*.

Plausible reasons could be assigned for established different terms of office in large and small cities, but I cannot perceive any relation between the three combined incidents out of which a class is constituted, and the legislation following upon it. Why should a city of two or three wards, with a given population, have more members in its common council than one with four or five wards? Nor am I able to perceive how this legislation, if a public necessity for small cities, should be limited to those *then* having twelve members of common council and those having a less number or a greater, or thereafter to have twelve, be excluded from its advantages. Under the three conditions which form the basis for the class, Burlington was probably the only one included of the small cities in the State.

But the case does not necessarily turn on this law of 1878. No member of council whose office is sought to be impeached in these proceedings must of necessity rest his title upon that act. We have to consider the effect of the act of February 20, 1883, in connection with legislation prior to the adoption of the constitutional amendments. This legislation of 1883 was applied to "cities of the third class," and extended the term of offices of members of the common council for as many years as there are members from each ward. It provided for so classifying members that the term of one member from each ward should expire in each succeeding year; that at the election then next succeeding the passage of the act the common council should be elected as *therefore*.

Under the charter of the city approved March 4, 1851 and the supplements thereto, one approved March 26, 1863, the other, March 20, 1871, the city of Burlington was entitled to twelve members with a term of office of two years' duration and so classed that the term of one-half the members expired each year.

The plea shows that at the annual charter election in 1882, each of the respondents was elected for the term of two years, Wood and Ivins from the first ward, Budd, Abdill and Lippincott from the second ward, and were duly sworn into office. At the charter election of 1883, three members were chosen in each of the wards to take the places of those whose terms were about to expire. On the 5th of February, 1884, the persons elected in the respective wards divided themselves into classes. This was not at the second meeting of the council held after the election, but that provision of the act is regarded as directory. In such allotment Wood drew a term of four years, Ivins of six years in the first ward, Lippincott two years, Abdill five years and Budd six years, in the second ward.

Now it is clear, that irrespective of the legislation here sought to be

impeached the city was entitled to have twelve members of the council, and to elect six each year for a term of two years.

The principal object of the act of February 20, 1883, was to so adjust the terms of office of members of the common councils in cities affected by it, that one member should be elected in each ward each year.

Several objections are made to this legislation; that the object of the law is not sufficiently expressed in its title; that being a regulation of the internal affairs of cities it is special and local; that if a general law it embraces provisions of a private, special or local character; that it provides that an existing law shall be deemed a part of the act without inserting such law in the act. The title is "An act concerning cities of the third class." It refers to a classification of titles made by the legislature in 1882, and from the title it would be inferred that its object was to effect some general legislation in respect to that class of cities. Now, while a more specific statement of the object of the act might be desirable and more closely in accord with the constitutional provision, yet the practice in this State of employing general titles in public laws regulating municipal government has come to be so established that we ought not on this ground to hold the act invalid. The conclusion in *State v. Town of Union* justifies this result. The second objection, that the law is special and local, rests upon the ground that its operation is limited to cities of the third class, those having a population of less than twelve thousand. No question is raised by this case on the validity of classification of cities upon the basis of population for general purposes of government. The office of the classification act is here simply to designate the cities to which the legislation is intended to apply. The question here is, whether for the purpose of this legislation enlarging the terms of office of councilmen, smallness of population may not be a substantial and sufficiently important ground to distinguish such communities from the great cities of the State. May it not be justly believed by the legislature that in small cities the duties of such office are measurably small, not sufficient of themselves to constitute an employment but rather calculated to interfere with other callings; that these offices in small cities are avoided not sought for by proper men, and that unless the duty which election to public office enforces is imposed for a considerable time, competent and experienced service is not likely to be obtained, and that in this larger cities differ. Frequent selections of men by the electors where public interests to be cared for are meager may justly be regarded as an unnecessary and dispensable public burden. If these or other considerations justify the drawing of some line of demarkation between the larger and smaller aggregations of people, it is for the legislature to say where that line shall be placed. I am not prepared to say that the selection of the smaller municipalities from the whole, as the objects to which this legislation shall apply, is so inappropriate that we may deny to the legislation based upon it the quality of a general law. But it is objected that under the ruling of *Borough of Hightstown v. Glenn*, 18 Vr. 105, the act is specified in excluding from its operation boroughs with similar conditions.

Upon this point it is sufficient to say that the case of *Fitzgerald v. New Brunswick*, 18 Vr. 479, the same case subsequently approved in the court of errors, established the constitutionality of a classification of cities for the purposes of legislation of this character. But it is further claimed that this legislation is wanting in generality even as applied to the cities to which it relates, for the reason that under its operations there may and probably will be non-uniformity in the terms of offices in different wards in different cities or in the same city. But I think these are rather incidents to the operation of the rule adopted which address themselves to the wisdom of the scheme for measuring the term rather than to the constitutionality of the law. The design of the legislature and the scheme adopted, was the election of one member only in each ward at each annual election. In doing this it may be that wards in cities differ in the numbers to be chosen from them and this will necessarily make a difference in the term. But I see no other way in which the principal object of the act, namely, the selection of one in each year, can be accomplished unless the legislature shall go further and declare that a certain number shall be selected from each ward in all such cities embraced in the class. This they may do, but have not done by this law.

Again the act is said to be special, being applicable only in cities having wards. If this objection were valid it does not appear in the case that there are such cities within this class not divided into wards. No such allegation exists in the pleadings and we are not, I think, to assume it, especially since there stands upon the statute book a law antedating the one in question empowering and possibly directing all cities of the State to divide their territory into wards.

The next objection is that the law violates part 4, section 7, article 4 of the Constitution which provides that no general law shall embrace any provision of a private, special or local character. This objection is predicated upon that provision in the act which enacts that at the next succeeding municipal election "members of the common council shall be elected as *heretofore*." This assumes that the elections were held in virtue of the provisions of the before-mentioned act of March 4, 1878. As to this and the other objection based upon the same clause in the act, I think this law can be rejected altogether without affecting this case; therefore, it is unnecessary to discuss these objections; I think it a mistake to suppose that the election of the respondents depends upon any provision in the law of 1878. That law made no change that is important to us in the number of the common council, in the times of election, or in the terms for which they should hold office; all these were legislated for in the charter and its supplements. As to the elections in 1882 and thereafter, they were in accordance with the requirements of the charter in all respects, except that under the charter the common council were elected at large, while these elections were held in wards. But as I think there was clear authority for that in virtue of the provisions of the act of March 22, 1881—Pamph. Law, 175—entitled "An act relating to the division of certain cities in this State into wards," which provided that at the city or charter elections to be held in any city after a division thereof into wards, an equal number of members of

the common council or other governing board or body shall be elected from each of the said wards. This law, as I interpret it, was applicable to and controlled the elections in the city of Burlington.

From these conclusions it would follow that the relators are properly in office if the legislature had power to extend the terms of those who were elected in 1884. The power of the legislature in this respect is not denied or questioned. There should be judgment, therefore, for the respondents.

GARRETT v. STATE.

December 8, 1886.

LICENSE — NUISANCE NOT MAINTAINABLE UNDER.

A license from a county board of health and vital statistics authorizing the licensees to carry on the business of manufacturing fertilizers will not protect the manufacturers from prosecution for maintaining a public nuisance growing out of the business.*

Indictment for nuisance. The opinion states the case.

Babbitt & Lawrence and *Mr. Ryerson*, for plaintiffs in error. *Mr. Winfield*, *contra*.

KNAPP, J. The plaintiffs in error were convicted on trial before the court of sessions of the county of Hudson, of the offense of maintaining a public nuisance in the said county. Their business was that of extracting fats from dead animals, and converting the same into fertilizers. It was established by the finding of the jury that the process of manufacturing, created nauseous and offensive odors to an extent sufficient to create public annoyance. The plaintiffs in error had received a license from the board of health and vital statistics of the county of Hudson to carry on the business of manufacturing fertilizers, and they sought to vindicate their action in virtue of such license. This line of defense was distinctly presented in a request to the court to charge that "If the jury believe the board of health and vital statistics established in the county of Hudson has enacted ordinances on the subject of carrying on the business carried on by the defendants, and under such ordinances has licensed the defendant to carry on the business, this prevents an indictment for nuisance during the continuance of such license." This the court declined to charge, and charged that the fact of the license being granted did not prevent the indictment of the licensees of the board if they created and maintained a public nuisance. To this refusal of the request to charge, and to the charge as made upon that point, exceptions were duly sealed, and errors were assigned thereon. The action of the court thus excepted to, presents the only questions for consideration here. The board, whose licenses the plaintiffs in error set up in their justification, was created by an act of the legislature entitled "An act to provide for a board of health and vital statistics in the county of Hudson, and to prevent the spreading of disease," passed March 27, 1874. Pamph. L. 569. It gave power to the board to enact ordinances in relation to the public health not inconsistent with

* See Wait's Act. & Def. 784; 7 id. 564.

the laws of the State, and to impose a penalty for their violation. By that act, power and authority to grant licenses was not conferred, but by a public act entitled "An act concerning county boards, established for the protection of public health, and the registration of vital facts and statistics in the counties of this State," passed May 5, 1884 — Pamph. L. 282 — such boards were empowered to regulate and control or prohibit the carrying on of all trades and manufactures in said county, obnoxious or offensive to the inhabitants of such county, or any part thereof, and which are attended by noisome or injurious odors — par. 5, § 4 — and to regulate, license and control all dealers in bones, fat and animal offal or refuse whatsoever, also all bone and fat-boiling or grease-making establishments — par. 6, § 4. The plaintiffs in error produced on the trial a license from the county board of health to manufacture fertilizers and materials within Hudson county or Hackensack river, Kearney township, for one year from the 1st day of July, 1884, subject to revocation for cause. This paper lays the foundation of the matters objected to at the trial.

The defendants invoke in their behalf a recognized principle, that a public nuisance must be occasioned by acts done in violation of law and that any business or pursuit which is authorized by law cannot be such nuisance. It is not denied that the legislature have the power to make lawful, so far as the public is concerned, a work or business which by the common law would otherwise be a public nuisance. An instance of the exercise of this power is found in the schedule of powers usually conferred upon the railroad companies, many of which, in their unauthorized exercise, would amount to such public wrong. And it has not been questioned in this case that it is competent for the legislature through its selected agents to determine when, where and in what manner such business may be conducted.

Such legislation, however, being in derogation of the common law must receive strict construction, and the public injury from which one holding such a grant would be protected must be necessary results of the authorized business after the exercise of proper care, skill and diligence, employing careful servants and using processes least likely to produce detriment to the public. If he fails in any of these and unnecessary injury results to the public he becomes liable to indictment. 2 Whart. C. L., § 1424.

In the light of these rules and assuming that the licenses which the plaintiffs in error held were lawful authority for carrying on the business so licensed, is the proposition contained in their requests to charge one that is supportable in law? What he asks the court to declare to the jury as a legal rule for their guidance is that the license of this board to carry on a particular business is, under any and all circumstances, a protection against an indictment for nuisance growing out of such business. It left no room for the consideration of unnecessary or even reckless injury to the public in the mode of manufacture. This is the plain meaning of this request, and had it been put to the jury as asked no matter how willful or extensive the offense to the public may have been, it demanded in virtue of the licenses the acquittal of the plaintiffs in error. The proposition can find no support or countenance

in any legal rule. But on looking into the licenses is there any authority given the plaintiffs in error to create noisome odors and smells and corrupt the air with them to the inconvenience of the public? The authority is, by the licenses, to manufacture fertilizers and materials in a certain locality for one year.

Is it to be assumed that the necessary consequence of such manufacture was to corrupt the air and produce public annoyances? Are we to infer from this grant that either the legislature, or the board acting in their behalf, designed to grant the right under such terms to create what otherwise in law would be a public offense? Such is not its expression, and on every recognized principle in the interpretation of such grants the presumption would be against any such intent. The object of the legislation constituting boards of health and marking out their duties was to prevent nuisances in conservation of the public health. With this purpose as the single object of their creation and sole guide in action it would be novel indeed to find in such words a license to effect a public nuisance. In either of these views the judge was clearly right in refusing to charge as requested. I am also of opinion that the objection to the charge as made is not supportable. It is to be observed that the charge given which was objected to was in answer to the plaintiff's request. The judge had in a former part of the charge clearly defined a public nuisance. He had instructed the jury that the business of manufacturing fertilizers was a lawful business when the manner of its conduct was not hurtful or offensive. He had declared the law in this case to the jury in these words "when a lawful business is conducted in an unlawful manner so that it is injurious and interferes with the rights of those about him, then that offensive method of conducting the business may be abated and the parties guilty of it may be punished by indictment if it has become a public nuisance." The plain deduction from what was said in answer to the request is that no inference was to be drawn from the license which the plaintiffs held, that they were authorized to inflict injury upon the public by their mode of conducting the business and that they were responsible if thereby they created a nuisance to the public. If the language used can be understood as an instruction that these licenses can in no wise impair the common-law right of the public to be protected against unwholesome and noxious odors I would still regard it as a correct exposition of the law.

The purpose which the legislature had in view in creating boards of health was to supply additional means to prevent disease and discomfort, such as might arise from contamination of air, water or food. These means were designed to be auxiliary to existing methods of protection. It was no part of that purpose to legalize or protect any of the sources of such evil.

It is a mistake to ascribe to this legislation a design to grant immunity from the ordinary legal consequences of creating or continuing a public nuisance; such design is not to be found in the causes which gave rise to these enactments, and no words found in the acts express or suggest a power in the several boards of health to license offenses against the public health and comfort. Their powers, large as they are, are granted

solely for the repression not the creation or protection of nuisances. The power to license is given as a means of exercising restraint and control over doubtful pursuits. As to those noxious in nature or becoming so by carelessness the sole power given or designed to be given is to abate and suppress. Business not unlawful in itself may be brought under control by safe and proper regulations touching modes of conducting such business — to avoid offense to the public. But such boards have not been endowed with power to grant away the public right to pure and uncontaminated air.

If it be as the plaintiff in error contends, under a class of laws declared to be enacted for the protection of the public health, power has been conferred upon these local agencies broad enough to punish through the form of a license the establishment, in the midst of our largest cities, of the most dangerous and intolerable nuisances. This cannot be conceded.

The evidence offered at the trial has been brought here with the return to the writ. We cannot look into this, but must assume that the convictions rest upon competent and sufficient evidence.

We think there was no error in the refusal to charge as requested or the charge as given and the judgment should be affirmed.

MICHAELIS v. BOARD OF COMMISSIONERS OF JERSEY CITY.

December 1, 1886.

OFFICE AND OFFICER—JERSEY CITY FIRE DEPARTMENT—TRANSFER WITH LESS PAY.

The transfer of an employee in the Jersey City Fire Department from his position of engineer to that of stoker, which last position is attended with different duties and decreased pay, is invalid under the act — Pamph. L. 1885, p. 180 — regulating the terms of officers and men in fire departments.

Such employee is protected, although he was appointed without filing an application sworn to and having a physician's certificate showing his physical condition, according to the requirements of a rule adopted by a preceding board of fire commissioners.

The prosecutor brings up certain proceedings to remove him from the office or employment as engineer of Engine Company No. 1 to the position of stoker of Engine Company No. 3.

Argued at June term, 1886, before Justices DIXON and REED.

C. H. Voorhis, for prosecutor. *A. L. McDermott*, for defendant.

REED, J. The prosecutor attacks the resolution of the board of fire commissioners of Jersey City, which made the transfer above mentioned. He claims that by the terms of the act of 1885 — Pamph. L. 1885, p. 130 — no power was vested in the board to make the transfer.

This act provides that the officers and men employed by municipal authority in the fire department of any city shall severally hold their respective offices and continue in their respective employments during good behavior, efficiency and residence in said city. It then provides for the removal of such officers or employees for certain causes.

I think that he held his employment as engineer protected by the terms of that act, and any attempt to transfer him without his consent was a removal from office or employment.

The place of stoker was a different position, inferior in dignity, dissimilar in its work and attended with decreased wages. It was, within the meaning of the act, a different employment or office.

The defendants, however, contend that he never held the position of engineer by municipal authority. He was promoted to his position as engineer June 1, 1885. But it is in evidence that there was at that time in existence a rule of the board which reads thus: "No appointment in this department shall be legal until the applicant has filed an application properly sworn to and having a physician's certificate attached thereto showing his physical condition. This rule of the board was adopted in August, 1881, and has never been re-adopted or rescinded since.

Inasmuch as the power to appoint and remove officers was—until the act of 1885—lodged in the board of each year, without any restriction, except such as the board of that year might adopt, no resolution of a board of 1881 could restrict the power of appointment of the board of 1885.

There is no evidence of any action of the board of the last-named year in reference to the resolution. In fact it seems to have been disregarded.

Besides, the rule seems to have prescribed what was to be done by a candidate before he could be considered eligible to be appointed.

It seems to have been a rule which was designed for the convenience of the board, and which it could in its discretion disregard.

Certainly after permitting an appointee to exercise an employment and receive pay for months it can hardly be said that they have not waived the performance of the preparatory steps which the rule contemplates.

If the appointee is physically unfit to perform the duties attached to his employment he is removable under the act of 1885.

The resolution is set aside.

STATE, VAN ALST, v. FIRE COMMISSIONERS OF JERSEY CITY.

December 1, 1886.

The clerk of the board of fire commissioners of Jersey City is an employee, and his position is protected by the act of 1885, page 180.

This writ brings up the proceedings concerning the election of a clerk and the removal of Van Alst from his position of clerk to the board of fire commissioners of Jersey City.

Van Alst was elected clerk of the board of fire commissioners April 17, 1880.

At a meeting held on April 28, 1886, the board voted to proceed to ballot for a clerk to fill the position then occupied by the prosecutors, but, after a number of ballotings without success, the board adjourned.

The writ brings up the proceedings of the board in its attempt to elect a clerk.

Argued at June term, 1886, before Justices DIXON and REED.

G. T. Collins, for prosecutors. *A. L. McDermott*, for defendants.

REED, J. The counsel for the prosecutor claims that his office is within the terms of the act of 1885, page 130, and that he is by it protected from removal.

The act provides that the officers and men employed by municipal authority in the fire department of any city shall severally hold their respective offices, and continue in their respective employments during good behavior, efficiency and residence in such city. It then provides for what causes they may be removed.

The point mooted upon the argument was whether the clerk of the board of fire commissioners was an officer or employee within the meaning of the act.

The fire department of Jersey City was organized by the charter contained in Pamphlet Laws, 1871, page 1094. Section 115 of the act confers upon the fire commissioners authority to appoint a clerk, and such persons as they may deem necessary for the proper management of the fire telegraph and alarm apparatus of said city, and to define their duties and fix their compensation.

This clause is the concluding one of the section, which section generally defines the offices and employment for which the board shall select men.

The act was amended by the act of 1872, page 665, but not so as to alter in any respect the method of appointing a clerk. I am of opinion that the clerk is an officer or person employed by municipal authority in the fire department. His duties are connected with the execution of the functions of the department. Although his services are more remote from the actual extinguishment of flames than are those of truckmen and firemen, yet all these men are engaged in a common service. His position is protected by the act of 1885.

It is objected by the defendants that he was not appointed by municipal authority, because of a failure to comply with a rule of the board providing that no appointment in the department should be legal until the applicant did certain things.

This rule is set out in the preceding case of *Michaelis v. Fire Commissioners*, and, in addition to what was said of the rule in that case, it appears that the rule was not in force when the appointment in the present case was made.

The resolution that the board should proceed to the election of a clerk is set aside.

DUNSTER v. SMITH.

December 1, 1886.

The power of a township committee to assign limits and divisions of the highways under section 37 of the road act could not be exercised in any township where the overseer was elected by the inhabitants of the road district, after such an election, during that year.

It is proper for a township committee to refuse to recognize a claim for work done by a road overseer in the absence of, or in excess of an appropriation to his district.

On *certiorari* bringing up an assessment for taxes against the prosecutor and the proceedings thereon.

Argued at November term, 1885, before Justices SCODDER and REED.

John A. Freck, for prosecutor. *Alvah A. Clark*, for defendant.

REED, J. The question argued in the briefs of counsel is whether the prosecutor, who is the overseer of a road district in the township of Bernards, in the county of Somerset, was entitled to an allowance of \$31.50 from his tax bill, for the year 1883, on account of his having worked out that amount upon the road in his district.

He was assessed for the year 1882 the sum of \$224.64, of which \$38.56 was for roads.

He claims that he had done as overseer of district No. 3, on the said township, work amounting to \$31.50, and that he was entitled to an allowance of that amount from his tax bill, which allowance was refused by the township committee.

The committee refused to recognize an expenditure in excess of \$18. He paid the remainder of the tax, and now claims that this court should exert some judicial action to remedy an alleged error in not allowing the additional \$13.50 of his claim. He grounds his claim to the entire amount upon the fact that he was elected an overseer of road district No. 3, at a meeting of the voters of that district held in the spring of 1883. By the provisions of an act of 1861—Pamph. Laws, 1861, p. 156—it was provided that the overseers of the highways in certain townships, including Bernards, should be elected by the legal voters of the several districts as they may be arranged from time to time by the township committee. The act provided for the posting of notices, and for the time at which said meeting should be held, namely, the Saturday next previous to the annual town meetings in said townships. By an act—Pamph. Laws 1879, p. 178—the time for holding such election was changed to Friday next preceding the second Tuesday of April. By an act—Pamph. Laws 1880, p. 56—the time was changed to Thursday next succeeding the regular annual meeting, which by the township act—Rev. 1202, § 50—is held on the second Tuesday in March. It provides that the existing overseer shall set up two notices, in two public places in the road district, five days before the day of the meeting, and in case of a failure to give such notice, then the township committee is to appoint the overseer.

There is some evidence that the prosecutor was elected, in 1882, an overseer of district No. 3. He took upon himself the unquestioned execution of the office, and I shall regard his incumbency of that office as a recognized fact in this case. The township committee on March 28, 1883, changed the limits of district No. 3, by cutting the territory over which it ran into two districts, or, speaking more accurately, by carving another district out of the old territory, which new district they numbered 56. At the same meeting the committee apportioned to the new district No. 3, the sum of \$46, and to the new district No. 56, the sum of \$41.

The prosecutor, however, proceeded as if no change had been made. He says that he worked the roads within the whole of the old territory, and did himself, and hired work done to the amount of \$80, and should have been credited with that amount.

His contention is, that after he was elected there was no power in the township committee to make any alteration in his district, and also that he had no notice of such change. The township committee has the power to assign the limits and divisions of the highways within the townships. Rev. 1002, § 37.

Unless the acts which provide for the election of overseers in the township of Bernards by implication repealed the provisions for the assignment of districts, the latter power existed at the time it was exercised.

I say unless the section 37 in this respect was repealed by implication, for there are no express words of repealer in the subsequent acts, such implied repeal must be gathered from the impolicy of changing the limits of a district in which an overseer has been elected by the inhabitants of the district.

This question has no importance beyond the solution of the rights of the parties in the present case, for the matter has since then been regulated by the act of 1885, page 12, which provides for the making of the assignment in January or February of any year, to take effect on or before the first of the following March.

I am of the opinion that the power to alter the limits of a district was not abrogated by the fact that the office of overseer was filled by the votes of the inhabitants of a district instead of the votes of the inhabitants of the township. But I think that the power of the committee to make such alteration was at an end whenever, under the former law, it had made an assignment of an overseer to a particular district, or under the new system a person had been elected for any district.

It could never have been the intention of the legislature to provide that the people of the district should select their officer and yet leave in the hands of the township committee the power to nullify the selection by stripping such officer of half his territory, or by adding to it other territory peopled by voters who had had no voice in his selection. The result in either instance would be that the overseer would work a district of which he had been elected overseer by voters other than the legal voters of the district. I conclude, therefore, that the attempt to divide his district was nugatory.

But there is another difficulty which confronts the prosecutor. No apportionment in excess of \$46 was made to his district. Nor do I think he stands in a position to claim both appropriations. He knew of the action of the committee in regard to the change of the district. The evidence taken in the cause satisfies me that he received the notice of the attempted change. Under the circumstances the appropriation in two sums to two districts supposedly existing was quite different from an appropriation of a single sum.

The right of an overseer to rely upon an appropriation by a committee rests upon a clearly proved act of the committee setting apart the amount for the specific purpose. The overseer cannot rely upon the fact that there have been previous appropriations of a certain amount and upon the probability that such amount will not be changed. He is bound to know the exact sum appropriated to his district for the

then present year. If he chooses to expend money in ignorance of whether there is any appropriation, or if so, to what amount, he does so at his own risk. *Callahan v. Morris*, 1 Vr. 167. This the prosecutor did. He made no inquiry about the appropriation. He knew there had been a change in the district, announced by the committee, and he concluded to ignore the committee's action and rely upon the fact that about \$80 was usually appropriated to that district.

The action of the committee in refusing to recognize his claim for an amount in excess of his part of the appropriation is correct, and is affirmed, with costs.

O'BRIEN v. KING.

December 18, 1886.

A grant of lands upon a public street as a boundary will be referred to such street as opened and used.

In ejectment on rule to show cause.

Argued before Chief Justice BEASLEY and Justices DEPUE, VAN STOKEL and KNAPP.

The cause was tried before Judge REED at Hudson circuit without a jury. The following facts were found by the trial judge :

"This is an action of ejectment brought to recover a strip of land six and thirty one-hundredths feet in width, now in the possession of the defendants. The parties to this action own adjoining lots, and the question involves the location of the correct line of boundary between them. The land upon which both are situate was in 1853, the property of Cornelius Van Vorst (heirs). In that year he had a plan drawn upon paper by which a tract — of which these lots were a part — was delineated as lots and streets.

"Among the streets plotted upon this map as running in an easterly and westerly direction were North Warren — now Congress — street and South street. Among the streets running north and south is Webster avenue. The lots are numbered and front twenty-five feet upon the streets running north and south. Lots 39 and 40 on the east side of Webster avenue, between North and Centre streets. Lot 39 is owned by the plaintiff, and lot 40 by Martha E. King, wife of Albert J. King.

"In May, 1853, Cornelius Van Vorst sold a portion of the tract he owned and had plotted, to Foster, Clinton and Hesketh, who bought for the Industrial Home Association. This grant included that part of block 10 on the map of the part of the Van Vorst estate south of a line drawn parallel to the north-east side of Centre street, two hundred and seventy-five feet north in block No. 10. In August, 1854, these three grantees conveyed lots 43 and 44 to George J. Hind. Lot No. 44 was the corner lot fronting twenty-five feet on Webster avenue, and its south side bounding on Centre street. No. 43 was the adjoining lot to the north. In September, 1859, the same grantees conveyed to William Natruss lots Nos. 41 and 42, being the two northerly lots. No. 42 adjoining No. 43 of the former grant, and 41 adjoining 42.

"When Van Vorst sold to Foster and others in 1853 he had taken a

mortgage for a part of the purchase-money. This mortgage was foreclosed in 1864, and in July, 1866, Jacob Weart, the master appointed under the foreclosure and decree to make sale of such part of the mortgaged property as was essential to raise the money, sold among other lots the two lots the location of which is now under consideration, namely, 40 and 39. No. 40 was sold on July 9, 1866, to Isabella Dominick, who sold in 1870 to Albert J. King, who in 1876 sold to his wife, the defendant; 39 was on July 9, 1866, sold to J. Fleming, who sold in 1867 to Michael O'Brien, the present plaintiff.

"The present litigation arises from the fact proven in the case, that Centre street was not opened parallel with North and South streets. It was plotted upon the map as a street running parallel with these streets at a certain distance from each. Centre street commenced at Palisade avenue at the point plotted upon the map. As it was opened it was deflected from the parallel line in which it was plotted toward South street, so that the farther it ran, the greater distance it was from the invisible line delineated upon the map. At the point where it intersected Webster avenue, the street as opened, is six and thirty one-hundredths feet further toward South street than the street as plotted. This results in leaving between Centre street as opened and North street six and thirty one-hundredths feet more land than that called for by the map.

"The defendant's lot is located and built upon in accordance with the map. The plaintiff claims that he should be located in respect to the lines of the opened street. That would draw the southerly lines of his lot six and thirty one-hundredths feet southward into the present occupied lot of defendant. The facts concerning the physical marks of the adjacent properties are these: *Congress street had been roughly opened by Van Vorst as early as 1853 upon the lines where it now exists. In 1864 it had been regularly improved, flagged and curbed by the municipal authorities upon the same line.*

"In 1854 Hinds had built upon the corner lot No. 44 a house, locating it in accord with Congress street as opened. No. 43 was also built upon and located in reference to the same line. In 1853 Natrus built upon the southerly part of 42, and five years later built upon 41; all of these buildings were erected and lots located with reference to Congress street as opened. So that in 1866, when 39 and 40 were sold, Congress street was an established, improved street, and the four lots between it and lot No. 40 were located and built upon with reference to the lines of such streets as then established in fact and had been marked for thirteen years.

"At this time no improvements existed between lot 41 and North street, nor was the line of North street opened upon the ground, although there is evidence that its line had been marked by iron bolts. When the purchaser of No. 40 located his lot he measured from the line of North street, which measurement, as has been observed, placed his lot six and thirty one-hundredths feet further northward than if he had, as the owners of 41, 42, 43 and 44 had done, measured from Centre street as opened.

"This left a strip of ground between lot 40, as located, and lot 41, six

and thirty one-hundredths feet wide. This strip the owners of 40 and 41 proceeded to divide between them. When Mr. O'Brien, who lived in New York, came to examine his lot, I think in 1884, he found that King had built upon the north side of lot 41, as he had located. He found that the owner of lot 38 had built upon the southerly line of his lot, which he had located in reference to Congress street, as were lots 36 and 37. North of 36, such lots as had been built upon had been located in reference to the line of North street. This left a surplus to the north of 36 of six and thirty one-hundredths feet, which was also divided between adjoining owners.

"In view of this juncture of circumstances, in respect to which point shall Nos. 39 and 40 be located? In respect to the line of North street, or to Centre street as it has been opened? The descriptions in the deeds from Mr. Weart call merely for lots No. 39 and 40 upon the Van Vorst map.

"I am of the opinion that Centre street had become such an established monument, at the time of the conveyance by Mr. Weart, of 39 and 40, and that the location of lots 41, 42, 43 and 44 had become monuments which must be relied upon as fixing the plotted lots upon this section of the Van Vorst map upon the ground. I say 'this section of the Van Vorst map,' for I accord much force to the deed made by Van Vorst to Foster and others. It will be remembered that that deed conveyed a portion of land carved out by the entire tract. It did not convey all the lots fronting on Webster street, between North and Centre streets, but only eleven lots, 'south of a line parallel to the north side of Centre street, two hundred and seventy-five feet, north in block No. 10.'

"It is through this conveyance that both the plaintiff and defendants claim. It by its terms fixes the location of the lots conveyed on the map, by a reference to a street which was then marked, and which, as marked, became an established street. The description, therefore, not merely inferentially fixes the southerly boundary upon the street, but it fixes the northerly boundary in reference to the street. The northerly boundary of these eleven lots is ascertained under this conveyance, not by reference to North street, but in respect to the line of Centre street.

"All subsequent conveyances of lots included within this grant, although made by a general description of a number upon the Van Vorst map, must in the location of that number be controlled by the Foster deed through which the title comes. Now, in view of the history of the original opening and subsequent establishment of Centre street, of its recognition by the adjoining lot-owners, by the location of the adjoining lots, I think that the opened Centre street must be regarded as a monument controlling the location of all the lots at least from 33 to 41. The northerly line of 33 is a line parallel with the northerly line of the opened Centre street and distant therefrom two hundred and seventy-five feet, and so on each twenty-five feet lot takes its width and pushes No. 40, six and thirty one-hundredths feet southward of present location. I find that the title of all the land included in the plaintiff's declaration is in the plaintiff, and order judgment in accordance."

Vredenburg & Garretson, for the rule. *James Fleming*, contra.

KNAPP, J. The facts found by the trial judge, as they appear in the foregoing opinion, so far as they are essential to the determination of this case, are not controverted by the parties. The defendants who move this rule place their case upon the ground that the judge on the facts so found, drew erroneous conclusions as to the proper location of the disputed line. I am persuaded, upon an examination of the case, that the determination of the judge as to the proper location of the disputed line is not open to criticism.

If in the chain of title under which these parties came to their property, the intervention of the grant to Foster, Clinton and Hesketh in May, 1853, had not arisen, and the parties had taken title by description, merely referring to lots on the Van Vorst map, there would have been room to doubt the correctness of the result reached. But in view of that conveyance to the three parties from Van Vorst which included the lots of these parties—in a tract of larger dimensions—Congress street was called for as a monument, from which such larger tract conveyed, took its northern boundaries. And although in that description certain lots on the Van Vorst map are called for, yet while the arrangement and dimension of the lots so conveyed remained defined by the Van Vorst plan, Congress street as then marked upon the ground became the monument or base line from which the location of lots contained within that grant was to be made. Van Vorst or his heirs having opened upon the ground definite lines for Congress street, acquiesced in by their grantees, under which these parties claim their title, such opening accepted and adopted by the public, and since improved and used by the public upon those lines, it becomes of little consequence in this case where such street should have been located under the mere guidance of the lines as originally placed upon the map of the Van Vorst property.

A grant of lands upon a public street will be referred to the street as opened and used. *Smith v. State*, 3 Zab. 130; id. 712; *De Veney v. Gallagher*, 5 C. E. Gr. 35; *Jackson v. Perrine*, 6 Vr. 137; *Den v. Van Houten*, 2 Zab. 61.

When the defendant's grantor purchased his lot in 1864, not only was this street opened and well defined, but all the lots on Webster avenue intervening between Congress street and his lot had been located and built upon with a width of front in each equal to the quantity conveyed. Measuring from the street as it existed, the northerly line of lot 41 was properly located; and this should have been conformed to in locating the defendant's lot. Under the plain rule as illustrated in *Den v. Emerson*, 5 Halst. 284, the proper location of the defendant's lot was easy of ascertainment. Moving it six and three-tenths feet to the north of that line was an encroachment to that extent upon the plaintiff's property, and although the division line in question as made has stood for some eighteen years before suit brought, there is no evidence that the plaintiff, or those under whom he claims, have assented to, or acquiesced in, such location. I am unable, therefore, to discover any reason for disturbing the conclusions which the trial judge arrived at.

The rule should, therefore, be discharged.

NEW YORK COURT OF APPEALS.

DELAFIELD, *Resp't*, v. SHIPMAN, *App't*.*

November 23, 1886.

WILL.—LIFE ESTATE.—LIMITATION OF AN EXPECTANT ESTATE.—1 R. S. 726, § 40.

The testator gave the residue of his estate to trustees to manage for the following purpose, viz.: To provide a home during the life of his wife for herself and his children, and pay the expenses of maintaining the same out of the trust estate, and then, either semi-annually or quarterly, to make a dividend of the residue of the income equally between his wife and six children, so as to give each an equal share of the whole, and each one to defray out of his or her share of said income his or her personal expenses. He directed that upon the death of his wife, his trustees should make an equal division of the trust property between his children then living and the descendants of any deceased child who may have married and died leaving issue, so that such descendants of any deceased child should receive the same share which their parent would have received if living. The testator's widow is still living. After the death of the testator one of the daughters married and subsequently died leaving an infant child, the appellant, and a will in which she gave all her property to her husband for life, and after his death to her children.

The husband claimed that after the death of his wife, one-seventh of the surplus income was payable to him under her will. It was claimed on behalf of her child, the appellant, that the one-seventh was payable to him, while the trustees claimed that this share went to the testator's widow and surviving children.

Held, that the *corpus* of the residuary estate did not vest in the children until the death of the widow; that the testator's widow and children took the surplus income distributively as tenants in common, and that upon the death of the daughter the one-seventh of the income which was payable to her during her life was undisposed of by the terms of the will and, therefore, it devolved upon the appellant under the statute.†

Appeal from a judgment of the general term of the supreme court, first department, affirming the judgment of the special term, construing the will of the late Richard Delafield, and determining the rights of the respective parties hereto, from which judgment the defendant, Richard Delafield Shipman, alone appeals.

This action was brought for the construction of the will of Richard Delafield, deceased. The will was dated January 17, 1873, and the testator died on the fifth day of November following, leaving a widow, then aged sixty-two years, and six children, five daughters and one son, all unmarried adults and members of his family.

After several devises and bequests, the will contained the following clause: "All the rest, residue and remainder of my estate of every description and wheresoever situated I give, devise and bequeath to my executors and trustees hereinafter named, in trust to apply and manage the same for the benefit, support and comfort of my wife and children in the manner following, to-wit: In the first place to provide, during the life of my wife, a furnished house, as a home for my wife and children, and out of the income of my estate to provide for the expense of keeping said house so as to enable my said family to live in the manner they have been accustomed to — said house and the keeping of the same to be under the control

* Reversing 34 Hun, 514.

† See 25 Eng. Rep. 799.

and direction of my wife as the head of the establishment; secondly, to keep the house and furniture in good repair, and from time to time to renew the worn-out furniture; thirdly, to pay all taxes and assessments on the property; and fourthly, either semi-annually or quarterly to make a dividend of the residue of the income after satisfying the objects hereinbefore provided for, equally between my wife and my six children aforesaid, so as to give each of my said children and my wife an equal share of the whole, and each one is to defray out of his or her share of said income his or her personal expenses, such as for wearing apparel, traveling, etc.

"*Item* : Upon the death of my wife I direct that my executors and trustees shall make an equal division of my whole estate, not herein specifically otherwise disposed of, among and between my children then living, and the descendants of any deceased child who may have married and died leaving issue, so that such descendants of any deceased child will receive the same share which their parent would have received if living." He appointed his wife, son and daughter Susan, executors and trustees under the will, and they entered upon the discharge of the trusts. The trust estate yielded an annual income of \$21,000, and of this, \$7,000 was required to defray the expenses of maintaining the family home as provided in the will, leaving a surplus of \$14,000 to be annually divided between the widow and six children. The widow is still living. After the death of the testator one of the daughters married Edgar J. Shipman, and subsequently died, leaving an infant child, the appellant, and a will in which she gave all her property to her husband for life, and after his death to her children.

Mr. Shipman claimed that after the death of his wife one-seventh of the surplus income was payable to him under her will; and it was claimed on behalf of the appellant that the one-seventh was payable to him. The trustees claimed that such income was payable to the widow and six children as a class, and that upon the death of Mrs. Shipman it became payable to the six survivors, and that the *corpus* of the estate vested in the trustees during the life of the widow, and did not vest in the children until after her death, and so it was held in the court below. Mr. Shipman did not appeal to this court.

William C. Beecher, for appellants. *Charles M. De Costa*, for respondents.

EARL, J. We agree with the court below and with the contention of the respondents, that the *corpus* of the residuary estate did not, during the life of the widow, vest in the testator's children, and for this conclusion the cases of *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 id. 92, and *Shipman v. Rollins*, 98 id. 311, are ample authority.

The whole income is not given to the children during the life of the widow, and during her life, the estate is vested in the trustees. There is no direct gift to the children, but simply a direction for a division among them after the death of the widow. In *Warner v. Durant*, **FOLGER, J.**, said : "Where there is no gift, but a direction to executors or trustees to pay or divide and to pay at a future time, the vesting

will not take place until that time arrives." In *Smith v. Edwards*, FINCH, J., said, that "it has been often held that if futurity is annexed to the substance of the gift, the vesting is suspended," and that "when the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is the essence of the gift." These general rules must control the construction of this will, as there is nothing in its context or general language which renders them inapplicable. This construction, too, is in harmony with the presumed intention of the testator. He vested the whole estate in the trustees during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or liable to be seized by their creditors; and after the death of his widow he gave it, not to the children living at his death, but to the children and descendants of children deceased living at her death.

It is clear that the testator intended that his wife and children should take the surplus income, not as a class, not as joint tenants, but distributively as tenants in common. Such is the plain language of the will. The trustees were to divide the surplus "equally between" his wife and six children so as to give each "an equal share," and "each one" was "to defray out of his or her share" his or her personal expenses. Such language is always held to constitute the beneficiaries tenants in common, and to show that they take distributively unless there is something in other provisions of the will to show that the testator intended that they should take as a class, and so it was held in *Hoppock v. Tucker*, 59 N. Y. 202. Here there is nothing in the will to control, modify, or limit the plain meaning of this language. The testator's wife was old, and it appears that he contemplated that one or more of his children might during her life marry, die, and leave descendants. He made no provision for the support of such descendants in the family home, and it cannot be supposed that he intended they should during the life of his widow be left without any means of support. He put such descendants in the place of their deceased parents after the death of his widow, and it is fair to infer that he expected that they would in some way take the place of their parents during her life. A construction giving such effect to the will will certainly come nearest to the presumed intention of the testator.

Therefore, when Mrs. Shipman died, the one-seventh of the income which was payable to her during her life did not pass to the surviving six, but was undisposed of by the terms of the will, and was devolved upon the appellant under the Revised Statutes — 1 R. S. 726, § 40 — which provides as follows: "When, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate." This case precisely fits that section. There is a valid limitation of an expectant estate to the appellant. During the life-time of the widow there is a

suspension by a valid trust of the power of alienation, and since the death of Mrs. Shipman the income is undisposed of by the will, and the appellant is the person presumptively entitled to the next eventual estate, and, therefore, entitled to the income otherwise undisposed of.

The judgments of the general and special terms should, therefore, be reversed, and judgment entered in accordance with this opinion, the costs of all parties in the supreme court and in this court to be paid by the trustees out of the surplus income of the trust estate.

All concur.

Judgment reversed.

PEOPLE, *Resp't*, v. SHERMAN ET AL., *App'ts*.

November 23, 1886.

LIBEL — EVIDENCE.

On the trial of the defendants for libel in charging the misappropriation of moneys in connection with the comptroller's office of the city of Troy, the evidence tended to show that the libelous article was written by one L.; that it was published in the first edition of the defendants' newspaper; that immediately after a question arose as to the truthfulness, and thereupon L. and one H. were sent to the comptroller's office to ascertain if the charges were true; that they returned and reported them false, but that defendants refused to publish a retraction. The testimony of L. and H. in regard to going to the comptroller's office was contradicted by the defendants, and they denied any knowledge of the article until it had been published in the second edition. The prosecution then called one D., who was a clerk in the comptroller's office at the time, and proved by him that, on the day testified to by L. and H., they came to the comptroller's office and looked over the books. The testimony of D. was objected to by defendants as incompetent, and as an attempt on the part of the people to corroborate their own witnesses. *Held*, that the evidence was properly received as bearing upon the main issue, and as constituting a part of the *res gesta*.

Appeal from a judgment of the general term, third department, affirming a judgment of the Rensselaer sessions, entered upon a conviction, by a jury, of the appellants for libel.

The opinion states the case.

N. C. Moak, for appellants. *Chas. E. Patterson*, for respondent.

MILLER, J. The defendants were convicted of participation in the publication of a libel against one Sheary. The alleged libelous article was published in a newspaper printed by a corporation with which all the defendants were connected in some capacity. Upon the trial proof was given to establish that the libelous article in question was written by one Lowery; that it was published in the first edition of the newspaper in question; that, upon its perusal immediately after the printing of the newspaper, a question was made as to the truth of the charges contained in the article published, which related to the disbursement of money for street cleaning purposes in connection with the comptroller's office in the city of Troy, and thereupon said Lowery and one Hennessey were sent to the comptroller's office to ascertain if the charges in the printed article were true. They reported that the same was false, and an article was written by Hennessey in season for the second edition, containing a retraction, which defendants declined

to publish, and issued the second edition, which contained said libelous article as previously published.

The testimony of Hennessey and Lowery, in regard to their going to the comptroller's office, was contradicted by the defendants, and each of them denied any knowledge of the libelous article until after it had been published in the second edition of the newspaper. The prosecution then called as a witness one De Freest, a clerk in the comptroller's office, who testified that between three and four o'clock on the day in question Hennessey and Lowery came to the office of the comptroller and looked over the books.

The evidence was confined to this single fact. The defendants' counsel objected to the evidence upon the ground, among others, that it was not competent for the people to corroborate the alleged truthfulness of the witnesses who had previously testified as to the same fact, by proving that a fact which they stated to have occurred in the absence of the defendants, or either of them, was true. The objection was overruled and the defendants separately excepted to the ruling of the judge.

We think there was no error in the admission of the evidence objected to. Hennessey had sworn that the defendants, with the exception of Sherman, held a meeting after he and Lowery had been to the comptroller's office and notified them that the printed article was untrue. The testimony objected to and introduced corroborated Hennessey's evidence. The evidence previously introduced tended to establish that all the defendants, with the exception of Sherman, had knowledge of the sending of Lowery and Hennessey to the comptroller's office; that they had made an examination there and had found the article in question to be false; that a retraction was prepared and the publication thereof refused, and the libelous article re-published. The testimony, therefore, of DeFreest strongly sustained the other evidence introduced. It related to the principal question involved whether the defendants had knowledge of or participated in the alleged libelous publication. It was a corroboration in regard to the main issue involved upon the trial. Although the facts testified to by DeFreest had been previously proven, yet as it was material and bore upon the whole case, it was competent to establish, by another witness, what had already been proved. It added to the weight of the testimony introduced as to a very important fact, and was entirely competent additional proof bearing upon the issue presented. Even if it be regarded as corroborating another witness, as it related to the main question of the defendants' guilt, it was entirely relevant. As Lowery was an accomplice, and on his evidence alone no conviction could be had, the corroboration was proper and the evidence material to prove that defendants had knowledge and notice as to the falsity of the charges made.

The authorities cited by the learned counsel for the appellants, to sustain his position that the evidence was inadmissible, are not, we think, in point. The visit to the comptroller's office was a very material fact which bore directly upon the innocence or guilt of the defendants. It related to the motive of the defendants and the question of

malice which was involved upon the trial. If the defendants knew that the charges made, were false and untrue before the publication of the second edition of the newspaper, and had an opportunity to correct the same, proof of such knowledge was material and important. The time of the visit was important, and the testimony was limited mainly to that and might well have been proved by any number of witnesses. In the case of *People v. Haynes*, 55 Barb. 450, which is relied on, the evidence held to be incompetent related to a collateral matter which had no direct bearing upon the charges made, while the testimony here was direct and connected with the gravamen of the offense alleged.

The other authorities cited are also inapplicable. If the testimony here can be regarded as a corroboration of an accomplice, it related to a fact which tended to fix the guilt upon the persons charged with the offense, but, as we have seen, it was otherwise admissible as relating to the main issue involved and as constituting a part of the *res gestæ*.

We have examined the other questions raised by the appellants' counsel, and find no ground for holding that any error was committed by the court in its rulings in regard to them.

They are sufficiently considered, so far as material, in the opinion of the general term.

The judgment and conviction was right, and should be affirmed.

All concur.

Judgment affirmed.

ABEL, *App't*, v. PREST., ETC., OF DELAWARE AND HUDSON CANAL CO.,
Resp't.

December 7, 1886.

MASTER AND SERVANT—DUTY AS TO RULES FOR PROTECTION OF EMPLOYEES.

It is the duty of a railroad company to make and promulgate rules, which, if faithfully observed, will give reasonable protection to its employees, and whether it is negligent in that respect in a given case is a question for the jury.

Appeal from judgment of general term, third department, entered after motion for a new trial on exceptions directed to be heard in the first instance at general term. Action for negligently killing plaintiff's testator. Nonsuit granted at circuit.

N. C. Moak, for appellant. *L. B. Pike*, for respondent.

PER CURIAM. The plaintiff's testator was a car repairer in the employ of the defendant, and while under one of its cars standing upon a side track engaged in making repairs, its employees using an engine carelessly backed a car against it, and thus he came to his death.

The principal claim on the part of the plaintiff is that the evidence tended to show that the defendant had not made and promulgated proper rules for the government of its employees, and hence that its negligence in that respect should have been submitted to the jury.

The law imposes upon a railroad company the duty to its employees of diligence and care not only to furnish proper and reasonably safe appliances and machinery, and skillful and careful co-employees, but also to make and promulgate rules which, if faithfully observed, will give reasonable protection to the employees. *Slater v. Jewett*, 85 N. Y.

761; S. C., 39 Am. Rep. 627; *Basel v. N. Y. Cent., etc., R. Co.*, 70 N. Y. 171; *Sheehan v. Same*, 91 id. 339; *Danna v. Same*, 92 id. 639.

It appears, that the managers of some railroads in this country have adopted a rule substantially like this: "A blue flag by day and blue light by night placed in the draw-head, or on the platform or step of the car at the end of a train, or car standing on a main track or siding, denotes that car repairmen are at work underneath. The car or train thus protected must not be coupled or moved until the blue signal is removed by the repairmen." This is certainly a very efficient rule, and if faithfully and carefully observed would give reasonable protection to repairmen.

The plaintiff contends that it was under the circumstances of this case a question for the jury to determine whether the defendant for the protection of its repairmen engaged in a peculiarly hazardous work should not have promulgated such a rule or one substantially as efficient. The only rule the defendant had made bearing upon this case was as follows: "A red flag by day and a red lantern by night, or any signal violently given, are signals of danger, on perceiving which the train must be brought to a full stop as soon as possible, and not proceed until it can be done with safety."

This rule seems, from its phraseology, to have been mainly, if not exclusively, intended for the government of moving trains, and was not very well adapted for the protection of men under stationary cars upon side tracks engaged in making repairs. There was no rule prohibiting the removal of the signal, and the signal was not intended exclusively for the protection of such men, nor did it give notice that human life was in danger.

It matters not that there was a custom or rule among the repairmen in the employ of the defendant at Mechanicville that they should place a red flag at each end of the cars which they were repairing. It does not appear that that rule was regularly promulgated by the defendant, or that obedience to it was required by the defendant; nor does it appear that it was printed or generally known to the engineers engaged in running trains.

It appears that it was a common and frequent occurrence for engines and cars to be switched upon the side tracks at Mechanicville without any check or hindrance from any one having control of the tracks at that place, and thus the repairmen engaged under and about cars seem to have been exposed to constant peril.

We do not perceive how it was possible to say as matter of law that the rules of the defendant were proper and sufficient for the protection of its repairmen, and that it should not have taken greater precautions, by rules or otherwise, for their safety. We think the facts should have been submitted to the jury and that the nonsuit was improper.

The judgment should be reversed and new trial ordered, costs to abide event.

All concur, except EARL, J., not voting, and MILLER, J., taking no part.

Judgment reversed.

BREWSTER, AS EX'R, ETC., *App't*, v. CARNES, *Resp'ts*.

December 7, 1886.

DEED—ASSIGNMENT IS "CONVEYANCE"—NOTICE.

The assignment of a mortgage and the satisfaction of the same are "conveyances" within the meaning of the recording act.

The recording of an assignment of a mortgage is notice to a purchaser of the equity of redemption, and payments made by him to the assignor after the assignment are invalid and do not bind the assignee.*

AGENCY—IMPLIED POWER.

An attorney authorized to receive the interest on a bond and mortgage has no implied authority to receive the principal.†

Appeal by plaintiff from a judgment of the general term, fifth department, entered upon an order which affirmed a judgment of foreclosure and sale, entered upon the report of Hamilton Ward, referee, in favor of the plaintiff, on the 17th day of February, 1885.

This was an action to foreclose a mortgage on lands in Cattaraugus county, executed by Calvin Dodge and wife to Philip Verplanck, as trustee for Mary A. Miller and John B. Miller, infants, dated March 10, 1868, recorded March 30, 1868, for \$4,000.

Verplanck having been succeeded in the trust by James W. Taylor assigned the mortgage to Taylor as trustee for said infants, by assignment dated August 2, 1869, recorded February 12, 1873.

By assignment dated June 28, 1877, recorded July 14, 1877, Taylor assigned the mortgage to Mary A. V. Webster, formerly Mary A. Miller, one of the persons for whom he held it in trust.

By assignment dated August 24, 1878, recorded August 24, 1883, Mary A. V. Webster assigned the mortgage to the plaintiff in this action.

There was due at the time of the assignment from Taylor to Webster, \$1,000 of the principal, the balance having been previously paid.

When Taylor assigned to Mrs. Webster, in 1877, he delivered to her the bond and mortgage, and they have never since been in Taylor's possession, but have been kept constantly by E. A. Brewster, who was Mrs. Webster's attorney, and who is the present plaintiff.

Taylor was permitted, on behalf of the holder of the mortgage, to collect the interest, but was never authorized by either Mrs. Webster or the plaintiff to receive any part of the principal.

The only answer in the action was by defendant, Spencer Carnes, who set up payment of \$1,000 of the principal to Taylor in January, 1880.

Calvin Dodge, the mortgagor, executed a mortgage to Spencer Carnes, dated October 4, 1868, recorded January 31, 1871, on part of the same premises covered by the plaintiff's mortgage.

The Carnes mortgage was foreclosed, and the property therein described, except a part released, was conveyed to Carnes by sheriff's deed dated March 27, 1875, recorded March 30, 1875.

After the assignment from Taylor to Webster, Carnes made the

* See 25 Eng. Rep. 355; 37 Hun, 409; 51 Mich. 532.

† See *Coondoo v. Watson*, 9 App. Cas. 561; S. C., 36 Eng. Rep. 172, 178, note.

following payments to Taylor; June 3, 1878, \$35 for interest, for which defendant produced on the trial a receipt signed "Jas. W. Taylor, attorney for mortgagee."

December 4, 1879, \$35 for interest, for which defendant produced on the trial a receipt signed "Jas. W. Taylor, attorney for mortgagee."

In January, 1880, Carnes sent to Taylor two drafts, one for \$300, which had previously been sent to Taylor and returned to Carnes, at the latter's request, and the other for \$700, both payable to Taylor individually.

Taylor never paid any part of the amount so received to the plaintiff, and plaintiff never knew or heard of such payment until after this suit was brought.

At the time of sending these drafts by letter to Taylor, Carnes requested that the bond and mortgage be assigned to Thankful Carnes.

Defendant never requested that the mortgage be canceled.

The question presented was as to the validity of the payment in January, 1880. At that time the bond and mortgage in suit belonged to the plaintiff, and were in his possession.

The plaintiff never in any way authorized Taylor to receive any of the principal on the mortgage.

The referee decided that the payment of \$1,000 on the principal, made by Carnes to Taylor in January, 1880, was a valid payment on the bond and mortgage in suit, and binding on the plaintiff, and gave judgment accordingly, and the plaintiff appealed to the general term where the judgment was affirmed and plaintiff appealed to this court.

E. A. Brewster, for appellant. *G. S. Van Gorder*, for respondents.

MILLER, J. Under the Revised Statutes — 1 R. S. 763, § 41 — the recording of an assignment of a mortgage is not, of itself, notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee.

The section of the statute above cited cannot be said to apply to the facts which are presented for consideration in the case under advisement, as is apparent from a careful reading of the same.

The defendant who made the payment was not the mortgagor, nor his heir, nor his personal representative. He was the purchaser of the equity of redemption, and became seized of the premises subject to the mortgage. He was not, therefore, a party named in the statute, or from its phraseology intended to be embraced within its terms. If the statute was designed to include a purchaser of the mortgaged premises, it no doubt would have so stated, and thus made it manifest that such was its intention.

Nor was the payment made to the mortgagee, the party named, but to a third person, who claimed to act for the owner of the mortgage, without any authority, at any time, to receive payments upon the principal.

It would seem, therefore, that the statute cited, does not embrace any such case as is presented by the evidence here, and if the payments made can be upheld it must be upon some other and entirely different ground.

This is sought to be done, and reliance is placed upon Jones Mortgages, § 791; and *Heermans v. Ellsworth*, 64 N. Y. 159, which, it is claimed, bear upon the construction which is given to section 41 of the statute.

In Jones on Mortgages, the notice, it is said, must be given to the owner of the equity of redemption, in order to protect the assignee against payments made in good faith by the mortgagor, or the party liable to pay the mortgage, to the assignor, that the recording of the assignment is not, of itself, such notice of the assignment as will afford such protection. This *dictum* would seem to be in direct conflict with the general rule relating to the effect to be given to the assignments of mortgages when placed on record, and to conveyances to subsequent purchasers of the mortgaged premises who take title subject to the mortgage. It is a well-established principle of law that the assignment of a mortgage, and the satisfaction of the same, are conveyances within the meaning of the recording act. *Van Keuren v. Corkins*, 66 N. Y. 77; *Westbrook v. Gleason*, 79 id. 25; *Decker v. Boice*, 83 id. 215; *Bacon v. Van Schoonoven*, 87 id. 446.

Taylor, to whom the payments in controversy were made by defendant Carnes, was the owner of the mortgage, and assigned the same to Mrs. Webster, which assignment was recorded on the 14th of July, 1877. This was before the payment from Carnes to Taylor in 1880 was made, and was a notice to all subsequent purchasers, or incumbrancers of the mortgaged property, and to all persons who might afterward have any dealing with Taylor in regard to the mortgage.

Carnes, in making payments on the mortgage after the recording of the assignment, was a purchaser subsequent to Mrs. Webster, whose title, by virtue of the assignment, was previously recorded.

Under the recording act, therefore, Carnes was chargeable with notice that the mortgage, which he intended to pay, had been assigned by Taylor to another party, Mrs. Webster, who subsequently assigned her rights therein to the plaintiff.

The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, save as excepted by the statute. *Viele v. Judson*, 82 N. Y. 32.

In the case cited, it is laid down in the opinion by FINCH, J., that the recording of an assignment furnishes protection against any subsequent assignment of the same mortgage, or any unauthorized discharge, and is notice that the rights of the mortgagee are gone, and that he can neither assign nor discharge the instrument. This case is directly in point, and very distinctly covers the question presented. The record of the assignment here, as in the case cited, was an ample protection to the plaintiff's claim, and notice to Carnes that Taylor had disposed of his interest in the mortgage.

In *Heermans v. Ellsworth*, *supra*, the action was upon a demand against the defendant for money loaned by the plaintiff's assignor, and it was held that it is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against payment by the debtor to the original creditor, to notify the former of the assignment, and that in an action upon the demand where such a payment is established, the

burden of proving notice prior to payment is upon the plaintiff. No question arose as to the constructive notice, or the effect of the recording act, and the case cited, therefore, is not in point.

Inasmuch as upon the recording of the assignment Carnes had constructive notice thereof, it is not material whether he had notice otherwise sufficient to put him upon inquiry that Taylor had ceased to be the owner of the mortgage. It may be remarked, however, that before the assignment of the mortgage by Taylor to Webster, the receipts were signed by Taylor individually, and subsequent to the assignment they were signed by him as attorney for the mortgagee, thus disclosing and notifying the defendant that Taylor had ceased to be the owner of the mortgage, and that he only acted as attorney for the owner. Having this information, it would seem to have been the duty of the defendant to have made further inquiry as to the ownership of the mortgage before making payments.

As to the claim of the defendants' counsel that the omission of Taylor to produce the bond and mortgage when Carnes made payments thereon does not, in this case, show that Carnes had no right to make such payments to him, it may be remarked that if constructive notice was given of the assignment by the recording thereof, then it is not material to discuss the effect of Taylor's not producing the bond and mortgage. If, however, any question can arise as to the non-production of the bond and mortgage, it is a complete answer to the position taken, that although Taylor had authority to collect interest, such authority did not authorize him to receive the principal. This was held in *Smith v. Kidd*, 68 N. Y. 130; S. C., 23 Am. Rep. 157, where it is said, in the opinion by RAPALLO, J., that it is incumbent on the debtor who makes a payment to an attorney to show that the securities were in the attorney's possession on each occasion when the payments were made, and that it is not incumbent on the creditor to show notice to the debtor of the withdrawal of the papers from the possession of the attorney.

Under these circumstances there is no ground for claiming that plaintiff is estopped from denying the right of Taylor to receive the principal due upon the mortgage. There is no foundation for the position that Taylor, as agent, had any authority from the plaintiff beyond that which authorized him to receive the interest, or that the plaintiff was chargeable with negligence in his failure to give notice to the defendant Carnes that he was the assignee of the mortgage. As the referee erred in his conclusion, and the General Term in affirming his judgment, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except RUGER, Ch. J., not voting.

Judgment reversed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

COMMONWEALTH v. JULIUS.

November 23, 1886.

INTOXICATING LIQUORS.

Under Public Statutes, chapter 100, forbidding the sale of liquor to an intoxicated person, it is no defense that the seller did not know, at the time of making the sale, that the buyer was intoxicated.

Complaint under Public Statutes, chapter 100, charging the defendant with selling liquor to an intoxicated person. At the trial in the superior court, the defendant, at the close of the evidence, asked the court to instruct the jury that the defendant must have sold liquor to an intoxicated person, knowing him to be intoxicated at the time when the sale was made in order for the jury to convict him.

The court declined to give this instruction, but instructed the jury that it was immaterial whether the defendant knew that the person was intoxicated at the time of the alleged sale. That if the person was in fact then and there an intoxicated person and the defendant sold him liquor as alleged in the complaint, it was sufficient to warrant a conviction. The jury returned a verdict of guilty and the defendant alleged exceptions.

H. N. Shepard, assistant attorney-general, for Commonwealth. *T. J. Gargan*, for defendant.

By the COURT. It has been too often decided to be now open to question, that guilty knowledge that one is acting in violation of law is not essential to the offense of unlawfully selling intoxicating liquor, and that whoever has a license is bound, at his own peril, to keep within the terms of it. *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Finnegan*, 124 id. 324; *Roberge v. Burnham*, id. 277; *Commonwealth v. Emmons*, 98 id. 6. In the case at bar the jury have found that the defendant sold liquor to an intoxicated person. The statute does not make guilty knowledge by the defendant one of the elements of the offense, and the court rightly instructed the jury that it was immaterial whether the defendant knew that the person to whom he sold was intoxicated.

Exceptions overruled.

COOPER v. JOHNSON.

November 24, 1886.

FIXTURES.

A boiler and iron tank used in connection with the boiler placed in a building by the tenants at will, upon a foundation of brick and cement to keep them tight and in place, and which could be equally well used elsewhere, remain personal property.*

Action of replevin to recover one express wagon, one harness, three kettles, one upright tubular boiler, twenty-horse power, one iron tank,

* See 22 Eng. Rep. 816; 23 id. 462.

one iron press, one platform scales, several ladles and shovels, one iron tank for boiling grease, one small iron kettle and piping connected with boilers.

At the trial in the superior court the plaintiff offered evidence tending to show that on January 26, 1885, William H. Winslow & Co. conveyed to him by bill of sale certain articles named in the plaintiff's writ to secure him of certain indebtedness of said Winslow & Co. to him. On the day the plaintiff took the bill of sale he was, and had been for a number of years, the foreman of the shop, where Winslow & Co. were carrying on the business of rendering grease, and where most of the articles were, and where he had been foreman for a number of years. Winslow & Co. were tenants at will of the Misses Nichols. The building occupied was a low story and a half structure, with a floor of earth, and apt to be wet in winter.

The plaintiff, at the time the bill of sale was delivered, had the key to the building, and, so far as known, held it at the time of the attachment. The plaintiff further offered evidence tending to show that the defendant attached the property in question on the twenty-second of June, upon a writ against said Winslow & Co., and in favor of the Misses Nichols, for rent. Also, that he made a demand upon the defendant for the property attached.

Upon the cross-examination plaintiff testified that the upright tubular boiler was placed upon a foundation of brick-work and cement, the edges of the brick-work upon which the boiler was placed being cemented before the boiler was placed thereon, to keep it tight, and that the iron oblong tank was similarly placed. These articles were placed there by Winslow & Co. The defendant, a deputy sheriff, offered in evidence the writ and officer's return, upon which the attachment was made, and also evidence tending to show that, when he made the attachment, the door of the building was unlocked and no one was in possession, and he procured a key from the Misses Nichols and locked the door, putting on a new lock. The defendant contended that the tank and upright boiler were a part of the realty.

The court instructed the jury as to the boiler and tank, that for the purposes of this trial the jury would not be justified in finding that either was part of the realty, but both were to be taken as personal property. The jury found for the defendant as to the scales and one kettle and for the plaintiff as to the rest of the articles, and the defendant alleged exceptions.

C. W. Richardson, for plaintiff. *C. Sewall*, for defendant.

C. ALLEN, J. There was no contradictory evidence, and it is assumed by both parties that the facts testified to by the plaintiff's witnesses were true. It thus appears that the boiler and tank were placed in the building by Winslow & Co., who were tenants at will. Whether their tenancy had ended or not is not mentioned in the bill of exceptions. The boiler was placed in a foundation of brick-work and cement, the edges of the brick-work being cemented before the boiler was placed thereon to keep it tight, that is in place. The tank was similarly placed. It is apparent that these articles could be used equally well

elsewhere, and that the fastening, such as it was, was merely to keep them in place. They were easily removable. There is nothing to show that the defendant contended at the trial that a reasonable time for their removal had expired, and no such question is presented by the bill of exceptions. The boiler and tank remained personal property, and indeed were so treated by the defendant and the owners of the building in making the attachment. *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 448; *Carpenter v. Walker*, 140 id. 416.

Exceptions overruled.

MOEBS v. WALFFSOHN.

November 26, 1886.

NEW TRIAL—JUROR WAS CONSTABLE.

The fact that one of the jurors was a constable, and was thus exempt by statute from jury duty, does not entitle a party to a new trial, as of right.

Action of review of a judgment obtained by the defendant in review, against the plaintiff in review, wherein the principal question tried was the alleged misconduct of the defendant in review, acting as a constable of the city of Boston, in the collection of a claim of the plaintiff in review, from one Hellbach, in violation of section 45, chapter 159 of the Public Statutes. The case was tried in the superior court before a jury, and a verdict was rendered for the plaintiff in review. After the verdict, the plaintiff in review filed a motion in the case that the verdict be set aside, and for a new trial, "because one of the jurors who heard said case was disqualified from acting as a juror, he being at the time a constable of the city of Chelsea; all of which was not known to the defendant in review until after the verdict in said case." At the hearing upon said motion it was shown by the evidence of the defendant in review, and his counsel, who tried the cause, and by other evidence which was not controverted by the plaintiff in review, that Hugh H. McCann, the juror referred to in said motion, was, at the time of said trial, a constable of the city of Chelsea; that that fact was not known to either the defendant in review or his said counsel until after the verdict, and that, had either of them known that fact, they would have challenged said McCann for cause or peremptorily. These facts not being controverted by the plaintiff in review, were found proved by the court.

The court ruled that these facts furnished no legal and sufficient ground for granting said motion, and overruled the same. To which rulings the defendant in review alleged exceptions.

A. F. Means, for plaintiff. *I. J. Cutler*, for defendant.

By the Court. A constable is exempt from serving as a juror. Pub. Stats., chap. 170, § 2. But if a constable is clearly drawn and serves as a juror, this does not entitle a party to a new trial as of right. Upon this point the case of *Munroe v. Bingham*, 19 Pick. 368, is decisive.

Exceptions overruled.

BECKWITH v. CHESHIRE RAILROAD CO.

November 24, 1886.

CARRIER — REMOVAL OF PASSENGER WITHOUT ARREST.

A railroad company may, for proper cause, remove a passenger from a train at any regular passenger station without arresting him or delivering him to an officer at the station.

Action of tort for an assault, in forcibly removing the plaintiff from the cars of the defendant road. At the trial in the superior court the plaintiff offered evidence tending to show that she was a minor of the age of nine years and was traveling in the care and custody of her mother. They took the cars of the defendant road at Fitchburg, intending to go to Marlboro, N. H. The mother purchased a ticket for herself, but none for the plaintiff, and the plaintiff was unprovided with any. Soon after the train started the conductor came along and demanded the fare. The mother surrendered her ticket and he thereupon asked for a half ticket for the plaintiff, or the payment of half fare, but the mother declined to pay the plaintiff's fare. The fare remaining unpaid, the conductor removed the plaintiff from the train at Ashburnham, a regular station on the defendant road, taking her from the seat in which she was riding.

The presiding justice in the charge to the jury read the section 197* of chapter 112 of the Public Statutes, and ruled that the only legal method of removing a person from the car of a steam railroad corporation for non-payment of fare was by a railroad police officer, whose duty it was, upon the arrival of the train at some station, to place such a person in charge of an officer to be taken to a place of lawful detention; and inasmuch as the plaintiff was otherwise removed, the defendant, by reason solely of its neglect to comply with the provisions of this statute, was guilty of an assault upon the plaintiff, for which she was entitled to nominal damages. The jury returned a verdict for the plaintiff in the sum of \$250. The defendant alleged exceptions to rulings of the court.

Pierce & Stiles, for plaintiff. *G. A. Torrey*, for defendant.

HOLMES, J. We agree with the argument of counsel for the defend-

* Public Statutes, chapter 112, section 197, is as follows: Whoever fraudulently evades or attempts to evade the payment of a toll or fare lawfully established by a railroad corporation, or street railway company, either by giving a false answer to the collector of the toll or fare, or by traveling beyond the point to which he has paid the same, or by leaving the train or car without having paid the toll or fare established for the distance traveled or otherwise, shall forfeit not less than \$5 nor more than \$20. Whoever does not upon demand first pay such toll or fare shall not be entitled to be transported for any distance and may be ejected from a street railway car; but no person shall be removed from a car of a steam railroad corporation, except as provided in section 18 of chapter 103, nor from a train, except at a regular passenger station.

Public Statutes, chapter 104, section 18, is as follows: If a passenger upon a railroad train refuses to pay his fare, or is noisy or disorderly, a railroad police officer may arrest him without a warrant, and remove him to the baggage or other suitable car of such train and confine him there until the arrival of the train at some station, where such passenger can be placed in charge of an officer, who shall take him to a place of lawful detention.

ant that, if the meaning of the words of Public Statutes, chapter 112, section 197—Stat. 1874, chap. 372, § 150—"no person shall be removed from a car of a street railroad corporation, except as provided in section 18 of chapter 103"—Stat. 1874, chap. 372, § 146—had been to take away the right of such corporation to remove from a train a person who does not pay his fare, without arresting him, as provided in the section referred to, there would have been no reason for adding the further words "nor from a train, except at a regular passenger station." If the passenger is arrested, chapter 103, section 18 requires the removal to be, not only at a station, but at a station where the passenger can be placed in charge of an officer, etc.

The statute seems to us to speak of removal from a car by way of partial antithesis to removal from a train and to refer to such removals from a car, as are provided for in chapter 103, section 18, that is to removals "to the baggage or other suitable car of such train." We are of opinion that, when proper cause exists for removal, but the company does not deem it necessary to arrest the passenger, the statute does not prohibit putting him off the train at a regular passenger station without arresting him.

Apart from the clause which we have construed, there is no doubt of the company's right to put off the infant, whether by the contract for her carriage, if any was made with her, or with her mother, she was a passenger, and as such was not entitled to be carried unless paid for. Public Stat., chap. 112, § 107. She did not stand on the the same footing as her mother's parasol, as was suggested by counsel.

Exceptions sustained.

RAWSON v. DOFNER.

November 24, 1896.

APPEAL — BOND OF TRUSTEE — APPROVAL OF.

Plaintiff moved to dismiss the trustee's appeal from the district to the superior court upon the ground that the trustee had not filed a bond approved either by the court or the plaintiff. The clerk's record, as finally amended, stated that the trustee had "filed a bond not approved or disapproved by said court, as no motion was made by either party requesting approval or disapproval." *Held*, that the clerk's record must be taken to mean that there was no formal action by the judge, but that the sureties were deemed by him to be sufficient, and, as thus construed, there was a sufficient compliance with the statute to give the superior court jurisdiction.

Action of contract, brought in the first district court of Southern Worcester, in Worcester county, to recover one month's rent. The H. N. Slater Manufacturing Company was summoned as trustee. From the record of the said district court it appeared that the defendant was defaulted; that the trustee appeared and filed an answer; that interrogatories were filed and answered, and issue was joined; that, after due hearing, the H. N. Slater Manufacturing Company was charged as trustee of the said Dofner. From this judgment the said trustee appealed to the superior court, and, as stated in the record of said district court, "files a bond not approved by said court, with sureties in the sum of \$200," to prosecute the appeal.

In the superior court the plaintiff moved that the trustee's appeal be dismissed because the trustee did not file a bond with sufficient sureties, approved either by the court or plaintiff, according to the statute in such cases made and provided. Thereupon the clerk of the district court asked leave to amend the record so that it should read in place of the written words, "filed a bond not approved by said court," as follows: "Filed a bond, not approved or disapproved by said court, as no motion was made by either party requesting approval or disapproval," and that said record might stand as thus amended. The superior court discharged the trustee upon its answer, and the plaintiff appealed.

C. I. Rawson, for plaintiff. *W. S. B. Hopkins*, for trustee.

C. ALLEN, J. The true construction of the record, as amended, of the district court is that the sureties were sufficient, but that the bond was not approved or disapproved by said court as approval or disapproval. This must mean that there was no formal action by the judge, but that the sureties were deemed by him to be sufficient. Construed thus, there was a sufficient compliance with the requirements of the statutes to give jurisdiction to the superior court. Pub. Stata., chap. 155, § 29; chap. 154, §§ 39, 52; Stat. 1882, chap. 95.

No other question being presented in the plaintiff's brief, the entry must be judgment affirmed.

Judgment affirmed.

COMMONWEALTH v. O'LEARY.

November 24, 1886.

CRIMINAL LAW — SALE OF LIQUOR TO MINOR AS AGENT.

A contract for a sale of intoxicating liquor made with a minor, as the agent of a disclosed principal, is a sale to the minor, for the use of another person, within the meaning of Public Statutes, chapter 100, section 9, and it may be so alleged in the complaint.

The person for whose use the sale was made need not be alleged.

Complaint charging an illegal sale of intoxicating liquor to Jane O'Connell, a minor. At the trial in the superior court, the following were admitted by the parties to be the facts for the purpose of the trial. That on a certain day in June, 1884, the said Jane O'Connell was a minor under the age of twenty-one years; that her mother, a woman of full age, furnished her with money and sent her to the defendant's place of business in New Bedford to buy a half pint of whisky; that she told defendant that her mother sent her for a half pint of whisky for her own, the mother's, use; that thereupon the defendant delivered the whisky to Jane, the mother not being present, and Jane paid him for it with the money so furnished by her mother. She then carried it to her mother and delivered it to her for her mother's use.

The defendant was duly licensed at the time to sell intoxicating liquor and could lawfully sell and deliver it to the mother personally. The defendant asked the court to rule that an allegation of sale to Jane could not be sustained upon these facts, as Jane was the agent of a disclosed principal. This the court refused, and instructed the jury

that upon these facts, if believed, the jury was warranted in law in convicting the defendant. The jury found a verdict of guilty and the defendant alleged exceptions.

E. J. Sherman, attorney-general, for Commonwealth. *J. Brown*, for defendant.

FIELD, J. The defendant is charged with unlawfully selling intoxicating liquor to one Jane O'Connell, a minor. By the admitted facts it appears that the contract of sale was made by the defendant with Jane as the agent of her mother, an adult person, and the defendant at the time of the sale knew this and delivered the liquor to Jane, who was a minor, for the use of her mother. The decisions under the provisions of the statute which prohibit the sale of intoxicating liquor without license or authority, are to the effect that a sale by an unlicensed person to the agent of an undisclosed principal may be alleged, either as a sale to the agent or to the principal, but that a sale by an unlicensed person to an agent whose principal was disclosed at the time of the sale must be alleged as a sale to the principal. *Commonwealth v. Kimball*, 7 Metc. 309; *Commonwealth v. McGuire*, 11 Gray, 460; *Commonwealth v. Very*, 12 id. 124; *Commonwealth v. Remby*, 2 id. 508; *Commonwealth v. Gormley*, 133 Mass. 580. Statutes 1875, chapter 99, section 6, clause 4, provides "that no sale of liquor shall be made on the premises described in the license to a person known to be a drunkard, or to an intoxicated person, or to a minor." Under this provision of the statutes it was held that the sale and delivery by a licensed person of intoxicating liquor to a minor for the use of another person, although the fact that the liquor was bought for another person was undisclosed, was not a sale to a minor. *Commonwealth v. Lattinville*, 120 Mass. 385; *Commonwealth v. Finnegan*, 124 id. 324; *Goddard v. Burnham*, id. 578. In consequence, perhaps, of these last decisions, the statute 1880, chapter 239, section 3, was passed, by which the clause of section 6, chapter 99, statute 1875, which has been above recited, was amended by adding to it these words: "And that no sale or delivery of intoxicating liquor shall be made to a minor for his parent's use, or for the use of any other person; or to a person who is known to have been intoxicated, within the six months next preceding." The commissioners on the Public Statutes reported these two provisions together, without any verbal changes, but in enacting the Public Statutes, slight changes were made, although it is plain that no change in the law was intended. Public Statutes, chapter 100, section 9, clause 4, provides as follows: "That no sale or delivery of liquor shall be made on the premises described in the license to a person known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months next preceding, or to a minor for his own use, the use of his parent, or of any other person."

The ground of the distinction between the two classes of cases which have been cited was said to be that a sale by an unlicensed person was a prohibited sale, without regard to the person to whom the sale was made, and the purchaser was named in the complaint only for the purpose of identifying the offense, but that a sale by a licensed person to a

minor was only prohibited because the sale was to a minor, and the minority of the purchaser was a constituent element of the offense, and it was said that the mischief, which the statute of 1875 was designed to remedy, was the possession of intoxicating liquor by a minor for his own use. As under the Public Statutes the sale or delivery by a licensed person to a minor is equally an offense, whether made for the use of the minor or the use of any other person, the analogy of the cases upon sales by an unlicensed person shows that if the principal is understood at the time of the sale, the sale may well be alleged as a sale to the minor. But in the case at bar, the principal was disclosed and it must be conceded by the admitted facts that not only the title to the whisky passed by the sale from the defendant to the mother, but if the sale had been upon credit, the credit would have been given solely to the mother, and the contention of the defendant is that by the rules of pleading the act of the defendant could not be alleged as a sale to the minor, but should have been alleged as a sale to the mother, and a delivery to the minor for the mother's use. But we think that a contract for the sale of intoxicating liquor, made with a minor as the agent of a disclosed principal, is a sale to a minor, for the use of another person, within the meaning of the statute, and that it may be so alleged in the complaint. It is true, perhaps, that technical words in a complaint must be held to have their technical legal meaning, and other words their common and popular meaning, and that statutes may use both technical and common words in an unusual sense, and that in such case it might not be sufficient in a complaint to follow merely the words of the statute, but our cases show that in complaints for selling intoxicating liquors to a person in violation of the statutes relating to intoxicating liquors, the word "selling" is not used in its technical legal sense, because it includes an exchange, by way of barter, as well as a sale for money, and is supported by evidence of a sale to a person as the agent of an undisclosed principal, where the property passes not to the agent but to the principal.

In common speech, as well as by the words of the statute, the delivery of intoxicating liquor to a minor under a contract of sale made with him, as the agent of a disclosed or undisclosed principal, is a sale to the minor for the use of the principal. The complaint charges an unlawful sale to a minor, and it may be argued that the legal construction of the charge is that the defendant unlawfully sold to a minor, for his own use, and that, if the sale was to a minor for the use of his parent, or any other person, this should be alleged in the complaint, and that there is a variance. This raises the question whether a complaint for unlawfully selling intoxicating liquor to a minor should allege either that the sale was made for his own use, or the use of his parent, or for the use of any other person. It is manifest that, if the use must be alleged, only one use can be alleged in one count, and that the proof must conform to the allegation. The statute intended to prohibit all sales or deliveries of intoxicating liquor to a minor, and the enumeration of the uses in the statute of 1880 was to remedy the defect of the statute of 1875, which, as held by this court, only prohibited the sale or delivery of intoxicating liquor to a minor, for his own use. The ground

on which it is contended that the person for whose use the sale was made must be alleged is that it is necessary to identify the offense, which is the ground on which it has been held here that the person to whom the sale was made must be alleged, or he must be alleged to be a person unknown. But it has never been held here that the price at which the liquor was sold, or that the quality or kind of intoxicating liquor sold, must be alleged. There is clearly some limit to the necessity of allegations for the purpose of identifying the offense. It has been said that the offense ought to be so far identified that the defendant may know what charge he has to meet, and may be able afterward to plead a former conviction or acquittal. As it is the same offense, whether the liquor was sold for the use of the minor, or for the use of his parent, or for any other person, and the gist of the offense is the unlawful sale of intoxicating liquor to a minor for the use of any person, we are of the opinion that the person for whose use the sale was made need not be alleged. The act of the defendant is defined with sufficient certainty by charging him at a time and place named, with selling, unlawfully, intoxicating liquor to one Jane O'Connell, who was then and there a minor.

Exceptions overruled.

WAY v. MULLETT.

November 24, 1886.

MORTGAGE — POWER OF SALE — FORECLOSURE — REDEMPTION — TENDER.

The mortgagor of a "power of sale mortgage" may bring a bill in equity to redeem after the mortgagee has commenced advertising the premises for sale for condition broken, and before the sale actually takes place, notwithstanding that up to that time he has made no tender of the amount due on the mortgage. Pub. Stats., chap. 181, §§ 21, 27.

DEVENS, J., dissents.

Bill in equity to redeem land from two mortgages. At the hearing before a single justice the court found as follows:

I find that the defendant held a mortgage, popularly known as a power of sale mortgage, that the interest was overdue thereon, and that by its terms the defendant was entitled to sell the premises and advertised the same for sale.

I further find that, although plaintiff knew that the interest was overdue, he neither tendered such interest, nor made any offer of tender, which it was possible for defendant to accept. That although repeatedly plaintiff said he would pay the same, was ready to pay the same, etc., on being urged to make any actual offer or tender thereof, wholly failed to do so, and had no intention of delivering to defendant any sum which he could accept. I further find that, while defendant was ready to receive the interest only, had the same been tendered, he also claimed the costs of advertising the same for sale, etc., etc., should also be paid; that the charges and costs claimed were not unreasonable, if they had any right to charge for counsel fees paid by them for preparation of papers for advertising; that they did claim for this \$25, which was a reasonable sum.

I find that although plaintiff objected to charges as unreasonable, he

failed to make any actual offer or tender whatever, although requested so to do if he objected to any of the charges incurred by the defendant. I find that both as to interest and charges the plaintiff not only failed to make any actual tender, but wholly neglected and practically refused so to do when requested. On the whole case I was of opinion that the bill should be dismissed, and that by filing the bill the plaintiff did not deprive the defendant of his right to advertise and sell the mortgaged property.

The court ordered the bill dismissed, and, at the request of the plaintiff, reported the case for the determination of the full court.

E. M. Bigelow, for plaintiff. *F. E. Bryant* and *W. B. Durant*, for defendant.

GARDNER, J. The defendant was the holder of two mortgages with power of sale, upon breach of their conditions. The plaintiff was the owner of the equities. The defendant advertised the mortgaged premises for sale on the 3d of April, 1885, for breach of the conditions of the mortgages. The bill was filed April 1, 1885, and the subpoena was served upon the defendant personally about three hours before the time appointed for the sale. The plaintiff also caused to be recorded in the registry of deeds for the county of Suffolk the memorandum, required by Public Statutes, chapter 126, section 13. The plaintiff at the sale gave notice to all parties present that this bill had been filed and that the memorandum above mentioned had been recorded. The only question raised is whether the plaintiff has the right to redeem the mortgaged premises.

The person entitled to redeem, where the condition of a mortgage has been broken, may, at any time "before the expiration of the three years limited for the redemption and either before or after an entry for breach of the condition, bring a suit for redemption, without a previous tender, and may, in such suit, offer to pay such sum as shall be found due from him." Pub. Stats., chap. 181, § 27. The statute of 1798, chapter 77, which provided that a bill to redeem must set forth a payment, or tender of payment, of the sum due, was held by this court in *Tirrell v. Merrill*, 17 Mass. 116, to require the mortgagor to make the best calculation he could and tender at his peril. The statute gave him no remedy if he failed to tender the exact amount. The injustice of this provision was so apparent that the court suggested in the opinion that the legislature make some change in the statute. The act of 1821, chapter 85, was passed, which provided that when a mortgagor, having a right to redeem, shall bring his bill within three years after the mortgagee shall have obtained possession, "and shall in his bill offer to pay such sum as shall be found justly and equitably due . . . such offer shall have the like force and effect as a tender of payment, or performance, made before the commencement of the suit." In the Revised Statutes, chapter 107, section 18, some changes were made and the same provisions and requirement were enacted as are now contained in Public Statutes, chapter 181, section 27.

The provisions of this statute apply to power of sale mortgages of real estate. By the terms of the mortgage, upon default in the per-

formance of its conditions, the right of the mortgagee or his assigns to sell attached at once, and as it was a power, coupled with an interest, it could not be revoked by the mortgagor. *Cranston v. Crane*, 97 Mass. 459; *Hall v. Bliss*, 118 id. 554. After breach of the condition the mortgagor had no remedy at law. His right of redemption was gone, subject to the equitable right which he might pursue prior to the sale under the power. If the sale was complete and the conveyance made of the estate in accordance with the terms of the mortgage, the mortgagor lost not only his legal but his equitable right of redemption, and an unconditional estate passed to the purchaser. But until the power is executed, the relation of the mortgagor and mortgagee remains independent of the power to sell. It is reserved to be put in operation upon breach of the condition wherever the mortgagee may determine. He may decide not to execute the power, but may choose to take possession for foreclosure, in the manner pointed out by the statute in those cases where the mortgage contains no power of sale, and wait three years for the foreclosure to be completed — Pub. Stats., chap. 181, § 1 — or he may pursue some other remedy pointed out by the statute. The power in the mortgage to sell, unexecuted, leaves the estate as it would be if no such power existed. *Shaw v. Norfolk Co. R. Co.*, 5 Gray, 162, 182. "The right of redemption, which is the true *indicium* of a mortgage, remains in the mortgagor and his representatives until it shall be foreclosed by entry or judgment with possession, as prescribed by law, or until availing himself of his power the mortgagee shall have made a conveyance, pursuant to it, to some one who shall intend to purchase an irredeemable estate." *Eaton v. Whiting*, 3 Pick. 484, 491. The Public Statutes have enacted in substance, that the sale of mortgaged premises made pursuant to a power of sale contained in the mortgage, will operate as a foreclosure. "When the condition of a mortgage has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the mortgaged premises unless the mortgagee, or some person lawfully holding under him, has obtained possession of such premises for a breach of the condition, and has continued that possession for three years, or unless a sale of such premises has been made pursuant to a power of sale contained in the mortgage." Pub. Stats., chap. 181, § 21. The last clause of this section, relating to a sale, is here enacted for the first time.

In *Eaton v. Whiting*, *ubi supra*, it was intimated that the foreclosure was not complete until a conveyance was made to the purchaser at the sale. In *Cranston v. Crane*, 97 Mass. 459, the opinion of the court stated that the foreclosure was made complete by the sale. The last clause of this section was evidently enacted for the purpose of fixing the time when a foreclosure is complete under the execution of a power of sale in a mortgage. The section treats of those who may redeem, and when they may redeem, and of nothing more. It does not change the law which was in force when this provision was enacted except to determine when the mortgagor may redeem the mortgaged premises. By its terms until a sale of the premises is completed, the mortgagor, or any person claiming under him, may redeem the same.

It is apparent from the Public Statutes, chap. 181, sections 21 *et seq.*,

title Redemption, that a mortgagor could resort to two courses for redemption of his mortgage. First. He could pay or tender the amount due to the mortgagee. If the tender was not accepted it would not prevent the foreclosure, unless a suit was commenced within a year after the tender was made. § 25. Second. He could bring a suit without a previous tender, as appears by sections 27, 29.

We do not think that the sections of the statute relating to tender contain the only resource for the redemption of a power of sale mortgage. Section 24 provides that "the tender may be made at any time before the expiration of the three years limited for redemption, and either before or after an entry for breach of the condition;" and if the mortgagee does not accept the tender and discharge the mortgage the mortgagor may recover the premises by a suit in equity for redemption. The language of this section is similar to that of section 27 already quoted, relating to bringing suit without a tender. It contains no reference to mortgages with power of sale, and no allusion to the last clause of section 21.

In *Cranston v. Crane*, *ubi supra*, it has been held that section 24 applies to such mortgage. The court say in that case that the tender of the amount due and payable upon the mortgage did not operate to defeat the right to sell under the power, unless a suit to redeem was brought within a year afterward. This decision was rendered many years before the enactment of the Public Statutes. We think that section 27 applies with equal force to mortgages with power of sale. In the one "the tender may be made at any time before the expiration of the three years limited for redemption." In the other "the person entitled to redeem may, at any time before the expiration of the three years limited for redemption . . . bring a suit for redemption without a previous tender, and may in said suit offer to pay," etc., etc. If one section is applicable to mortgages with power of sale, it is difficult to determine why the other does not apply. The several sections under the title "redemption" contain the only provisions provided by statute for the redemption of power of sale mortgages. The same provisions are applicable to mortgages with and without such power. The foreclosure in one case is complete upon the sale under the power for breach of condition; in the other upon the expiration of the three years limited for redemption. Before the foreclosure in either case is complete, the mortgagor may resort to either of the methods provided by the statute under the title "redemption." Pub. Stats., chap. 181, §§ 21 *et seq.*

In the case at bar, the plaintiff brought his suit in equity to redeem before the sale of the premises had been made, pursuant to the power of sale contained in the mortgage. In his bill the plaintiff alleges that he is "willing and ready to pay any and all sums of money that may be due under either of said mortgages." Even if the statute was mandatory in requiring him to offer to pay such sum as shall be found due, the plaintiff has complied with its provisions. A majority of the court are of the opinion that the plaintiff has brought himself within the terms of the statute, and that he is entitled to redeem the estate, upon paying what is due the mortgagee. Under Public Statutes, chapter 181, section

28, the court must determine what sums are due on the mortgages. To regain his legal title and possession, the plaintiff must pay what is actually due up to the time of redemption. *Adams v. Brown*, 7 Cush. 220. It is within the discretion of the court to award costs to either party. Pub. Stats., chap. 181, § 29.

Decree accordingly.

DISSENTING OPINION.

DEVENS, J. I am unable to concur in the opinion of the majority of the court. On examining the facts found, it will be seen that the question presented by the case at bar is whether after breach of condition of a mortgage by failure to pay the debt secured thereby, which mortgage contained a power of sale to be executed by the mortgagee or his assignee, and after the execution of such power had commenced by advertising the premises for sale, the mortgagor, not only failing to make any actual tender, but wholly neglecting, practically refusing to do so, may deprive the mortgagee of his right to sell the mortgaged property, except subject to the right of redemption, by simply filing a bill in equity offering to redeem and notifying purchasers of such filing. In the opinion of the court this question is determined in favor of the plaintiff's contention by section 21, chapter 181, Public Statutes and also by section 27, chapter 181.

Section 21, chapter 181, Public Statutes, provides that "when the condition of a mortgage has been broken, the mortgagor, or any person lawfully holding under him, may redeem the mortgaged premises, unless the mortgagee, or some person lawfully holding or claiming under him, has obtained possession of such premises for a breach of the condition and has continued that possession for three years, or unless a sale of such premises has been made, pursuant to a power of sale contained in the mortgage." This seems to me a misconstruction of this section, by reason of the failure to connect it with those which follow. The section 21 having provided he may redeem and when he may do so, the section 22 proceeds to provide what "the person entitled to redeem" — it would seem as described in the previous section — shall do, which is that he shall pay or tender the debt or performance of the condition. If these sections are successively connected, section 21 can have no bearing on the case at bar, as no tender was made. That they are thus connected is shown, not only by their own language, but by reading the four sections that follow. Taken together, these six sections constitute a system by which a party entitled to redeem may pay or tender performance within three years after possession taken, or before sale of the premises under a power, and, having so paid or tendered, may have a year thereafter within which to commence a suit, even if, at the time of the commencement of the suit, the three years may have expired, or the sale have been made. The section 25 negatively thus enacts, by providing that "the tender, if not accepted, shall not prevent the foreclosure of the right of redemption, unless a suit is commenced within a year after the tender is made." The legislation contained in these sections, excepting the clause as to a sale under a power, is found in the Revised Statutes, chapter 107, sections 12 to 17,

and has been continued since. The construction here given is that attributed to them in *Adams v. Brown*, 7 Cush. 220. The only effect of the introduction of the clause as to sale under a power is to provide the means of defeating such a sale by a payment or tender. If my view of section 21, chapter 181, is correct, it is still necessary for me to consider whether the plaintiff may not maintain this bill by virtue of Public Statutes, section 27, chapter 181 — Rev. Stat., chap. 107, § 18; Gen. Stats., chap. 140, § 19 — relied upon also in the opinion of the court. If he might do so, I should concur in the result reached, even if not in the construction ascribed to section 21. The section 27 provides that a suit for redemption may be brought, with or without a previous tender by the person entitled to redeem "at any time before the expiration of three years limited for the redemption and either before or after an entry for a breach of the condition." It will be observed that in this section no mention is made of any power of sale which might be contained in the mortgage or of any effect, which might be produced thereon by commencing such a suit. What is properly known as a power of sale mortgage is a combination of two instruments. The one a security for a debt or other obligation by a mortgage of property, to which the usual incidents of the right to foreclose on the part of the creditor, and to redeem on the part of the debtor, are attached. The other is a power in the nature of a trust to sell the premises and devote the proceeds to the payment of the debt. The latter is to be executed, according to its terms, except so far as its effect or execution may be controlled by the statutes. The donor cannot revoke it, as it is coupled with an interest.

The rights of a creditor, who is mortgagee and also donee of a power are not less distinct, because one instrument instead of two is used to state them. At the time the legislation we are discussing was originally passed, power of sale mortgages were not familiar securities. It has been recently provided as above stated by statute — §§ 21 to 26 — that the power of sale contained in a mortgage may be affected by a tender made previous to a sale of the premises, provided suit be brought thereon within one year. By this provision, these powers to sell are necessarily controlled, but no similar provision is found in section 27. The fact that the sections which relate to suits brought upon tender made, the effect of such tender in defeating the power of sale is distinctly stated, while no allusion is made thereto in section 27, strongly indicates that the power to sell is not defeated by a bill brought without previous tender, and that such a bill affects the creditor, only as he is mortgagee and not as he is donee of a power. No reason suggests itself to my mind why this distinction exists between these sections 21 and 27, except that in a proceeding under section 27, if brought without previous tender, it was not contemplated that the power of sale would be affected. *Cranston v. Crane*, 97 Mass. 459; *Montague v. Darves*, 12 Allen, 397, are both cases in which the court discuss the effect of a tender upon the power of sale. While it is not so decided, nor stated in terms, they both apparently proceed on the theory that the only mode in which a power to sell may be defeated is by tender.

It is readily understood why legislation might intervene to prevent

the exercise of a power to sell granted by the debtor, when such debtor was ready to pay or tender his debt, as it has done under section 21, but it is not so conceivable why it should do so, when the debtor fails to do any thing toward complying with his obligation. Nor do I find it easy to suppose that the prompt remedy intended to be obtained by a power of sale can be defeated by so simple a device as filing a bill alleging a willingness to pay after a refusal to pay or tender any thing. That upon filing such a bill the court might issue an injunction restraining the sale in its discretion, is true, but that discretion will be applied to the circumstances and governed by them. The applications for such orders have been frequent and they have been carefully investigated by the justices of this court, yet if the law be as claimed by the plaintiff, such investigation has been idle, as all that could be attained by an injunction was readily obtained without invoking that process.

The law on this subject is so controlled by statute, that authorities from England or other States have less value than on legal subjects, the discussion of which depends on general principles, but it has been held elsewhere that a bill to redeem does not suspend the power to sell. *Adams v. Scott*, 7 W. R. 213; *Rhodes v. Buckland*, 16 Beav. 212; *Benjamin v. Longborough*, 31 Ark. 210. It is contended that the cases of *Eaton v. Whiting*, 3 Pick. 484; *Shaw v. Norfolk County R. Co.*, 5 Gray, 181, sustain the position that filing a bill with an offer to pay what is due will suspend the exercise of a power of sale. *Eaton v. Whiting* decides only that the interest of a mortgagee is not attachable on *mesne* process at law, and further that the fact that the mortgagee has a power of sale, which he has not executed, does not change the relation of mortgagor and mortgagee, "if such was the relation created by the instrument separate from the power." In other words, the power to sell, possessed by the mortgagee, had not added any qualities which enlarged the estate in him, so as to render it subject to his debts by attachment and levy. *Shaw v. Norfolk County R. R.* is very similar in principle. Of such an instrument, it is there said "it was not less a mortgage than it would otherwise have been, because the grantees were invested, by special agreement, with an additional authority beyond what they would have possessed without it, and, which they had no right to exercise except under an express stipulation, and as long as they took no advantage of it and nothing was done under it, the rights and interests of the respective parties to the conveyance, and their relations to each other, were in no respect affected by it." This gives no color to the idea that, because the power executed has no effect on the mortgage relation, it cannot be executed if the mortgagor seeks to redeem the mortgage. Both opinions in terms treat the mortgage relation, created by the instrument, "as separate from the power." In neither of the cases had there been any attempt to execute the power, and the only question was whether an unexecuted power had in any way affected the mortgage estate. When a mortgagee has actually commenced the execution of his power, it cannot, in my view, have been the intention of the statute that he should be prevented from so doing, unless upon tender made and bill promptly brought in compliance with sections 21 to 25, or unless he should be

restrained by the court for equitable reasons from executing the power.

ALDRICH v. ALDRICH.

November 28, 1886.

EVIDENCE — PLEADING — AMENDMENT — FORECLOSURE — RENTS AND PROFITS.

When evidence has been introduced without objection upon a matter necessarily involved in taking an account between the parties, and there is nothing to indicate that either party has been taken by surprise, or that the matter has not been fully and fairly tried, there ought not to be a new trial, because the pleadings were not in every particular so specific as they ought to have been.

Under Public Statutes, chapter 167, amendments to pleadings may be made at any time before final judgment.

In an action upon a mortgage note, where the plaintiff had previously foreclosed the mortgage by making entry for condition broken, the defendant is entitled to have deducted from the principal and interest due on the note the annual rents and profits of the premises for three years after the plaintiff took possession.

Action of contract on a promissory note made by the defendant for \$2,500, dated January 21, 1858.

At the trial in the superior court, without a jury, it appeared that the said note was secured by a mortgage upon real estate of the defendant, situated in Oxford. The lot of land described in said mortgage contained about one hundred acres, and was divided into woodland, pasture, tillage and mowing; there being about twenty or twenty-five acres of woodland, twenty-five acres of rough pasture land, thirty or forty acres of mowing and other pasture of better quality, and the remaining part of the land was tillage. There were no buildings on the premises. In February, 1859, the defendant removed from the Commonwealth and has never resided here since that date, nor has he since that time ever occupied the mortgaged premises. In March, 1859, the mortgagee, the plaintiff's testator, entered upon the mortgaged premises and took open and peaceable possession of the same for the purpose of foreclosing the mortgage for condition broken and remained in possession, taking the rents and profits, till the mortgage was foreclosed by the lapse of three years. The defendant bought the premises of the plaintiff's testator in January, 1858. The value of said premises, at the time of the foreclosure of the mortgage, was estimated by several witnesses, called by the parties, at from \$2,200 to \$3,000. This was all the evidence in the case material to the question raised in the case. The court found upon the evidence that the value of the premises during and at the close of the three years was \$2,700, and that the annual rents and profits were at least equal in value to the annual interest on the note. The plaintiff asked the court to rule as matter of law that he was entitled to interest upon the principal of said note to the time that the foreclosure of the mortgage became absolute; and that the value of the premises at that time should be deducted from the amount then due on said note, including principal and interest; and that the plaintiff was entitled to recover in this suit the balance thus found to have been due on the note; and that under the answer and evidence the annual rents and profits could not properly be allowed in part pay-

ment of said note. The court did rule as requested in relation to the allowance of interest on said note, and refused to rule as requested in relation to the allowance of rents and profits, and found that the value of said premises, at the time of the foreclosure, and at the time the mortgagee took possession, was \$2,700, and that the annual rents and profits were at least equal to the annual interest on said note for said three years; and that the note had in that manner been fully paid, that is, in the value of the mortgaged premises and in the value of the annual rents and profits, and found for the defendant. After the finding the court allowed the defendant's second amendment to his answer. This amendment was objected to by the plaintiff at that stage of the case. No part of the evidence introduced at the trial was objected to as not admissible under the answer as the answer then stood. The case, at the request of the plaintiff, was reported to this court. If the superior court erred in its refusal to rule as above requested, or in the allowance of said second amendment, or in its final decision of the case, that decision is to be set aside and a new trial granted, otherwise judgment is to be entered upon the finding of the court.

F. A. Gaskill, for plaintiff. *T. G. Kent* and *T. G. Dorey*, for defendant.

FIELD, J. Whether there was sufficient evidence to enable the court to find that the value of the annual rents and profits were at least equal to the annual interest on the note is a question not raised in this report. The evidence on this subject does not appear to have been fully stated in the report. The objections of the plaintiff are to the refusal of the court to rule "that, under the answer and evidence, the annual rents and profits could not properly be allowed in part payment of said note," and to the allowance by the court of the defendant's second amendment; and to the finding that the note had been fully paid, which was reached by debiting the plaintiff with the value of the rents and profits for three years after he took possession. The supplemental answer, which must be considered as the defendant's final amendment, alleged that the plaintiff made peaceable entry upon and took possession of the mortgaged premises on March 17, 1859, and continued in said possession for the term of three years thereafter, "when said mortgage was fully foreclosed," and that the "land was of greater value than the amount of said note at the time of said foreclosure, and said note has been fully paid." "No part of the evidence introduced at the time was objected to as not admissible under the answer, as the answer then stood." This must include the evidence of the value of the rents and profits. When evidence has been introduced without objection upon a matter necessarily involved in taking an account between the parties, and there is nothing to indicate that either party has been taken by surprise, or that the matter has not been fully and fairly tried, there ought not to be a new trial, because the pleadings were not in every particular so specific as they ought to have been. The note expressly drew interest. The plaintiff must account not only for the value of the land, but also for the rents and profits, if he received any, while in possession. All this was evident to both parties.

Public Statutes, chapter 167, section 42, permits amendments at any time before final judgment, and if the supplemental answer did not, with sufficient certainty, allege that the plaintiff had received rents and profits which ought to be applied toward the payment of the principal and interest on the note, it was within the discretion of the superior court to permit the defendant to amend his answer and the original objection, if there were ever any thing in it, became immaterial. It does not appear that the plaintiff has in any respect been prejudiced by this action of the court.

Judgment on the finding.

WALKER v. MAYO.

November 23, 1886.

DEBTOR AND CREDITOR — COMPROMISE AGREEMENT — PROMISSORY NOTE — ILLEGAL CONTRACT.

An agreement of compromise for a certain percentage, in case all other unsecured creditors would sign the agreement, has no binding effect upon the signers in case of failure of all unsecured creditors to sign.

When there is an indebtedness existing between two parties growing out of a valid agreement, and they enter into a new and unlawful agreement in respect to the same, to carry out which the debtor gives to the creditor his promissory note, and the debtor afterward repudiates the note as illegal, the creditor may still maintain an action against the debtor upon the original agreement.

Action of contract, the first count of the declaration being upon an account annexed for merchandise sold to the defendant. The second count of the declaration is upon a note for \$700, dated April 28, 1879, made by the defendant payable to the order of the plaintiffs, in yearly installments of \$100, it being alleged that five of the yearly installments were due with interest thereon. The amended answer of the defendant was to the effect that, if he was ever indebted to the plaintiffs under the first count, the defendant presented to the plaintiffs for signature an agreement for compromise, which the plaintiffs refused to sign unless the defendant would give them his note for the balance of the account, and that thereupon the note declared on in the second count of the declaration was given to the plaintiffs in payment of the amount due them over and above twenty per cent upon the secret agreement that the plaintiffs should execute the composition deed; that on receipt of the note the plaintiffs did execute the composition deed and subsequently received from the defendant the amount stipulated to be paid, all of which was fraudulent to the other creditors named in the composition deed. The case was heard in the superior court upon agreed facts in substance as follows:

On the 15th of April, 1879, defendant was indebted to the plaintiffs for merchandise sold him in the sum of \$382.56, the amount of the debt intended to be covered by the first count of the declaration. The defendant was then in embarrassed circumstances and was endeavoring to make a compromise with his creditors at twenty cents on the dollar; certain of his creditors signed the agreement for composition. By this agreement the creditors agreed to accept twenty per cent of the amount of their claims in full settlement, the agreement not to be binding unless signed by all unsecured creditors. The plaintiffs declined to sign the

paper unless the defendant would agree to give them a note for the remaining eighty per cent of their indebtedness. To this the defendant agreed, and the plaintiffs signed said agreement and received said note for eighty per cent. Thereafter the agreement for twenty per cent was signed by three of the creditors of the defendant, the names of these creditors being upon the paper after the names of the plaintiffs. The paper was not signed by all the unsecured creditors of said Mayo. One of them who had a claim against Mayo refused to sign the paper, and was subsequently paid by Mayo in full.

After the paper had been signed by all the creditors whose names are borne upon it the defendant paid to the plaintiffs and other signers of the compromise twenty per cent of the amount of their claim, having given them the note in suit for the remaining eighty per cent, as agreed.

The superior court gave judgment for the plaintiffs and the defendant appealed.

G. Wells, for plaintiffs. *C. L. Long*, for defendant.

C. ALLEN, J. The agreement of compromise is no bar to the plaintiffs' action, there being an express stipulation that it should not be binding, unless signed by all the unsecured creditors. *Turner v. Comer*, 6 Gray, 530. There was nothing to show a waiver by the plaintiffs of this stipulation, and the defendant, therefore, acquired no rights under it. The plaintiffs did not agree to accept twenty per cent in full, unless all the unsecured creditors should sign the agreement, which they did not do. The plaintiffs' conditional agreement to accept the percentage in full is, therefore, to be disregarded. In this respect this case differs from *Huckins v. Hunt*, 138 Mass. 366. It is conceded on all hands that the note was fraudulent and void, and that no recovery can be had upon the second count. *Fay v. Fay*, 121 Mass. 561; *Huckins v. Hunt*, 138 id. 366. The defendant sets up its fraudulent character in defense, and since it was clearly void, and since both parties so treat it, we must assume that the court also so treated it, and that the finding of the court for the plaintiffs was on the first count, which declared on the original indebtedness of the defendants to the plaintiffs. The question, therefore, is, whether the note being thus void and avoided by the defendants is nevertheless to be deemed a payment of the original debt.

Ordinarily in Massachusetts a note given for a simple contract debt is presumed to be taken in payment. The reason for this was thus given by Chief Justice SHAW: "It is founded in the consideration that, when a note is given for goods, even if it is not negotiated, it is equally convenient to the creditor—and generally more so—to sue on the note as on the original consideration, and so there is no reason for considering the original simple contract as still subsisting and in force." *Curtis v. Hubbard*, 9 Metc. 322, 328.

The giving of the note is simply giving a new promise in place of the old one. But in case the new promise is void and avoided by the promisor, then the creditor gets nothing at all for his debt. The defendant seeks in the same breath to say that the plaintiffs got nothing and something; that they did not get a new promise to be enforced, but

got one sufficient to supersede the old promise. This cannot be in a case where the defendant has repudiated, withdrawn, canceled, and nullified the new promise. It is as if it had never been. The plaintiffs were barred, by their participation in the fraud, from recovering on the note itself; but the fraud does not affect the original debt. It was no part of the transaction on which the plaintiffs seek to recover under their first count. The defendant cannot be allowed to escape payment of a debt, originally just, by setting up an independent and subsequent fraudulent scheme, like that adopted in the present case, which he himself has set aside and avoided. This rule has been uniformly applied where the new note was void for usury. *Johnson v. Johnson*, 11 Mass. 359; *Stebbins v. Smith*, 4 Pick. 97; *Ramsdell v. Soule*, 12 id. 126. And it is a general rule that, where a debtor gives a new security which is void and avoided, the creditor may sue him on the original contract. *Leonard v. First Cong. Society in Taunton*, 2 Cush. 462; *Turner v. Browne*, 3 C. B. 157.

For these reasons, in the opinion of a majority of the court, the entry must be

Judgment for plaintiffs affirmed.

COMMONWEALTH v. ROOSEWELL.

November 22, 1886.

CRIMINAL LAW — RAPE.

Under an indictment charging the defendant with an assault upon a female child under the age of ten years, with the intent feloniously to unlawfully and carnally know and abuse the said child, it is no defense that the acts done by the defendant were done without force or violence, or with the consent of the child.

In Massachusetts the offense of unlawfully and carnally knowing and abusing a female child under the age of ten years is rape.

Where the crime of rape upon a female child under the age of ten years is charged, by carnally knowing and abusing her, it is not necessary to aver or prove that the acts were done against her will or without her consent.

Two indictments, each charging the defendant with assaults upon a female child under the age of ten years, with the intent feloniously to unlawfully and carnally know and abuse the said child. At the trial in the superior court, at the close of the evidence, the defendant requested the court to rule and instruct the jury among other things, that, if they should find that the acts done by the defendant were done without any force or violence, or with the consent of the child, the defendant must be acquitted. The court refused to give this instruction, but among other things instructed the jury that if the children were under the age of ten years, and the jury must be satisfied of that fact before they could find the defendant guilty, their consent would not protect the defendant, and it was immaterial whether they did in fact consent or not. The jury returned a verdict of guilty on both indictments, and the defendant alleged exceptions to rulings and refusals to rule of the presiding judge.

E. J. Sherman, attorney-general, for Commonwealth. *Pierce & Stiles*, for defendant.

C. ALLEN, J. The chief argument for the defendant is, that an indict-

ment for an assault upon a female child under the age of ten years, with intent to unlawfully and carnally know and abuse her, cannot be maintained without proof that the acts were done without her consent; that the carnal knowledge and abuse of a child is a special statutory offense, distinct from the crime of rape; and that the consent of the child is no defense to the substantive crime, because the statute expressly so provides or implies, but is a defense to the assault with intent, because the terms of the statute do not extend to the assault, and because an assault consented to is no assault in law — and there are many decisions, both English and American, some of which are cited,* which sustain this defense. But it is not a valid defense in this Commonwealth.

The statutes upon which the case depends are as follows: Pub. Stats., chap. 202, § 27: "Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully and carnally knows and abuses a female child, under the age of ten years, shall be punished by imprisonment, in the State prison for life or for any term of years." § 28: "Who ever assaults a female with intent to commit a rape shall be punished by imprisonment in the State prison for life or for any term of years, or by fine," etc.

There is indeed another statute — Pub. Stats., chap. 210, § 8 — which provides that "whoever attempts to commit an offense prohibited by law, and in such attempt does any act toward the commission of such offense, but fails in the perpetration," shall be punished. But the indictments in these cases are not brought under this statute. Indictments for attempts, whether brought under particular statutes, or under the common law, should set forth in direct terms, that the defendant attempted to commit the crime, and so are the precedents. *Frain & Heard Prec.* 50, 53; *Whart. Prec. (Am.)* 1046-1052; *Commonwealth v. Dennis*, 105 Mass. 162; *Commonwealth v. Sherman*, id. 169; *Commonwealth v. McLaughlin*, id. 460; *Christian v. Commonwealth*, 23 Gratt. 954. See, also, *Commonwealth v. Thompson*, 116 Mass. 346. This statute, therefore, being disregarded, it is to be considered if these indictments can rest upon the Public Statutes, chapter 202, section 28, punishing an assault with intent to commit a rape.

In England the definitions of rape have sometimes included the statutory offense of carnal knowledge of a young child. Thus, "rape is felony by the common law, declared by parliament for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years, with her will, or against her will." 3 Co. Inst. 60. "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman child under the age of ten years with or against her will." 1 Hale P. C. 628. See, also, page 631. In East P. C. 436, it is said: "This last offense — viz., unlawful abuse of a child — is not, properly speaking, a rape, which implies a carnal knowledge against the

* On this point, counsel for the defendant cited the following cases: *Smith v. State*, 12 Ohio St. 466; *State v. Pickett*, 11 Nev. 255; *Stephens v. State*, 34 Alb. Law Jour. 228; *Reg. v. Connolly*, U. C. Q. B. 817; *Cliver v. State*, 45 N. J. Law, 46; *Reg. v. Cockburn*, 8 Cox C. C. 548; *Reg. v. Read*, id. 114; *Reg. v. Roadley*, 14 Cox, 241; 1 Den. C. C. 879, note; *Christian v. Commonwealth*, 23 Gratt. 954.

will of the party; but a felony created by this statute — 18 Eliz., chap. 7, § 4 — under which the consent or non-consent of the child, under the age of ten years, is immaterial." Other writers have sometimes directly or by implication included the statutory offense within the term "rape." See 4 Bl. Com. 212; 1 Gabb. Crim. Law, 832; Roscoe Crim. Ev. (7th ed.) 289, 851. But however it may have been elsewhere, in Massachusetts the offense of unlawfully and carnally knowing and abusing a female child under the age of ten years is, and for more than two hundred years has been, known and designated as rape. In October, 1669, the ordinary form of rape being already punishable by existing laws, the following statute was passed: "For as much as carnal copulation with a woman child, under the age of ten years, is a more heinous sin than with one of more years, as being more inhuman and unnatural in itself, and more perilous to the life and well being of the child, it is, therefore, ordered by this court and the authority thereof, that whosoever he be, shall commit, or have carnal copulation with any such child under ten years old, and be lawfully convicted thereof, he shall be put to death." This was printed in the edition of 1672 of the colony laws, page 15, with the marginal note "rape of a child." See, also, Anc. Chart. (ed. 1814) with the same marginal note. These statutes for the ordinary form of rape and for the abuse of a child were in substance re-enacted in separate and successive editions in 1692; but by Prov. Stat. 1597, chap. 18, entitled "an act against ravishment or rape," both were put into one section and so they have ever since remained. See 1 State ed. Prov. Laws, 56, 296. The next statute appears to be that of 1784, chapter 68, entitled "an act for the punishment of rape," both offenses being included in the same section, the marginal note in the edition of 1873, being "rape punished with death." This was followed by Statute 1805, chapter 97, entitled "an act providing for the punishment of the crime of rape, or for the prevention thereof," in which by express reference the offense of carnally knowing and abusing a woman child under the age of ten years is classified as rape. The later statutes are Statute 1815, chap. 86; Rev. Stats., chap. 125, § 18, where the marginal note is, "rape or abuse of female child." Gen. Stats., chap. 160, § 26; Pub. Stats., chap. 202, § 27, in each of which the marginal note mentions only "rape." In Davis Crim. Just. (ed. 1824) a work long used and relied on in this State, the carnal knowledge of young female children is called rape. "A rape upon children under the age of ten years, whether with or without their consent, was made a capital felony as early as the reign of Queen Elizabeth." Page 590. See, also, Id. (Heard ed.) 673, 668; Bouv. Law Dict.; "Rape," eds. of 1852 and 1883; *Commonwealth v. Sugland*, 4 Gray, 7.

Where a rape upon a female child under the age of ten years is charged, by carnally knowing and abusing her, it is not necessary to aver or prove that the acts were done against her will or without her consent. The reason is, that from her tender years she is held, in law, to be incapable of giving a valid consent to such acts, and the law conclusively presumes that she did not consent. 3 Greenl. Ev., § 211. The rule has always been so, from the earliest times, though the reason has not always been stated in this form.

In this Commonwealth the statute punishing an assault with intent to commit a rape also includes both phases of the crime of rape; the carnal knowledge and abuse of a young female child, as well as a rape, committed upon a grown woman, by actual force and violence and against her will. This is apparent from an examination of the first statute upon the subject. Stat. 1805, chap. 97, § 3. Section 1 provides the same punishment for any man who shall ravish and carnally know any woman by force and against her will, or shall unlawfully and carnally know and abuse a female child under the age of ten years; and for any person present, aiding and consenting in such rape, etc. There "rape" obviously includes both offenses previously described. Section 2 provides for the punishment of accessaries, "after any rape committed as aforesaid." Section 3 provides for the punishment of any man who, "with intent to commit a rape, as aforesaid, shall make an assault upon a woman or female child." This is perfectly explicit, as also the statute of 1815, chapter 86, which increases the punishment for an assault on a female child under the age of ten years, with an intent to commit a rape. The Revised Statutes, chapter 125, section 18, provided for the punishment of any person who should ravish and carnally know any female of the age of ten years or more by force or against her will, or should unlawfully and carnally know and abuse any female child under the age of ten years; and in section 19 provided for the punishment of any person who should "assault any female with intent to commit the crime of rape." No other provision was made for assault upon a child with intent to carnally know and abuse her, and no mention was made by the commissioners of any intention to change the law by omitting altogether all provision for this offense. It is apparent that section 19 was intended to be as comprehensive as Statutes 1805, chapter 97, section 3, and 1815, chapter 86, both of which are referred to in the margin, and that the offense of assaulting a young female child with intent unlawfully and carnally to know and abuse her was included under the description of assaulting "any female with intent to commit the crime of rape." The language of General Statutes, chapter 160, section 27, and Public Statutes, chapter 202, section 28, is in substance the same and bears the same construction. It thus appears that the legislature intended by Public Statutes, chapter 202, section 28, to punish as a criminal offense an assault upon a female child under the age of ten years, with an intent, carnally, to know and abuse her. But it is contended, and there are many decisions elsewhere to support this ground of defense, that the assault is the gravamen of this offense, and that an assault must of necessity be against her will. This argument, however, involves a confession in the use of the terms "against her will." Every rape involves an assault, and a rape, as well as an assault, must be against the will of the victim. But it has already been clearly established in this Commonwealth that "against her will" means the same thing as "without her consent" — *Commonwealth v. Burke*, 105 Mass. 376 — and, accordingly, it has been held that if a man has carnal intercourse, using so much force as is necessary, with a woman, who is incapable of consenting by reason of sleep, drunkenness, stupefaction, unconsciousness, idiocy, helpless-

ness, and sometimes, even, where the consent of one capable of consenting is procured by fraud, he may be convicted of rape. See *Commonwealth v. Burke*, 105 Mass. 376; *Commonwealth v. McDonald*, 10 id. 405; *Reg. v. Mayers*, 12 Cox C. C. 311; *Queen v. Dea*, L. R., 14 Irish, 468; S. C., 15 Cox Cr. Cas. 579; 36 Eng. Rep. 615. In the last case, which was decided in 1884, it was determined in Ireland, on great consideration, that the consent of a married woman, if fraudulently obtained by personation of her husband, is no defense to an indictment for rape. There is a full discussion by counsel and by the court of the previous English decisions upon the subject, and the determination is in accordance with the later intimations of English judges. See *Queen v. Flattery*, 2 Q. B. Div. 410; S. C., 21 Eng. Rep. 188. *Queen v. Young*, 14 Cox C. C. 114; S. C., 28 Eng. Rep. 548. In cases of assault upon young girls with intent, the English courts, though making a distinction between consent and submission, and holding that mere submission would not amount to a defense — see *Queen v. Lock*, L. R., 2 C. C. 10, and cases cited — did not entirely break away from the earlier decisions, which held that the consent of a young girl would defeat an indictment for such an assault; and at last it was enacted by parliament — Stat. 43 and 44 Vict., chap. 45, § 2, A. D. 1880 — that “it shall be no defense to a charge or indictment for an indecent assault on a young person, under the age of thirteen, to prove that he or she consented to the act of indecency.”

The difficulty in England appears to have arisen from the phraseology of the early statutes, punishing carnal knowledge and abuse of a young girl, whether by her consent, or without her consent, apparently implying that she might consent thereto. See *R. v. Johnson*, 10 Cox C. C. 114. But there has been no such language in any of the Massachusetts statutes; and even if there had been, it is more in accordance with the spirit of the law simply to hold a girl under the age of ten years incapable of giving a valid consent, so that the question whether she did or did not give a formal or apparent consent becomes immaterial. If, as all agree, it is immaterial upon a charge of committing the completed act which includes an assault, no reason but an extremely technical one can be urged why it should not be so upon a charge of assault with intent to commit the completed act. Indeed, to speak of an assault upon her without her consent, with intent to carnally know and abuse her with her consent, seems to involve a contradiction in terms. But when it is once considered that the intention of the law is to declare that a young girl shall be deemed incapable of consenting to such an act to her injury, and that evidence of any consent by her shall be incompetent in defense to an indictment therefor, and that, although she gives a formal and apparent consent, yet in law, as in reality, she gives none, because she does not and cannot take in the meaning of what is done, all legal difficulty disappears, and the conclusion may properly be reached that the assault is without her consent and against her will. This principle has been clearly maintained with reference to kidnapping children and removing young slaves from the Commonwealth. *Com. v. Nickerson*, 5 Allen, 518; *Com. v. Taylor*, 8 Metc. 72, 73; *Com. v. Aves*, 18 Pick. 193, 225; *State v. Rollins*, 8 N. H. 550; *State v. Far-*

ran, 41 id. 53; and also in some other States in cases of indecent assaults. *People v. McDonald*, 9 Mich. 150; *Hays v. People*, 1 Hill, 351; *Singer v. People*, 13 Hun, 418; *State v. Dancy*, 83 N. C. 608; *State v. Johnson*, 76 id. 209. See, also, *Givens v. Com.*, 29 Gratt. 830; *Queen v. Dee*, L. R., 14 Irish, 468; S. C., 15 Cox Cr. Cas. 579; 36 Eng. Rep. 615.

There is nothing in the other exceptions requiring a new trial or calling for remarks.

Exceptions overruled.

COMMONWEALTH v. BESSE.

November 24, 1886.

CRIMINAL LAW—VENIRE—JUROR.

There is no express statutory requirement in this State that the town clerk or selectmen should certify in writing the names of the jurors drawn by them. The court, therefore, will not set aside a verdict on the ground that the *venire* contained no certificate of such officers that the persons summoned by the constable had been drawn as jurors.

Indictment charging the defendant with the murder of Richard N. Lawton. The defendant was arraigned and pleaded not guilty. At the trial the counsel for the defendant, after the drawing by the clerk of the court of the names of certain jurors and before the persons so drawn were sworn and before the jury were impaneled, challenged them, alleging that each of said persons was not a legal juror, was not legally drawn and not competent to serve for the reason, among others, that no indorsement or return was made on the *venire* by any person having authority under the statute to make it, that any person named was legally drawn to serve as a juror in the case. The court, against the defendant's objection, allowed the jurors to be sworn as jurors to try the case. The jury returned a verdict of guilty, and the defendant alleged exceptions.

E. J. Sherman, attorney-general, and *E. C. Bumpus*, district attorney, for Commonwealth. *H. Kingman* and *J. C. Sullivan*, for defendant.

C. ALLEN, J. The argument for the prisoner rests chiefly on the ground that the statute prescribing the manner of summoning a juror "by reading to him the *venire* with the indorsement thereon of his having been drawn, or by leaving at his place of abode a written notification of his having been drawn," etc., contemplates an indorsement by the town clerk or selectmen of the fact that certain persons have been duly drawn, and that, without such indorsement, the constable has no proper means of knowing the facts since the law does not require his presence at the drawing. This particular alternative method of making service was first enacted in Statute 1784, chapter 7, section 5. An examination of the statutes upon the subject from 1692 to the present time shows that there has never been any express requirement that the town clerk or selectmen should certify, in writing, who were chosen as jurors by the freeholders, as was the custom before 1736, or drawn from the jury-box by themselves,

as has been the law since that date, or even that the constable should be present when the jurors were so drawn or chosen. There has never been any express provision showing how the constable should ascertain what persons were chosen or drawn as jurors; but the constable *has* always been required, in general terms, to summon the persons chosen or drawn as jurors and to make return of the *venire*. See Prov. Stats. 1692-3, chap. 33, § 11; 1694-5, chap. 24, § 1; 1697, chap. 9, § 10; 1699-1700, chap. 1, § 4; chap. 2, § 3; chap. 3, § 5; 1736, chap. 10, §§ 1, 2; 1741-2, chap. 18, §§ 2-5; 1749-50, chap. 5, §§ 2-5; 1756-7, chap. 13, §§ 2-5; 1759-60, chap. 291, §§ 2-5; State ed. Prov. Stats., vol. 1, pp. 74-75, 193, 286-287, 368, 370, 371-2; vol. 2, pp. 828-829, 1090-1; vol. 3, pp. 474-475, 995-6; vol. 4, pp. 318-9; Stats. 1784, chap. 7, §§ 4, 5; 1807, chap. 140; Rev. Stats., chap. 95, §§ 13, 17; Gen. Stats., chap. 132, § 20; Pub. Stats., chap. 170, § 22. We have also looked at a number of original *venires* in different years, both before and after 1784 in two different counties, and upon the *venires* so examined usually the constable made a direct return that certain persons named were drawn as jurors; though in some instances an indorsement of the drawing was made upon the *venire* by the town clerk. As early as 1804 and perhaps earlier, there was a printed form of return upon *venires* in Suffolk county, in which the constable stated who were drawn. Such also is the form of return given in Goodwin's Town Officer — ed. of 1829 — 331, 332, and in the New England Sheriff — 2d ed. 1855. In the present case, the return was, in this respect, in the usual form, and it was not disputed that the jurors in fact were properly drawn, and the objection rests solely on the ground that the drawing was not certified upon the *venire* by the town clerk or selectmen. This was not necessary. If the jurors were to be summoned by reading to them the *venires* with the indorsement thereon of their having been drawn, such indorsement might be made by the constable. The result is that the exceptions are overruled. See *Commonwealth v. Moran*, 130 Mass. 284.

Exceptions overruled.

CONNECTICUT SUPREME COURT OF ERRORS.

COTTRELL v. BABCOCK PRINTING PRESS MANUF. CO.

June 18, 1886.

INJUNCTION—SALE OF GOOD WILL—SOLICITING OLD CUSTOMERS.

Where one of two partners sells out to the other the good-will merely of the business, the vendee only secures the right to conduct the old business at the old stand.

In the absence of express agreement, one who sells out his interest in a business, and its good will, may lawfully establish a similar business where he chooses, and by advertisement, circular, card and personal solicitation, invite all, including customers of the old firm, to trade with him. But he should not lead any one to believe that what he offers for sale is manufactured by the old firm, or that he is the successor of the old firm, or that his vendee is not carrying on the business formerly conducted by the old firm.

Suit for an injunction. The trial court found the following facts :

Calvert B. Cottrell and Nathan Babcock, both of the town of Stonington, in this State, formed a copartnership in 1855, under the name of Cottrell & Babcock, and carried on the business of manufacturing and selling machinery at the town of Stonington. In 1867 they commenced to manufacture and sell printing presses and printing machinery, and so continued up to July, 1880.

The firm manufactured lithographic stop cylinder, two revolution, and drum cylinder printing presses. The presses so manufactured and sold embodied many novel mechanical features and devices which were of great utility and value, by reason of which the presses became widely known among publishers and printers. The firm expended large sums of money in perfecting the mechanical arrangement and devices embodied in their printing presses, and also in advertising the presses. The printing presses, while manufactured by the firm, had cast upon their frames the words "Cottrell & Babcock," and were stamped, marked, advertised and sold in large quantities, and were known in the market and to printers, publishers and purchasers as the "Cottrell & Babcock" printing presses.

In July, 1880, the copartnership was dissolved by mutual consent. On the twenty-seventh day of that month the following agreement was entered into between Cottrell and Babcock :

"Whereas the copartnership heretofore existing under the name of Cottrell & Babcock has been by mutual consent dissolved ; and whereas the said Nathan Babcock has preferred his petition to Hon. John D. Park, judge of the superior court, for the appointment of a receiver of the partnership assets ; and whereas, in order to settle and determine all differences existing between said partners relative to their settlement of their partnership accounts and respective interests in said firm, they mutually agree as follows :

"First. That the said Nathan Babcock agrees to sell, assign, transfer and convey to said Calvert B. Cottrell all his right, title and interest in and to the partnership assets of every name and nature, including all patent rights, good-will and trade-marks, whether in his own name or in the copartnership name, for the sum of \$29,000 in cash

and the transfer to him of eighty-four shares of the capital stock of the New Williamsburg and Flatbush Railroad Company, now held by William B. Waite as security for the sum of about \$1,600, upon the release by said Waite of said stock upon the payment of said sum as security for which it is now held, and the agreement of the said Calvert B. Cottrell to assume and pay all the debts and liabilities of said firm of every description.

"Second. The said Calvert B. Cottrell agrees to pay the said \$29,000 as follows: \$3,000 within ten days; \$13,000 with interest within sixty days; and the balance of \$13,000 with interest within ninety days. And within ten days from date the said Calvert B. Cottrell agrees to transfer to the said Babcock as aforesaid the said eighty-four shares of stock of said railroad company, and further agrees that he will assume and pay all the indebtedness and liabilities of said firm of every description as they fall due, and save the said Babcock harmless therefrom, and from all costs, loss or damage on account of the same.

"Third. That said Calvert B. Cottrell further agrees that he will, on or before the 1st day of January, 1882, remove the savings bank mortgage, which was given to secure a debt of said copartnership by said Nathan Babcock upon his residence, and that as soon as practicable, and within the time limited by the trust deed, he will procure the said property to be released from the incumbrance of the conveyance in trust, to Thomas Greenman, to secure said partnership creditors.

"Fourth. The said Nathan Babcock agrees that, upon the full payment of said \$29,000 as stipulated, and the transfer of said eighty-four shares of stock as aforesaid, the said Babcock will execute and deliver to said Calvert B. Cottrell any and all instruments of transfer necessary and proper to convey to said Cottrell all of said Babcock's interest in and to the assets and property before mentioned, but without recourse to him, including all rights pertaining to the same of whatsoever description.

"Fifth. It is expressly understood that no obligation shall be contracted and no business carried on in the name of Cottrell & Babcock, except as hereinafter provided.

"Sixth. The said Calvert B. Cottrell agrees that upon the conveyance by said Babcock to him as hereinbefore stated, the railroad stock and the Pawtucket stock, if not already properly transferred to said Greenman as trustee shall be properly transferred to him for the purposes mentioned in the trust deed of Cottrell & Babcock to Thomas S. Greenman, dated the 26th day of August, 1879; and further, that the machinery now in their factory shall be conveyed to said Greenman in trust, by specific description, in compliance with the laws of this State, to make the same a valid security for the uses and purposes mentioned in said trust deed, and subject to said trust. That said property shall be conveyed to said Greenman for the further trust of securing said Nathan Babcock against any liability, loss, costs or damage arising on any claim by R. Hoe & Company.

"And said Babcock further agrees to take such necessary steps to execute all conveyances that may be necessary for the transfer and conveyance of all his right, title and interest in the stock of said Pawtucket

Manufacturing Company, and the said New Williamsburg Railroad Company to said Greenman in trust.

"And it is further agreed that said Cottrell shall have authority to use the company name of Cottrell & Babcock in liquidation and settlement of all matters growing out of said partnership and its dissolution, and not to be used for the purpose of creating any new liability.

"In witness whereof we, the said Calvert B. Cottrell and Nathan Babcock, have hereunto set our hands and seals the 27th day of July, A. D. 1880.

"C. B. COTTRELL. [L. s.]

"NATHAN BABCOCK. [L. s.]

The said Cottrell kept and performed all of the agreements by him made in the above contract, and performed all of the obligations by him therein assumed.

On the 16th day of September, 1880, Babcock executed and delivered to Cottrell two instruments in writing for the purpose of carrying out the contract.

The material part of the first of these instruments—Exhibit B—was as follows:

"Now, therefore, for and in consideration of the sum of \$1, to me in hand paid, and other good and valuable consideration, the receipt of which is hereby acknowledged, I, the said Nathan Babcock, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over, unto the said Calvert B. Cottrell all my right, title and interest in and to each and every of the letters-patent set forth in the schedule hereto annexed, which is hereby made a part of this instrument, together with the invention or inventions therein and thereby secured, and also all my right, title and interest in and to any other letters-patent or inventions owned or used by said firm, the said letters-patent to be held and enjoyed by the said Calvert B. Cottrell for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which each and every of said letters-patent are or may be granted—including any reissue or reissues, extension or extensions thereof—as fully and entirely as the same could have been held and enjoyed by me had this assignment and sale not been made.

"And for a like consideration, the receipt of which I hereby acknowledge, I, the said Nathan Babcock, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto the said Calvert B. Cottrell, all my right, title and interest in and to all trade-marks owned or used by the said firm of Cottrell & Babcock in the manufacture and sale of printing presses and printing machines.

"And it is further covenanted and agreed by the said Nathan Babcock that he will sign, execute and deliver—but without expense to him—any and all petitions, applications or papers which may be necessary to enable the said Cottrell, his legal representatives or assigns, to obtain and secure any reissue or reissues, extension or extensions, of all or any of said letters-patent set forth in the schedule hereto annexed, or which are assigned as aforesaid.

"It being understood that this sale and assignment is without recourse against said Babcock.

"In witness whereof, I have hereunto set my hand and seal this 16th of September, A. D. 1880.

"NATHAN BABCOCK. [L. s.]"

[Schedule omitted as immaterial.]

The other instrument, "Exhibit C," was a quitclaim deed from Babcock to Cottrell of all his interest in the real estate upon which the business of Cottrell & Babcock had been carried on, and in the personal property of the late firm of every kind, including its stocks, bonds, accounts and contracts, etc.

Immediately after the dissolution of the firm, Cottrell associated with him in the business of manufacturing and selling printing presses and printing machinery, his son Edgar H. Cottrell, under the name of C. B. Cottrell & Co., and succeeded and carried on as successors the said business formerly conducted by Cottrell & Babcock.

The rights and interests acquired by Calvert B. Cottrell under the contract of purchase, and the conveyances in pursuance thereof, were valuable in carrying on the business.

On July 12, 1882, the Babcock Printing Press Manufacturing Company was organized under the joint-stock laws of this State, and located at New London, in this State; the stockholders of which company consisted of the said Nathan Babcock, one Charles B. Maxson, and one George P. Fenner. Nathan Babcock was secretary and treasurer of the company, and Maxson president, and Fenner superintendent of the same. Said Maxson and Fenner were formerly employed for several years by Cottrell & Babcock, and were subsequently in the employ of C. B. Cottrell & Co.

After the organization of said Babcock Printing Press Manufacturing Company, said corporation commenced the business of manufacturing and selling printing presses, at New London, and caused to be printed, published, and widely circulated among printers, publishers, and others, an advertising card, of which the following is a copy:

THE

BABCOCK PRINTING PRESS MAN'FG CO.

Manufacturers of

DRUM CYLINDER, STOP CYLINDER
and **LITHOGRAPHIC PRESSES.**

New London, Conn.

NATHAN BABCOCK,

of the late firm of

CHAS. B. MAXON,
PRESIDENT.

COTTRELL & BABCOCK,
SECTY. & TREAS.

GEO. P. FENNER,
SUPT.

Between three and four thousand of these cards were sent by mail, and distributed among printers and publishers, including many of the old customers of the firm of Cottrell & Babcock. Prominence was given to the name of "Cottrell & Babcock" in the printing of the card, and also to the name of Nathan Babcock, by printing these names

in more conspicuous letters than any other words upon the card, and also the words "of the late firm of" were printed in much smaller type than any other words on the card. The different size of type were used by the printers in printing the card without any instruction from the defendant, and the card was not designed or adapted to mislead any person who read it. After the sale and conveyances above mentioned, Babcock wrote and sent by mail the following letter to one of the old customers of Cottrell & Babcock, namely, Van Antwerp, Bragg & Co., of Cincinnati, Ohio, soliciting their patronage, which letter was duly received by them.

"NEW LONDON, CONN., Oct. 19th, 1883.

"MESSRS. VAN ANTWERP, BRAGG & Co., Cincinnati, O. :

"GENTLEMEN — Your valued favor of the 15th is at hand and contents noticed. We regret that we are not able to send catalogue of stop-cylinder presses, as we have not yet published one of that class. We will mail you a photograph of our new lithograph press which is now completed, and we intend that our stops shall be similar in style and appearance. We should very much like to furnish you some stops, and can guarantee them equal in every respect to any thing you have seen. We have a new lock motion, for which patents are now pending, which works remarkably smooth and holds the cylinder very firm. We do not know how many presses you want, but we could furnish you three or four in four to six months. If you could make above time answer, we shall be happy to call on you and if possible arrange to furnish them. We have the patterns to make, which necessitates so much time. We have no need to assure you that we can furnish a first-class press, when we say that our Mr. Fenner has made all the working drawings ever used by the late firm of Cottrell & Babcock on that class of presses, and that, with the dictation of the writer, he made all the plans, measures, movements and proportions of said presses; hence we flatter ourselves that no builders better understand the requirements of a stop cylinder than we do, and certainly none would exert themselves more to furnish a first-class press. Please let us hear from you, and oblige,

"Yours respectfully,

"THE BABCOCK PR'T'G PRESS MFG. Co."

This letter was in reply to the following from that firm :

"CINCINNATI, 15th Oct., 1883.

"BABCOCK PRINTING Co., New London, Conn. :

"GENTLEMEN — We will be wanting a few presses soon. Please send us one of your catalogues. Our wants are stop cylinders to print matter 30x41. Do your presses resemble Cottrell & Babcock's, of which we have a number? What would you make us a press for, as per above, delivered here, set up? Send catalogue.

"Very respectfully,

"VAN ANTWERP, BRAGG & Co."

Babcock also, by visit in response to a letter from them, personally solicited one Yewdale, of Yewdale & Co., of Milwaukee, Wisconsin, to

patronize the Babcock Printing Press Manufacturing Company. Yewdale was a member of the firm of Yewdale & Co., who were old customers of the old firm of Cottrell & Babcock. The Babcock Printing Press Manufacturing Company, by their agents and servants, and by their private circulars, cards and newspaper advertisements, solicited the general public to purchase printing presses manufactured by them, and also in the same manner and by the same means solicited the old customers of the firm of Cottrell & Babcock and of their successors, C. B. Cottrell & Co.

After the dissolution of the copartnership and the purchase by Cottrell of Babcock's interest in the partnership assets, Cottrell and C. B. Cottrell & Co., as the successors of the firm of Cottrell & Babcock, continued for a time to manufacture and sell printing presses, stamped with the trade name of "Cottrell & Babcock, New York," thereon. Customers of the old firm of Cottrell & Babcock, and thereafter of C. B. Cottrell & Co., as their successors, have occasionally written and telegraphed to Cottrell & Co., and addressed them as C. B. Babcock & Co., Babcock & Son, and Babcock & Cottrell.

A. Brandegee and *C. Perrin*, for appellants. The "good-will" of a manufacturing business conducted with skill and probity for many years, and upon which "a large sum of money has been expended in advertising, and in perfecting many novel mechanical devices which have been patented, and which are of very great utility and value; whose printing presses are sold in large quantities, and have become known in the market under the name of the firm," is a species of incorporeal property, recognized by law, and which it is the duty of a court of equity to protect. *Brown Trade-Marks* (2d ed.), §§ 90, 91, p. 114; § 521, p. 524; *Holmes, Booth & Haydens v. The Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278. This species of property, though not technically a "trade-mark," is founded upon similar reasons of public policy and protected upon analogous principles. A trade-mark is a symbol, name or device affixed to some vendible commodity. It is adopted for the purpose, or by use and association comes to acquire the office of pointing out the origin or ownership of that article; and so in a sort becomes the badge and sign manual of the producer. "It is the only means," says Mr. Upton, "by which the manufacturer is enabled to inspire and retain public confidence in the quality of the thing manufactured, and thereby secure a valuable and permanent demand which is the life of manufacturing." It is a right neither created nor controlled by legislative enactments, but rests in common law, independent of all statutes. "Its adequate security and protection by the exercise of the highest powers of courts is an imperative duty, as well for the security of the interests of the public as the promotion of individual justice." On the other hand, the "good-will" of a trade or business exists only in contemplation of law. It has no outward and visible sign, but is none the less real because it is intangible. It has been recognized and protected by the courts from their very earliest history. It grows out of and is frequently treated as synonymous with a "trade name," and in many adjudged cases has been confused with a "trade-mark." Thus the noted case of *Brooklyn White Lead Co. v. Manwary*,

25 Barb. 416; *The Congress & Empire Spring Co.*, 45 N. Y. 291; *The Irving House* case, 3 Sandf. 925; *The Howe Bakery* case, 19 How. Pr. 14, together with many others, and among them it is respectfully submitted that of *Holmes, Booth & Hayden v. The Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, will be found, upon careful examination, to be genuine trade name or good-will instead of trade-mark cases. "Good-will" has been variously defined by the text-writers and judges, as viz.: In the simplest and most succinct phrase by Lord ELDON, "the probability that the old customers will resort to the old place." *Crutwell v. Lye*, 17 Ves. 335.

By POLLOCK, C. B.: "Very frequently the good-will of a business is made the subject of sale though there is nothing tangible in it. It is merely the advantage of the recommendation of the vendor to his connections and his agreeing to abstain from all competition with the vendee." *Potter v. Commissioners*, 10 Exch. 147.

"Good-will" is very clearly and admirably defined by Mr. Justice STORY, in *Story Partnership*, § 99.

"Good-will denotes a relation existing between a man or firm and the public with reference to a particular business. It is the good-will of the public to the man or firm, and the customers are really the people who form the good-will. 'Good-will' is a species of incorporeal personality. Being intangible or incorporeal, the person, firm or corporation possessing the 'good-will' indicates it to the public by means of a name or by some symbol or trade-mark."

A sale or transfer of the good-will passes the right to use the name or trade-mark which symbolizes it.

"Good-will means every advantage that has been acquired by a proprietor in carrying on his business, whether connected with the business or with the name under which it is managed. The name of a firm is a very important part of the good-will of the business carried on by the firm." *Churton v. Douglaes*, 1 Johns. Ch. (Eng.) 174; S. C., 5 London Jurist (N. S.), 1887.

"When a partner sells to another partner a going business every advantage acquired by the old firm in carrying on its business, whether connected with the old place or the old name, passes to the purchaser." *McGowan Bros. Pump Machine Co. v. McGowan*, 2 Cinc. (Ohio) 313.

"The sale of a good-will and business conveys the right to the use of the partnership name as a description of the articles sold to the trade, and that right is an exclusive right as against the person who sold it." *Levy v. Walker*, 39 Law Times (N. S.), 654; S. C., 10 Ch. Div. 436.

"A trade-mark passes on sale of business and good-will." *Sohier v. Johnson*, 111 Mass. 233; *Morgan v. Rogers*, 19 Fed. Rep'r, 596.

"A transfer by retiring partner to the other of 'The business connections and patronage belonging to the firm' may be deemed to include the good-will of the concern." *Kellogg v. Totten*, 16 Abb. Pr. 35.

"A transfer of the business and good-will gives the partner who purchases the same the right to use the firm name and trade-marks." *Adams v. Adams*, 7 Abb. N. C. 292.

"If the whole concern and the good-will of a business have been sold the name as a trade-mark would have been sold with it." *Banks v. Gibson*, 39 Beav. (Eng.) 566; S. C., 11 Jurist (N. S.), 680.

If these principles stand for law, then the sale by Babcock for a large sum, "of all his right, title and interest of every name and nature, including patent rights, good-will and trade-marks," whether in his own or the copartnership name — conveyed to Cottrell :

1. The "going business" of the old firm.
2. Every advantage acquired by the old firm, whether connected with the business, or the name under which it had been conducted.
3. The advantage of the recommendation of the vendor to his connections.
4. The right to all the probabilities that "the old customers would return to the old place."

5. The sole right to use the name of the old firm in such way as to indicate that Cottrell, and not Babcock, was its successor.

6. By this conveyance Babcock became both morally and equitably estopped from any conduct or representation which would tend to impair the value of this good-will, or render his conveyance nugatory.

The court erred in holding that the card "was not designed or adapted to mislead" the public or to injure the good-will and trade-name thus acquired by the plaintiffs.

1. The sixth paragraph of the complaint charges that the defendant prepared a business card, a specimen of which is set forth.

The card set forth is the identical card prepared and circulated by the defendant. Paragraph 5 of the answer admits that "the defendant prepared a business card of the description set forth in the sixth paragraph of plaintiffs' complaint, by means of which it advertised, etc." It would, therefore, appear somewhat late to contend that the card was printed without instructions from the defendant.

This court indicated its opinion of such a defense in *Boardman v. Britannia Co.*, 35 Conn. 407, as follows :

"When there is a strong resemblance in matter, color and arrangement the court will presume it was not fortuitous ; but that it was intentional with a view to mislead, and will enjoin against it."

Again : "Though an imitation is only partial if it is calculated and intended to mislead the public, courts will enjoin, if the success of the design is a probable or even a possible consequence."

Again : "The cases are numerous where the defendant has been enjoined against the use of a label, though he has placed his own name as manufacturer in connection with the trade-mark."

The case at bar would seem to be, in terms, one of the "numerous cases" which the court thus alludes to, only to condemn.

2. But even if it were true that the printer evolved this card, and its cunning arrangement solely from his own consciousness, that would not exonerate the defendant.

The printer was the defendant's agent in the premises, and the defendant ratified his act by accepting and circulating the card. The wrong and injury to the plaintiffs was not so much in printing as it was in issuing, sending out and circulating the card among the customers

of the old firm of Cottrell & Babcock, and of their successors, the plaintiffs.

The defendant having adopted a course of conduct which injured, or tended to injure, the plaintiffs, must be held to have intended the natural and probable consequences of its acts. *Holmes, etc., v. Holmes, etc.*, 37 Conn. 296.

3. Nor is the intent of the infringer a material question in this case.

"It can make no difference with the petitioners whether the respondents counterfeited their trade-marks, because they designed to defraud, or because they supposed they had a right to do so." *Boardman v. Brittanua Co.*, 35 Conn. 408.

"The grounds on which courts of equity offered relief in this class of cases is the injury to the party aggrieved and the imposition of the public. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo* named, therefore, seem to be an immaterial inquiry." *Holmes, etc., v. Holmes, etc.*, 37 Conn. 296.

And to the same effect: *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Dale & Smithson*, 12 Abb. Pr. 237; *Holmes, etc., v. Holmes, etc.*, 37 Conn. 278; *Coffeen v. Brunton*, 4 McLean, 516; *Coleman v. Crump*, 70 N. Y. 578; *McLean v. Fleming*, 96 U. S. 245.

4. Whether the card is "adapted," that is calculated to deceive the public under all the circumstances of the case, is to be determined by judicial inspection, and if this court is convinced, from such inspection, that the card would probably deceive or mislead the ordinary purchaser, no amount of expert or judicial evidence would justify the court in withholding an injunction. *Consolidated Fruit Jar Co. v. Thomas*, 2 N. J. L. J., U. S. Cir. Ct. of N. J., 1879.

The court finds that the card was not "adapted" to mislead any person who "reads it." By this we understand the court to mean that the card was not calculated to mislead any one who took pains to read the whole card.

But it is not the wary and those who take pains "to read," who are ordinarily deceived; nor are they the class that the courts are vigilant to protect; it is the ordinary, careless purchaser, that plain wayfaring man, who in the words of wisdom is said sometimes to be "a fool," he who catches his impressions from sight rather than from sense; who is the heedless purchaser for whom the cunning trap is set and for whose protection the court will break through the snare of the fowler.

In *Singer Manufacturing Company v. Wilson*, 3 App. Cas. 389, the lord chancellor, among other things, says: "What is the effect of the advertisements made by the defendant? It is earnestly insisted by him that his advertisements and representations are of such a character as to preclude all possibility of deception; that every one reading them is thereby apprised distinctly and plainly that the machines dealt in by him are not the machines made by the plaintiff, and it is claimed that this was especially intended to be made to appear in order that defendant might have the benefit of the superiority which he claims for his machines.

"There is no question but that it does appear from defendant's

advertisements that the plaintiff is not the maker of them, and that his machines are called 'English Singers,' and there is no question either but that to one informed these statements would be sufficient to impart all that is claimed. But we must remember the fact common to the knowledge of all, that the great mass of people likely to buy and use machines are not so informed. The most that such persons know is that the machines called 'Singer Machines' are what they want, and, consequently, when they find the word 'Singer' they are not apt to stop and read what accompanies it. But whether they are or not—the fact that they must do so to avoid being misled is sufficient. The defendant has no right to put them to that trouble or the plaintiff to that risk."

The court finds that the defendant caused between three and four thousand of said cards to be printed, published and circulated among printers and publishers, including many of the old customers of the old firm of Cottrell & Babcock. That prominence was given to the name "Cottrell & Babcock," and to the name "Nathan Babcock," by printing said names in more conspicuous letters than any other words upon the card, and the words "of the late firm of" in much smaller type than any other words that were printed on said card.

"Babcock," "Nathan Babcock" and "Cottrell & Babcock," are the names which are printed in large letters upon the card, and to which great prominence is given.

What most purchasers know is that the machine they want is that known as "the Cottrell & Babcock" drum cylinder or stop cylinder printing press, and finding that name upon the card, they ordinarily do not stop to read the whole card. Even if a purchaser did not read the whole card, he would be led naturally to believe that "the late firm of" Cottrell & Babcock had dissolved, and that the defendant was their lineal successor, and in reality the manufacturer of what are known as the Cottrell & Babcock printing presses. It will be noted that the name "Babcock," in the title of the company, and "Nathan Babcock," and "Cottrell & Babcock," are very adroitly linked together on this card in a manner which is calculated to mislead persons not pausing to carefully read or consider its tenor.

Furthermore, the name, "Charles B. Maxson, president," is printed in small letters at the left lower corner of the card, and the name "George P. Fenner, supt.," is also printed in small type at the right hand lower corner of the card. The words, "secretary and treasurer," are printed in small letters under the name "Cottrell & Babcock," instead of immediately after the name "Nathan Babcock," and the name of Babcock, though only secretary and treasurer, is printed in much larger type than the name of the president.

That such a card did operate to mislead the public is evident from the fact, found in this case, that customers of the old firm and that of its successors, C. B. Cottrell & Co., have written and telegraphed to C. B. Cottrell & Co., and have addressed that firm as "C. B. Babcock & Co.," "Babcock & Son," and "Babcock & Cottrell." Record, p. 72, close of page.

Chief Judge HARGIS, in *Avery & Sons v. Mickle*, 18 West. Jurist,

292, characterized this ingenious mixture of what is lawful with what is forbidden, in the following sinewy Saxon :

"The fraud is most frequently accomplished by the illegal use of names, forms, words, etc., which belong to the common stock. The law says you may use any thing which is common property or that cannot be exclusively appropriated. But you must use it to convey the ideas which it commonly expresses and of which it is the accepted sign, you must use it to tell the truth, the whole truth, and nothing but the truth. You must not steal the livery of heaven to serve the devil in."

Similar adroit attempts have been made to adopt just so much of another's trade name as to mislead the unwary and just so little as to keep within the law, with the following results :

In *Croft v. Day*, 7 Beav. Ch. (Eng.) 84, the master of the rolls, after noticing between the two labels distinctions sufficient to protect one who took upon himself the task of study and comparison, came to the conclusion that there was sufficient to mislead the ordinary run of persons and lead them to believe that the new establishment was in some way or other connected with the old, and the defendant was restrained from using labels or show cards calculated to produce such deception.

In *Glenny v. Smith*, 2 Drewry & Smale, 476; S. C., 11 Jur. (N. S.) 964, the defendant, a clerk, on leaving the plaintiffs' firm and starting the same kind of business, put up on his sign the words "from Thresher & Glenny," the word "from" in smaller letters than the rest. Among other things, the vice chancellor said: "Assuming that defendant had the right to put the words, 'from Thresher & Glenny,' it is but natural to ask why it is that the word 'from' both on the brass plates and the awning is written in letters so much smaller than the words 'Thresher & Glenny.' Why should it not have been written in letters so plain that it would be as visible and legible as the rest? Instead of doing so he puts in large and prominent letters the words 'Thresher & Glenny,' which standing alone would lead to the conclusion that his shop is the shop of Thresher & Glenny, and the word 'from,' which alone negatives that conclusion, he puts in letters so small and so placed as to be very apt not to catch the eye."

In *Scott v. Scott*, 16 Law Times (N. S.), 143, W. Scott retired from business and set up business for himself at T. near N. The inscription used by the firm over the door of their place of business at G. had been "R. & W. Scott of N." R. Scott made over his business at N. and G. to the defendants who, at their premises at G., made use of the inscription "Scott & Nixon, late R. and W. Scott of N."

On application of plaintiff the court granted an injunction restraining the defendants from using a door plate with such an inscription, inasmuch as it amounted to a representation that they had succeeded to the business of the late firm. Vice Chancellor Wood said: "When you say 'late' Robert & Walter Scott you imply that those partners, either one or both, have retired from the business, and that the whole good-will of the business has been transferred to the firm which is now Scott & Nixon." . . . "The public are told in effect that the good-will of the business of R. & W. Scott has gone to their successors, Scott & Nixon; that Scott & Nixon have as successors gone into business,

from which Robert & Walter Scott have retired. That is not a true representation of the state of facts at all."

In *Harper v. Pearson*, 3 Law Times (N. S.), 547, the defendants issued a circular and card in which they style themselves "E. & J. Pearson, late Harpers & Moore," and which were calculated to lead the public to suppose that the defendants had succeeded to the business of the plaintiffs and were working the same materials as the plaintiffs had formerly used. It was held that although the words of the circular and card might be literally true, yet if they intended to mislead the public the court would restrain them from further circulating or issuing such or any similar circular or card. An injunction was granted.

In *Churton v. Douglass*, 1 Johns. Ch. 174; S. C., 5 Jur. (N. S.) 887, the business had been carried on for some time under the firm name of John Douglass & Co. By a written instrument the defendant sold to the plaintiffs all his shares, rights and interests in the trade or business carried on by him and the plaintiffs at Bradford in copartnership and under the firm name of John Douglass & Co., and the good-will thereof. Notice of the dissolution of the old firm was given and the new firm was "Churton, Bankhart & Huett, late John Douglass & Co." The location of the old business was at Bradford. Subsequently the defendant opened a store for the same business next door to that of the plaintiffs and placarded it with the name of John Douglass & Co. The defendant was restrained from resuming or carrying on the business of snuff merchant at or about the immediate neighborhood of Bradford, either alone or in partnership with any person, under the style or firm of John Douglass & Co. Among other things Vice Chancellor Wood says: "Late John Douglass & Co. imports this: We are the people who carry on the business formerly the business of John Douglass & Co."

In *Hookham v. Pottage*, L. R., 8 Ch. 91, the question arose between persons who had been copartners. The plaintiff, defendant and defendant's brother were partners, and carried on business as tailors under the name of "Hookham & E. S. Pottage." The partnership was afterward dissolved by a decree of the court, in which it was provided that the business of the partnership should belong to the plaintiffs, the defendant receiving the value of his interest. The plaintiffs kept up the shop and continued to trade under the name of "Hookham & Co." Subsequently, the defendant set up in business within a few doors of the plaintiff's shop, and painted over his shop door the words "S. Pottage from Hookham & Pottage," the words "from" and "and" being in small letters. An injunction was granted restraining the defendant from using the plaintiff's name in such a manner as to deceive, on the ground that although the defendant was entitled to state fairly his connection with the former firm, he was not entitled to act so as to divert to himself custom intended for the plaintiff. That having regard to the manner in which the names were painted, the defendant had done that which was calculated to lead the public to suppose that he was still connected with the old firm.

In *Dence v. Mason*, Week. Notes, 1878, p. 23, it appears that the plaintiffs carried on a business under the name of "Brand & Co." One F. Mason, who had been for many years in the employ of the

plaintiffs' predecessor in business, began to deal in the same class of goods as the plaintiffs in partnership with one Brand as "Brand & Mason." In consequence of proceedings taken by the plaintiffs, this name was changed to "Mason & Brand." Brand refused to continue in the partnership, but the defendant continued to trade under the name of "Mason & Brand." On motion by plaintiffs for an injunction it was held by the court that in arranging with the proprietor of a small shop in the same street as the plaintiffs, for the exhibition on her shop front of the words "Agent for Mason & Brand's Essence of Beef," the words "agent for" being in small and the rest in large letters, the defendant had acted in a manner intended and calculated to deceive.

In *Witt v. Corcoran*, 2 Ch. Div. 69, the plaintiff, who was in partnership with the defendant and his son under the firm name of "Bryan Corcoran, Witt & Co.," purchased the business, good-will, trade names and trade-marks of the defendant. The defendant carried on business under the name of "Bryan Corcoran & Co." or "Bryan Corcoran, Son & Co." The defendant was restrained from carrying on business under those names or any other names calculated to induce the belief that the defendant was carrying on business in succession to the original firm.

Colton v. Thomas, 2 Brewst. (Penn.) 308, is a case strikingly in point. The plaintiff purchased from Dr. Colton, of New York, the right to use the name of the "Colton Dental Association," and commenced business in the city of Philadelphia, under the designation of the "Colton Dental Association," which name appeared upon all of the plaintiff's advertisements and was prominently displayed on his signs, doors and windows. The defendant, Thomas, was employed by plaintiff for upward of two years to extract teeth at the plaintiff's dental rooms, but subsequently left the employment of the plaintiff and opened dental rooms in the same city and issued cards as follows: Dr. F. R. Thomas, formerly operator at the Colton Dental Rooms," and placed on his sign over his door the words, "Dr. F. R. Thomas, late operator at the Colton Dental Rooms." The words "late operator at the" upon the cards and signs were in small letters, while the words "Colton Dental Rooms" were in large letters. The defendant was restrained from the use of the cards and signs complained of, and also restrained from the employment of any device by which the patients and patrons of the plaintiff, without the exercise of care, would be induced to suppose that the defendant's place of business was the place of business of the plaintiff. Among other things, the court remarked: "It is difficult to believe that the words 'late operator' and 'formerly operator' being in letters and type so much smaller than the other letters upon the cards and sign of the defendant have not been thus placed with a purpose to mislead and to create an impression that his rooms are the 'Colton Dental Rooms,' or the rooms of the 'Colton Dental Association;'" and the judge in that case quotes with approval the remarks of Mr. Upton, "that when the words on a sign of 'formerly' or 'successors to' are so small and indistinct as to escape observation unless upon careful inspection, in most instances they are fraudulent and their use would be prohibited by injunction."

Again the court remarks: "If, as the defendant says in his affidavit, his sole object is to inform the public that he is no longer in the employment of the plaintiff and is now in business for himself and to protect his reputation as an extractor of teeth against damage from the inferior capacity and reputation of the complainant as he charges, his object will be most effectually accomplished by placing before the public on his cards and sign in characters or letters as prominent and as easily read as the other words which are on them, those which give information to the public of the fact."

In *Smith v. Cooper*, 5 Abb. N. C. 274, it appeared that the defendant had been a member of the firm of Smith, Gray, Cooper & Co., doing business as clothiers in the city of Brooklyn. The partnership having expired, the defendant retired and embarked in the same line of business on the same street in the city and a short distance from the old store where the plaintiff continued the business. The plaintiff put up a sign on the front of his store, the words thereon being arranged in three lines. In the first or top line his name, "T. S. Cooper," and in the third or bottom line the name of the old firm, "Smith, Gray, Cooper & Co." The letters of the old firm name were eleven and one-half inches long, and in the second or intermediate line the words "of the late firm of" in letters about four and one-half inches long.

The court, speaking by NEILSON, Ch. J., says: "The question is whether the words as thus arranged performed the mere office of informing the public that the defendant was engaged in business there and was the same person who had been a member of the old firm, or whether they were calculated to mislead the public and divert to that store the customers of the plaintiffs or persons intending to become such customers."

It was urged upon the defendant that the buildings occupied by the parties are quite unlike; that of the plaintiff much the largest, ornamental and of iron; that of the defendant plain and of brick; persons acquainted with the plaintiff's place and paying some attention to appearances would not mistake the one store for the other. That is true and would be of importance in the absence of any device creating an artificial or seeming relation between the two stores, or even with such device if all persons would pay attention to appearances.

It was shown by witnesses for the defendant that the words "of the late firm of" are in letters as large as those on some signs put up for business purposes. But there is a difference between the effect of words of a reduced size when standing alone, or whether coupled with other and larger words. The latter especially, if the lowest line would catch the eye when the smaller words on the line above would not. So, too, it was proved that the words "of the late firm of" could be read from the opposite side of the street, and from the corner two hundred feet away. That being so it would have been quite to the purpose, if some good reason could have been given for having the words that follow those, much larger. If the words "of the late firm of" are in letters large and plain enough, why should the name of the old firm be in letters more than twice that size? There is — indeed can be — no good reason. Without imputing to the defendant any fraudulent intention,

the element of fraud not being material in cases of this class—*Millington v. Fox*, 3 M. & C. 338—it is impossible to avoid the conviction that this sign was cunningly arranged, and is calculated to mislead persons not pausing to read or consider all the words on it."

In *Findlay v. McWilliams*, 23 Low. Can. Jur. 148, it is said that "A sale by a retiring partner to his copartner of the good-will of the business implies an obligation on the part of the retiring partner to abstain from undue competition with the purchaser of the good-will. And where the retiring partner opened a similar shop in the immediate vicinity, and sent circulars to the customers of the late firm, and thereby sought to create the impression that he had succeeded to the firm's business, it was held that he had violated the obligations imposed in the contract of the sale of the good-will."

In the case at bar the inference which customers would deduce from the card would be, that Cottrell had retired from business, and that the good-will of the old business of Cottrell & Babcock had been transferred to, or had been acquired by, the defendant. The inference would be that defendant was the successor to Cottrell & Babcock, which is not a true statement of the facts, and would mislead or tend to mislead customers, and injure the plaintiffs. It must be borne in mind that Babcock had sold his right to the trade-mark, good-will and business reputation of the old firm of which he was a member, and that mode of advertising on the card did not set forth the whole or the exact truth. Babcock has no right of property either in the old trade name, or in the good-will and reputation, or in the patents, or trade-marks of the old business. Those he had been fully paid for by Cottrell. By issuing and circulating this card, the defendant company and Babcock sought to give prominence, reputation and value to the defendant's business at the expense of the old trade name, and the reputation of the old business. The old trade name, with its reputation, was so placed and connected with other names upon the card as to tell an untruth. The card did not state the whole truth, and if the object of the defendant was to state an historical fact the card did not embody the truthful history of the transactions between Babcock and the old firm and its business. The trade name, reputation and good-will of the old business was and is the plaintiff's property by actual purchase. The preparation and circulation of the card among printers and the customers of the old firm was an attempt on the part of the defendant and Babcock to transfer to the defendant—and to Babcock in so far as he had an interest as a stockholder—a part of the reputation and good-will of the old business. It was an attempt to advertise and boom the defendant at the expense of the old concern. The card was unlawful, inasmuch as its circulation was calculated to deceive the public, and to benefit the defendant at the expense of the plaintiffs. The defendant had no right to circulate a card which was calculated to lead the public to believe that it was carrying on the old business in continuation of, or in succession to, the old firm, or that it was in any way connected with the old business. 61 N. Y. 234.

The plaintiffs being the lawful successors of Cottrell & Babcock, and as such, being the owners of the old business and its good-will and

reputation, the defendant had no right, either by letter or by its officers or agents, to solicit the customers of the old firm of Cottrell & Babcock to come and deal with it.

In *Burrows v. Foster*, 32 Beav. 18-24; *S. C.*, 1 New Rep. (Eng.) 156, it was agreed plaintiff should have the benefit and advantages of the business and connections of two partnerships. Two firms were dissolved and the business sold for a valuable consideration, and the defendants attempted to derogate from the sale by setting up a rival business for themselves and taking away customers of the old firm. Lord Justice TURNER granted an injunction restraining defendants from soliciting the business of the old customers and connections.

In *Labouchere v. Dawson*, L. R., 13 Eq. Cas. 332, it appeared that previous to June, 1871, a long-established brewery business had been carried on at Kirkstall, near Leeds, under the firm of "Benjamin Dawson & Co." The defendant, Edwin Popplewell Dawson, was entitled to two-fifths of the business; the remaining three-fifths formed part of the estate of Benjamin Dawson, deceased, which in June, 1871, was being administered by the court of chancery. On the 12th of June, 1871, an agreement in writing was entered into for the sale, by Edwin P. Dawson and the legal personal representatives of Benjamin Dawson to the plaintiff Labouchere and others of the brewery at K., and the plant, fixtures, utensils and machinery and the good-will of the business and the exclusive right to use the name of "Benjamin Dawson & Co." in connection with the business of brewers. The agreement contained no stipulations to prevent the defendant from himself setting up business as a brewer. In December, 1871, the defendant, Edwin P. Dawson, commenced to carry on the business of a brewer at Burton-upon-Trent, and as alleged by the plaintiffs gave out that such new business was a continuation of the business formerly carried on by the firm of "Benjamin Dawson & Co.," and also by his travelers and agents solicited the customers of that firm for orders. Lord ROMILLY, master of the rolls, after full consideration of the facts in that case, held that the defendant was not entitled, either by private letter or by a visit, or by his travelers or agents, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. The master of the rolls said: "That is not a fair and reasonable thing to do after he, defendant, had sold the good-will." In that case an injunction was awarded against the defendant, restraining him, his partners, servants or agents from applying to any person who was a customer of the firm of "Benjamin Dawson & Co." prior to the 12th of June, 1871, privately, by letter, personally, or by a traveler asking such customers to continue to deal with the defendant or not to deal with the plaintiffs.

In *Ginisi v. Cooper & Co.*, 14 Ch. Div. 596, it was held that a trader, who had sold his business and good-will to another for value, must abstain not only from soliciting orders, but also from dealing with the old customers. The defendants were restrained from soliciting orders from or endeavoring to obtain custom of the old firm of Cooper & Hampson by distributing cards and sending a former manager to solicit trade from the old customers.

In a later case, that of *Leggott v. Barrett*, 15 Ch. Div. 306, BRETT, L. J., among other things, said: "It being a deed dissolving a partnership, it follows that the good-will is left to the partner who retains the business. If it had been the sale of the good-will to a stranger, I should be very apt to agree with the doctrine of *Labouchere v. Dawson*, and I think that there would be an implied contract, on the part of the person who sold the good-will, that he would not immediately afterward solicit the customers who are really the people who form the good-will; and I should say the same, where there is a dissolution of a partnership for a valuable consideration, that the outgoing partner who dissolves the partnership for good consideration does impliedly contract that he will not immediately afterward do away with that for which he has been paid by soliciting the customers, and so practically destroy the good-will which he has agreed to leave with the surviving partner. In either case I should be inclined to think that the doctrine of *Labouchere v. Dawson* was right, and that there is such an implied contract in either case. It is, therefore, an implied contract that he will not solicit former customers."

In *Hall's Appeal*, 60 Penn. St. 458, it is said that "Good faith requires of a party, who has sold the good-will of his business, that he should do nothing which tends to deprive the purchaser of its benefits and advantages."

In *Angier v. Webber*, 14 Allen (Mass.), 211, A., B. and C. were wagoners between Boston and Somerville, having several stands in Boston. B. and C. sold to A. their share of all the property used in the business, and the interest and good-will in the business, and agreed to do nothing which should impair or injure said interest or good-will. It was held that an injunction should issue to restrain B. and C. from soliciting, doing or obtaining any work, trade, custom or teaming business for or from any other of the customers or persons who had formerly been customers of A., B. and C.

The doctrine established by the cases cited is that where there is a sale of a going business, and the entire property and good-will is transferred by one partner to another for a valuable consideration, that the outgoing partner who dissolves the copartnership and receives a valuable consideration for his interest in the good-will and reputation of the old business, impliedly contracts that he will do nothing to injure or impair the good-will, and in any event he will not afterward solicit the customers of the old firm and thus practically destroy the good-will which he has agreed to leave with the partner who succeeds to the old business. This is the modern doctrine of the English equity courts and would seem to be well established by the cases cited. It is conceded that in the absence of an express covenant the retiring partner may set up a similar business to that of the late firm, but if he sets up a similar business and he has sold the good-will of the old customers, then he must not personally or by letter go to the old customers and solicit them to trade with him. To that extent, at least, there is an implied covenant on the part of the retiring partner. Because when he thus sells the good-will there is an implied obligation on his part to abstain from undue competition with the purchaser thereof. He may

carry on a similar business, he may advertise that business fairly, and the better doctrine would appear to be that if the old customers come to him without solicitation he may deal with them; but he may not go to them personally or by private letters or circulars solicit their trade, for that would, in effect, destroy or tend to destroy the property or thing which he has sold and for which he has received valuable consideration. This is the modern doctrine of the English equity courts, and, so far as we are aware, there is no adjudication in this country in conflict with this doctrine. The principle would appear to be sound and just and to be in harmony with the modern definition of "good-will."

In the case at bar the proof is clear that after the sale and conveyances by Babcock to Cottrell, and after the plaintiffs had become the lawful successors of the old firm and had acquired all its property, rights and interests, and after the formation of the defendant company, Nathan Babcock wrote and sent a private letter to one of the old customers of Cottrell & Babcock, to-wit: Van Antwerp, Bragg & Co., of Cincinnati, Ohio, soliciting their patronage. A copy of the letter was introduced in evidence and appears in the printed record as "Exhibit A." It will be noted that in the letter the defendant company advertises the same kind of printing presses that the old firm and its successors manufactured and sold, and that the patronage of the old customers was solicited in these words: "We should very much like to furnish you some stops, and can guarantee them equal in every respect to any thing you have seen. . . . We do not know how many presses you want, but could furnish you three or four in four to six months. If you could make above time answer we shall be happy to call on you, and, if possible, arrange to furnish them. . . . We have no need to assure you we can furnish a first-class press, when we say that our Mr. Fenner has made all the working drawings ever used by the late firm of Cottrell & Babcock, on that class of presses, and that with the dictation of the writer he made all the plans, measures, movements and proportions of said presses."

Furthermore, the court found that "the said Nathan Babcock also by visit, personally solicited one Yewdale, of Yewdale Co., of Milwaukee, Wis., to patronize the said Babcock Printing Press Manufacturing Co. Said Yewdale was a member of the firm of Yewdale & Co., who were old customers of the old firm of "Cottrell & Babcock."

From these facts it is clear that Nathan Babcock personally and as an officer and agent of the defendant company, solicited the patronage of Van Antwerp, Bragg & Co., by private letter, and that Babcock personally solicited the firm of Yewdale & Co., through its agent who was a member of the firm, to give the firm's patronage to and to deal with the defendant company.

These facts bring the case directly within the principle laid down in the case of *Labouchere v. Dawson*, and the other cases above cited.

The defendants cannot shelter themselves "behind their act of incorporation," but are subject to the same obligations and restrictions and responsible for the same duties as Babcock, whose name and obligations they have adopted.

In *McGowan Bros. Pump and Machine Co. v. McGowan*, 2 Cinc. 313, it appeared that Theodore J. and John H. McGowan were manufacturers of pumps, and partners in business under the name of "McGowan Bros." John H. sold out his interest in the business and assets of the firm to Theodore J. Subsequently Theodore J. with others incorporated "The McGowan Bros. Pump and Machine Co." and transferred to the corporation the rights and interest purchased from John H. An action was brought by John H. McGowan against the corporation to restrain it from using the words "McGowan Bros." in the corporate name, and the corporation was restrained from using the name "McGowan Bros." on the ground that the corporate name implied that the articles made by the corporation were in part the product of the skill and labor of John H. McGowan, or that the corporation was in fact the old firm. It will be noted that the action here was brought by an individual who had formerly been a member of the old firm against a corporation which the other partner had organized, and in which he was a stockholder. That case is very like.

In *Beal v. Chase*, 31 Mich. 490, it appeared that a printing establishment and business with the copyright of a valuable receipt book, together with the good-will of the business, was sold, and the vendor covenanted not to resume business within the State of Michigan while the vendee should continue business therein, at Ann Arbor, Mich. Subsequently the vendor formed a corporation for the purpose of conducting a new and a similar business. An injunction was granted restraining the vendor from engaging, directly or indirectly, in the printing business in the State, and from printing such receipt book, and the corporation was also enjoined from conducting the business with or for vendor. In that case it appeared that the vendor was the principal stockholder and the president and business manager of the corporation; and it also appeared that the other corporators and stockholders, with one exception, had been advised or had notice of the contract between the vendor and vendee. On the argument of the cause the question was raised whether an action could be maintained by the person who had purchased the printing establishment against the corporation defendant. The court placed its decision chiefly on the ground that the corporators and stockholders had notice of the contract, but in discussing the question whether the action was maintainable it said that if the action had been against a copartnership there would be no doubt that the knowledge of the vendor in the premises would have been a sufficient notice to the other partners, and the court intimated that the same rule would obtain in the case of a corporation.

In *Bradley v. Norton*, 33 Conn. 164, this precise question arose. Andrew Coe had acquired a valuable trade-mark under the name of Coe's Superphosphate of Lime. Russel Coe with others afterward carried on the same business, under the name of Coe & Coe, having acknowledged in writing the right of Andrew Coe to the trade-mark. Coe & Coe became insolvent, and the respondent carried on their business at the same place. In a petition for injunction by the assignee of Andrew Coe against the party who carried on the business, the defense set up was that the wrong party was made respondent. But the court said

"Russel Coe cannot be permitted to deny the trade-mark and that the right to use it is the property of the petitioner. The respondent, from his business relations with Russel Coe, is embraced in the same restrictions. From the mode of conducting business, adopted by Russel Coe and the respondent, either may be considered as principal for the purposes of the case."

The case of *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Company*, 37 Conn. 279, is singularly similar to the case at bar, both in its facts and in its law, and seems to clothe it as with a garment.

1. In both cases the name of the company designated the origin and ownership of the goods manufactured. Page 278.

2. In both cases the defendant corporation was made up of seceding members of the old company.

3. In both cases the seceders, after "preliminary confidential conferences," deserted the old company and organized and became officers in the new. Page 280.

4. In both cases the name adopted by respondent was a portion only of the name of the old company. Page 280.

5. In both cases such portion of the old name was the real birth name of the seceding members. Page 281.

6. In both cases, "confusion had resulted in business and correspondence," from this cause. Page 281.

7. There, as here, it was claimed that the retiring partners had a right to use their own names in the corporate title.

7. There, as here, it was claimed that the "corporation had the right to use these names in any way or form as a part of their corporate title, and that the use of them was reasonable and proper for the legitimate purpose of informing the community that the skill and reputation of Holmes and Booth, the seceders, are involved in the business." Page 287.

8. There, as here, it was claimed "there was no intention or purpose on the part of the respondents to use their name to the prejudice of the petitioners." Page 291.

9. But the court brushing away all these defenses, held,

(a) "That there was no distinction in principle between taking the entire name and so much of it as will mislead dealers into the belief that the two corporations are the same. The mischief in both cases is of precisely the same character." Page 293.

(b) "Hence it necessarily follows, that corporations, in the exercise of discretionary powers conferred by statute, must so exercise them as not to infringe upon the established legal rights of others." Page 293.

(c) "There is involved in the case the elements of a contract of estoppel. If these parties allowed the use of their names, thereby receiving, as they might have done and probably did, a consideration in the enhanced value of their stock, why does not the law imply an agreement that the name shall continue so long as the company shall exist? Or if they, in connection with others, held out to the world by the use of their names, that the corporation was entitled to the benefit of their skill and experience, what moral, equitable or legal right have they now to withdraw or otherwise impair the right to the using their names?" Page 294.

If the learned judge was selecting language to describe and include the case now on trial, he could not have chosen it more felicitously.

In the case at the bar at the time the cards were prepared and circulated, and at the time the patronage of the old customers was solicited, by letter, Babcock was the principal stockholder and the secretary and treasurer of the defendant company. He had full knowledge of the contract and of all the facts in the premises. The only other stockholders were Maxson and Fenner, both of whom were officers of the corporation and both had been in the employ of the old firm of Cottrell & Babcock and knew of the sale by Babcock to Cottrell, and knew that the plaintiffs were the successors of the old firm. The court has found that "the said Maxson and the said Fenner were formerly employed for several years by Cottrell & Babcock and were subsequently in the employ of C. B. Cottrell & Co., successors of said Cottrell & Babcock."

In view of these facts and circumstances and the authorities cited it would seem clear that the action was maintainable because of the knowledge of Babcock, who was an officer of the company, was sufficient notice to the company of the contract which he had made with Cottrell, and the other two officers and stockholders, Maxson and Fenner, had knowledge of the sale, and that the plaintiffs were the successors of the old firm and that was sufficient notice to them.

It was not necessary for the plaintiffs to show guilty knowledge or fraudulent intent on the part of the defendant. It was sufficient that the plaintiffs had proprietary rights which the defendant had violated. *Coleman v. Crump*, 70 N. Y. 573; 37 Conn. 278; 50 id. 282.

It was not necessary to show that actual damage to plaintiffs had accrued.

A reasonable apprehension of injury or a probability of deception from the acts of the defendant is sufficient. *Singer Mfg. Co. v. Kimball et al.*, 10 Scotch Law Rep. 173; *Coffeen v. Brunton*, 4 McLean, 516; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. (Penn.) 321; *Reeves v. Deimke*, 12 Abb. Pr. 92.

As to the test of resemblance between the real and the counterfeit, no iron-clad rule can be laid down.

Mr. Justice CLIFFORD in *McLean v. Fleming*, 96 U. S. 245, where "Dr. J. H. McLean's Universal Pills or Vegetable Liver Pills" was enjoined as unduly resembling Dr. C. McLean's Celebrated Liver Pills," upon this subject says: "All that courts of justice can do in that regard is to say 'that no trader can adopt a trade-mark so resembling that of another as that ordinary purchasers buying with ordinary caution are likely to be misled.'" Page 251.

And what is ordinary caution, and what are ordinary purchasers, is well laid down in *Gorham v. White*, 14 Wall. (U. S.) 256, as follows:

"The appeal is to the eye, and the eye alone is the judge of the identity of the two things — whether there be piracy or not is referred to an unerring judge — namely, the eye, which takes in the one figure and the other, and ascertains whether they are or not the same."

Nor is it the observation of an "expert or a person versed in designs in the particular trade in question," as is claimed by respondents in the case at bar.

"Such a test would destroy all the protection intended. Experts are not persons to be deceived. Much less than that which would be substantial identity in their eyes would be indistinguishable in the eyes of men generally."

It is not contended but that, as a general rule, every manufacturer has a right to the use of his birth-name in the conduct of any legitimate business. That question, whatever doubts may have heretofore existed, has been authoritatively settled in this State by the late well-considered case of *Rogers & Brother v. Rogers*, 53 Conn. 122.

But our contention is that the case at bar is not within the "general rule."

1. That Babcock and his associates are equitably estopped from the use of the name "Babcock" by reason of their antecedent conduct and of the conveyances to Cottrell.

This view of the case is amply sustained by the whole reasoning of this court in *Holmes, Booth & Hayden's* case, 37 Conn. 294, 295.

2. That, even under the "general rule," a birth-name may not be so used as unfairly and designedly to produce the impression that the goods manufactured by one firm are produced by another.

Such deception is at once a fraud upon the public, and an injury to proprietary rights, and it is the duty of a court of equity to prevent it. In this case it can work no hardship to the defendant to be enjoined from doing that from which he has expressly contracted to abstain.

Like Esau he has sold for a great price the right to use and the advantages derivable from the use of his birth-name. He cannot now be permitted to retain the mess of pottage and resume his birth-right. Least of all can he be allowed by sharp practice to steer clear between his contract and the law.

In shaping such a course he should meet with the result portrayed by Chief Justice HARGIS, of Kentucky, in the famous case of *Avery & Sons*, quoted approvingly by Brown on Trade-marks, p. 25, § 241.

"The trade-mark and the trade-reputation pirate always undertakes the difficult task of sailing between the Scylla and the Charybdis of the law, but he should never be allowed a successful voyage.

If on the one hand he escapes the rock by not infringing the trade-mark itself, he will not be allowed a safe passage by the use of any deceit or false representation known to the inventive brain of man, so long as courts of equity are true to the principles of their own existence."

J. Halsey and S. Lucas, for appellees.

PARDER, J. (after stating the facts). The plaintiffs' appeal presents the following reasons of appeal:

1. That the court erred in ruling that the plaintiffs upon these facts had not "acquired a valuable trade name and good-will in the business so advertised and conducted, which it was the duty of a court of equity to protect."

2. That the court erred in refusing to rule that the plaintiffs were the lawful and sole successors of the late firm of Cottrell & Babcock, and that the defendant had no right so to advertise or conduct its busi-

ness as to induce the public to believe that it, or any of its officers, represented or were the successors of said firm.

3. That the court having found as a fact that "the card gives prominence to the name of Cottrell & Babcock," that "the words 'of the late firm of' were printed in much smaller type than any other words printed on said card," and "that said card was distributed among many of the old customers of the old firm of Cottrell & Babcock," erred in ruling that said card "was not adapted to mislead any person who had it."

4. That the court having found as a fact that said Nathan Babcock, after the conveyance aforesaid, personally and by letter, and that the defendants by their circulars, cards and advertisements, did solicit the patronage of customers of the old firm to the new firm, erred in ruling "that such an attempt to divert their custom was not an unlawful interference with the plaintiffs' rights."

Of course, in the use of similar names, signs, advertisements, labels and cards, there is a wide field for efforts to mislead the public. There is the slight resemblance which would deceive only the most careless and the almost perfect reproduction which would deceive all save the most careful person of a thousand. And it must always remain a question of fact, as to whether the resemblance rises to the degree which constitutes it an injurious deception. Under our practice in this case the superior court inspected the card, saw the size and style of type, noted what is said and what is left unsaid, and heard evidence as to confusion of names, as to the misleading of possible customers and as to all other matters, and from the whole deduced and conclusively determined the resulting fact that no person would be led by the card to believe that the printing presses therein mentioned are manufactured by the plaintiffs, or that they have ceased to manufacture, or that the Babcock Printing Press Manufacturing Company had, upon their cessation from the manufacture, taken up and continued the business which they had dropped. By that finding this court is bound, and it answers the first three reasons for appeal.

In the contract terminating the partnership relation which had existed between Cottrell and Babcock, it is provided that no business shall thereafter be carried on in the name of that firm; thus reserving to each the full right to the use of his name. Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacture of printing presses. By purchasing the good-will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more he should have secured it by positive agreement; the matter of good-will was in his mind; presumptively he obtained all that he desired. At any rate the express contract is the measure of his right; and since that conveys a good-will in terms but says no more, the court will not, upon inference, deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next

door, and by advertisement, circular, card and personal solicitation, invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always, when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good-will to establish a like business at the next door, and, by the potential instrumentalities of the newspaper and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, namely, personal solicitation. To deny him the use of the newspaper and general circulars is to make successful business impossible, and, therefore, is to impose an absolute restraint upon the right to trade. This the courts could not do except upon express agreement. But possibly the old customers might not see these; and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even, would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade either totally or partially; and that all restraint of that nature must come from his positive agreement. And such we think is the present tendency of the law.

The plaintiffs cite *Burrows v. Foster*, 32 Beav. 18; *Labouchere v. Dawson*, L. R., 13 Eq. Cas. 332; *Quinn v. Cooper*, 14 Ch. Div. 596; *Leggott v. Barrett*, 43 Law Times (N. S.), 641. The court of appeal, in *Pearson v. Pearson*, 27 Ch. Div. 145, commented upon the last three of these cases in 1884. In that case Theophilus Pearson, as trustee of a will, carried on a business which had been carried on by the testator under the name of James Pearson. By an agreement made to compromise a suit, James Pearson, a son of the testator, and a beneficiary under his will, agreed to sell to Theophilus Pearson all his interest in the business, and in the property on which it was carried on; and it was provided that nothing in the agreement should prevent James Pearson from carrying on the like business where he should think fit and under the name of James Pearson. Theophilus Pearson brought an action to enforce this agreement and to restrain James Pearson from soliciting the customers of the old firm. An injunction was accordingly granted by KAY, J., on the authority of *Labouchere v. Dawson*, L. R., 13 Eq. Cas. 322, and the cases in which it had been followed. It was held by BAGGALLAY and COTTON, JJ.,—LINDLEY, L. J., dissenting—that *Labouchere v. Dawson* was wrongly decided and ought to be overruled, and that, even apart from the proviso in the agreement, the plaintiff was not entitled to the injunction which he had obtained. The judges remarked substantially as follows:

BAGGALLAY, J. J., said: "In this case the defendant agreed to sell to the plaintiff his interest in a business, which agreement was carried into effect by an order of the 27th of March, 1884, in another action. In the present action Mr. Justice KAY has granted an injunction restraining the defendant from issuing a certain circular and from privately, by letter, or personally, or by traveler, asking any person who prior to the 27th of March, 1884, was a customer or correspondent of the late firm whose business was that day sold to the plaintiff, to deal with the defendant or not to deal with the plaintiff. The defendant has not appealed as to the circular, but has appealed from the latter branch of the injunction. If the first clause of the agreement, which was confirmed by the order of the 27th of March, 1884, stood alone, I should be of opinion that the sale included the defendant's interest in the good-will, and I will first deal with the case as if that clause stood alone. Treating the case as a simple sale of the defendant's interest in the good-will, then if *Labouchere v. Dawson* is to be treated as laying down the law correctly, the plaintiff is entitled to retain his injunction. I have before expressed doubts as to the decision in that case, and the argument which we have now heard not only has not removed those doubts, but has led me to the conclusion that they were well founded. I am aware that the decision in that case has been followed on two or three occasions; it has been approved by one judge and disapproved by another; but it has never been either approved or disapproved by the court of appeal collectively. In that case an agreement in writing was entered into for the sale of a brewery at Kirkstall, and the plant, fixtures, utensils and machinery in and about the same, and the good-will of the brewery business theretofore carried on upon the premises. Lord ROMILLY there laid down that the seller of a business with its good-will may, in the absence of any express agreement to the contrary, carry on the same business wherever he pleases, and solicit customers in any public manner, but that he must not apply to any of the old customers privately, by letter, personally, or by traveler asking them to continue their custom with him and not to deal with the vendees. His lordship went on the principle that persons are not at liberty to depreciate the thing which they have sold. Before that decision the law was to be collected from the cases of *Churton v. Douglas*, Johns. 174, and the earlier cases of *Cook v. Collingridge*, Collyer Partnership, 2d ed., p. 215; *Cruthrell v. Lye*, 17 Ves. 335; and *Johnson v. Helleley*, 2 DeG., J. & S. 446. The effect of Lord HATHERLEY's judgment in *Churton v. Douglas* is that the vendor may carry on the same business where and as he pleases, and deal with the customers of the old firm, provided only that he does not represent himself as carrying on the old business or as being the successor of the old firm. It is admitted that *Labouchere v. Dawson* went beyond any thing to be found in the earlier cases. There are three decisions on the subject by Sir GEORGE JESSEL. In *Ginesi v. Cooper & Co.*, 14 Ch. Div. 599, it was distinctly laid down by that learned judge that a trader who had sold his business and the good-will of it could not deal with the old customers. The injunction, however, as granted, did not go that length, which may be the reason why there was no appeal. In *Leggott v. Barrett*, 15 Ch. Div.

306, Sir GEORGE JESSEL granted an injunction to restrain the defendant from applying to any customer of the firm privately, or by letter, personally or by a traveler, asking such customer to continue to deal with the defendant or not to deal with the plaintiff, or from actually dealing with such customer as a customer. There was no appeal from the first part of the injunction, but the defendant appealed from the second part, and the Lords Justices JAMES, BRETT and COTTON all agreed that there ought not to be any injunction against dealing with the customers of the firm. As the defendant submitted to the first part of the injunction the court of appeal did not deal with it, but Lords Justices JAMES and COTTON suggested doubts as to its propriety. In *Walker v. Mottram*, 19 Ch. Div. 355, Sir GEORGE JESSEL extended the doctrine of *Labouchere v. Dawson* to a case where the good-will had been sold, not by the trader himself but by his trustee in bankruptcy. The court of appeal held that the doctrine could not be extended to compulsory sales, and that the bankrupt could not be restrained from soliciting the customers of the old business.

"My colleagues, Lords Justices LUSH and LINDLEY, did not in that case express any dissent from *Labouchere v. Dawson*, but used expressions which may be read as tending to show that they approved of it. I expressed my opinion that it went beyond what any of the previous decisions would have sanctioned, and I reserved my judgment as to its correctness in case the question should ever come before the court of appeal. Thus the matter was left in 1881, the court of appeal never having in any case given collectively an opinion upon *Labouchere v. Dawson*. The case which I then suggested has not occurred. The point calls for our decision, and I feel bound to say that in my opinion, *Labouchere v. Dawson* was not correctly decided. It went beyond a number of decisions of a higher court, and I think without sufficient reason. It has been argued that as it has stood for twelve years and been acted upon, it ought not to be overruled, but should be treated by this court as binding, and open to be reviewed only by the house of lords. In support of this the respondent relied much on *Pugh v. Golden Valley Ry. Co.*, 15 Ch. Div. 380, where no doubt stress was laid on the fact that a decision had been standing unimpeached for twenty years, and it was said that it was very undesirable to disturb a rule which had been so long acted upon. The court, however, did not proceed solely or even mainly on that ground; they were of opinion that the decision referred to was right, and they followed it. The decision in *Labouchere v. Dawson* has not stood wholly unquestioned, and I do not think that we are bound to follow it merely because it has stood for twelve years without being authoritatively overruled. Taking the case then on the first clause of the agreement alone, I am of opinion that the plaintiff is not entitled to the second branch of the injunction. But assuming the first clause, taken *per se*, to amount to a sale of a good-will, are not its consequences modified by clause third? That clause, which expressly gives the defendant a right to carry on any business wherever he goes under the name of James Pearson, having regard to its terms, I think that, even assuming *Labouchere v. Dawson* to be right, the defendant has done nothing which would entitle the plaintiff

to the second branch of the injunction. I rest my decision, however, upon this, that *Labouchere v. Dawson* was wrongly decided, and that under the first clause, taken alone, the plaintiff is not entitled to the injunction."

COTTON, L. J., said: "Mr. Justice KAY granted this injunction considering that he was bound by the authorities. The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the business; but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing particularly, when it is a point which was in their contemplation. From what is this implied covenant to be inferred? It is said that there was a sale of the good-will, and according to the proper meaning of the word 'good-will,' I think that there was. The plaintiff purchased all the interest of the defendant in certain old pottery works. Taking good-will in the sense given by Lord ELDON in *Crutwell v. Lye*, 17 Ves. 335, 346, 'the probability that the old customers will resort to the old place,' we find that here the purchaser has a right to the place, and a right to get in the old bills; so the purchaser gets the good-will as defined by Lord ELDON. But the word 'good-will' is not used, and when a contract is sought to be implied we must substitute one word for another. Such a right as is here contended for might be inferred from a contract to sell the 'good-will,' and yet not be inferred from such a contract as we have here. But suppose the word did occur, what is the effect of a sale of 'good-will?' It does not *per se* prevent the vendor from carrying on the same class of business. But in *Labouchere v. Dawson*, it is laid down that it implies a contract not to solicit the old customers. I think that decision wrong. In *Crutwell v. Lye* the point did not directly arise, for the sale was by assignees in bankruptcy; but Lord ELDON says in that case: 'The good-will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect is prevented by no other means than those which belong to the fair course of improving a trade in which it is lawful to engage, I should by interposing carry the effect of an injunction to a much greater length than any decision has authorized or imagination ever suggested.'

"It is involved in this that if the good-will is sold and fraud is used to prevent the sale from having full effect, the court will interfere; but if customers are prevented by fair means from coming to the old place it will not interfere. In *Kennedy v. Lee*, 3 Mer. 441, 452, expressions are used which are material as regards a contract in the present form. 'The words 'concern' and 'inheritance' are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And when the plaintiff offers to take the business himself, he could not have forgotten that the defendant's own estate lay contiguous to the partnership property, and, therefore, his introducing no stipulation with reference to the fact of its contiguity is a clear intimation that when he wrote this letter he had no intention, in offer-

ing to take the partnership property, to purchase with it the good-will, in the sense of restricting the defendant from carrying on trade in its vicinity. In that sense at least, therefore, the good-will of the trade was not the subject of contract or treaty even, between the parties.' This, it is true, seems rather to favor the view that a sale of good-will might imply a covenant not to carry on the same trade in the neighborhood. In *Cook v. Collingridge*, Collyer Partnership (2d ed.), p. 215, a partnership business was sold by order of the court, with liberty for any of the partners to bid, and Lord ELDON made an elaborate order by which, after a declaration that there was no obligation restraining any of the partners from carrying on the same business after the sale of the business of the late partnership, and no obligation to restrain them from uniting in a new partnership in the same business after such sale, and that the claim to have any estimated value put upon any subject that could be considered as described by the term 'good-will' could not be supported on the same grounds or principles as those upon which a compensation or value was in that establishment received from a partner buying the share of the partner going out of the business of this establishment and retiring from trade or business altogether, it was declared 'that in this case, if the property of the then present establishment were sold, and the then present partners, or any of them, with any other persons, engaged in a new establishment carrying on the same trade or business — which they were at full liberty to do — it was obvious that if by good-will were meant the value of the chance that the customers of partners retiring altogether would deal with those who purchased from such retiring partners and succeeded to their establishment, a good-will of that nature could not be valued on the same principles, as the persons retiring, but not retiring altogether from trade, had also a chance of conveying the old customers with their new establishment, which must most materially affect, if it did not destroy, the chance that the persons purchasing the old establishment would retain many of the customers of the old establishment.' A partner then, in Lord ELDON's opinion, might 'convey' the customers from the purchaser. He must not do so by unfair means; and it is unfair if he represents that he is carrying on the old business; but I think that Lord ELDON was against the notion that the vendor of the good-will of a business, in the absence of express contract, is to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the good-will. Lord ROMILLY rests his decision in *Labouchere v. Dawson* on the principle that a man cannot derogate from his own grant. But it is admitted that a person who has sold the good-will of his business may set up a similar business next door and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place.

"I cannot see where to draw the line; if he may by his acts invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'good will' as would give a right to such an injunction as has been granted in the present case. I have thought

it right to rest my judgment on the ground that *Labouchere v. Dawson* is not to be followed, but the present case is less favorable to the plaintiff than that case, for not only have we no contract against carrying on the business, but the third clause shows it to have been in the minds of the parties that the defendant should carry on business, and I think that this stipulation entitles him to get customers in any fair way of managing his trade. It is urged that *Labouchere v. Dawson* has so long been treated as settled law that we ought not to disturb it. It is true that for eight years that decision does not appear to have been questioned by any judge, and there is no doubt it has been followed by other judges in courts of first instance. It was, however, doubted in *Leggott v. Barrett*, 15 Ch. Div. 306, by Lord Justice JAMES and myself, and has never received the sanction of the court of appeal. I think that under these circumstances we ought not to treat it as binding and encourage parties to shape their contracts on the authority of a case which the house of lords may determine to have been erroneously decided. It is not generally desirable to decide an important point on an interlocutory application; but as we come to the conclusion on a question of law that the plaintiff is not entitled to the injunction, it is, we think, right for us to decide the matter now."

LINDLEY, L. J., said: "The rights of the parties in this action depend on the agreement into which they have entered. That agreement was not an ordinary contract for sale, but an agreement to settle disputes between the parties. If we look at the position of the parties we find that the plaintiff, Theophilus Pearson, as trustee, had carried on this business, and that James Pearson, the defendant, was one of the *cestuis que trust*, and helped in the business, and had been employed in it as a traveler. By the agreement James Pearson gives up all his interest in the business for £2,000. Pausing there, although the goodwill is not in terms mentioned in the agreement, I think that it is included; for a man who sells all his interest in a business cannot retain any interest in the goodwill. Then by clause third it is provided that nothing in the agreement shall be deemed to restrict or prevent James Pearson from carrying on the business of a potter, earthenware manufacturer, or any other business, at such place as he may think fit, and under the name of James Pearson. That is an important stipulation which obviously was introduced for the benefit of James Pearson. By it he says in substance—Though I have sold to you all my interest in this business I am to have liberty to carry on business in my own name where I please. That means,—I am to be as free to carry on business as if I had not sold to you, and in the same way as if I had not sold to you. I think, therefore, that this case is not governed by *Labouchere v. Dawson*, and that the defendant, assuming that case to have been rightly decided, may yet solicit the custom of any. As to *Labouchere v. Dawson*, there has been a difference of opinion. For my own part I am of the opinion that it was rightly decided. It is true that, as was pointed out in *Walker v. Mottram*, 19 Ch. Div. 355, it went beyond the preceding cases; but did it go beyond them so far as to be wrong? It was on the principle that a person who has sold the goodwill of his business

shall not derogate from his own grant by doing what he can to destroy the good-will which he has sold. It is true that if this principle were logically carried out it would prevent the vendor carrying on the same sort of business he had sold; and if the court had held that he could not I do not think that the decision could have been complained of. It startles a non-lawyer to be told that if he buys a business and its good-will, the seller can immediately enter into competition with him next door. The courts, however, have held that this can be done; but I think that Lord ROMILLY was right in not applying this doctrine to a case where the vendor directly applies to his old customers to induce them to continue dealing with him instead of the purchaser. Sir GEORGE JESSEL and the Lord Justice LUSH were of the same opinion; but I believe there are other judges besides my learned brothers who think the decision in *Labouchere v. Dawson* wrong."

The plaintiffs cite *Hall's Appeal*, 60 Penn. St. 458, and *Angier v. Webber*, 14 Allen, 211. In the first case it is said that "good faith requires of a party who has sold the good-will of his business that he should do nothing which tends to deprive the purchaser of its benefit and advantages. The bill charges and the evidence shows that he is holding himself out to the public by advertisement as having removed from his former place of business, No. 1313 Vine street, to his present place of business, No. 1539 Vine street, where he will continue his former business. It is clear that he has no right to hold himself out as continuing the business which he sold to the plaintiff, or as carrying on his former business at another place to which he has removed."

In *Angier v. Webber* the defendant sold the good-will of a business to the plaintiff, and stipulated in writing not to do any thing "which should in anywise impair or injure said interest and good-will." It was held that it was a violation of this agreement to carry on the same kind of business at a place near the old one.

In *Bergamini v. Bastian*, 35 La. Ann. 60, there was a sale of a commercial establishment, together with the good-will thereof. The court said: "Holding, as we do, that he was not in the least precluded by any stipulation in his contract with the plaintiff from resuming the business of a saloon and lunch-house in any portion of the city, we must recognize his right to resort to ordinary means of advertising his business, and to other modes of soliciting patronage or custom; and the evidence, which we have read carefully and considered materially, fails to show that he directed his efforts to draw custom from Bergamini more than from any other dealer in the same line of business."

In *Hanna v. Andrews*, 50 Iowa, 462, the court said: "What the appellee agreed to do was to transfer his list of lands and correspondence and the good-will of his business, and give letters of introduction. If we should concede that the sale of the good-will of a business, without restriction upon the seller, would raise an implied agreement not to re-engage in the same business in the same place, such concession would not, we think, aid the plaintiff. By the terms of the appellee's contract it was allowable for him, after three years, to re-engage in the land agency business, and the only question is as to what extent he may

do so. It appears to us that when the appellant provided for the return of the appellee to the business after three years, he opened the door to the appellee to come in and compete with him in every respect. The appellee, if applied to, could certainly accept the agency of the lands in question. He could certainly compete for the agency by general advertisement, by acquaintance and by fidelity to business. The courts, we think, could not properly undertake to draw the line between such competition and that which should be carried on by more or less direct solicitation."

In *Barrett v. Percival*, 5 Allen, 345, the marginal note says that "a bill of sale of a stock of goods in a store and the good-will of the vendor's trade and all the advantages connected with the store does not import an agreement by the vendor not to engage in a similar business; and parol evidence is incompetent to prove such an agreement as a part of the consideration for the price named in the bill of sale." The court said: "The other objection is equally decisive. The parties having reduced their contract to writing, their rights under it must depend on the true interpretation of its terms, irrespective of any parol evidence of what took place previously to or at the time of the making of the agreement. Looking only at the written contract, we are unable to see any clause which can be construed into an agreement by the defendant's testator to refrain from engaging in a similar business to that which he sold to the plaintiffs. There was no express agreement to that effect, nor can any be implied from that clause of the bill of sale by which the vendor conveys the good-will of his trade and all the advantages connected with the store and premises. It was nothing more than a sale of the custom or trade which appertained to the place where the vendor was then carrying on his business. This was the real subject-matter of the contract between the parties, and it cannot be construed as imposing any personal restraint on the vendor, or as restricting his right to transact a similar business in another place at a subsequent time. Whenever such is the intent of the parties, it is carried into effect by an express stipulation which, if not in undue restraint of trade, may be valid and binding. But we know of no case where any such agreement has been raised by mere implication arising from the sale of the good-will of a person's trade in connection with a particular place of business where it has been carried on."

In *White v. Jones*, 1 Abb. Pr. (N. S.) 337, it is said: "The sale by Jones to White on the dissolution of their copartnership of his interest in it, and of the good-will of the entire business, did not deprive Jones of the legal or equitable right to engage in and prosecute a similar business in the vicinity of the place of business of the dissolved firm. This seems to be so well settled that nothing more is necessary than to refer to some of the prominent cases affirming this doctrine. *Crutwell v. Lye*, 17 Ves. 344; *Davis v. Hodgson*, 25 Beav. 177; *Churton v. Douglas*, 1 Johns. (Eng.) 176; *Howe v. Searing*, 6 Bosw. 354; *Dayton v. Wilkes*, 17 How. Pr. 510. The complaint does not allege that the defendant in prosecuting his business at 710 Broadway represents it to be the same business which the dissolved firm carried on at 658 Broadway, or that he is conducting business at 710 Broadway as successor

to the late firm of Jones & White. It does allege that Jones has opened letters, etc., directed to Jones & White, to Jones, White & Co., and to Jones, White & McCurdy, intended for the plaintiff; that such letters were from customers of the late firm of Jones & White, and contained orders for goods; and that Jones has filled such orders and received payment for the goods ordered; and judgment is prayed that Jones be enjoined from receiving or opening any letters or orders directed as aforesaid, or from filling the orders, or from in any way interfering with the business of the former firm, or the good-will thereof; and for damages. The defendant has a right to establish and carry on in his own name a business similar to that of the late firm so long as he does no act to lead customers into the belief that he is carrying on business as the successor of the old firm, or that, when dealing with him, they are dealing with White, or with the person succeeding to the business of the late firm of Jones & White."

If, therefore, we subject the defendant to the obligation which rests upon Nathan Babcock, the plaintiff's fourth reason of appeal remains without foundation.

There is no error in the judgment complained of.

All concur.

Judgment affirmed.

TOWN OF BRIDGEWATER v. TOWN OF ROXBURY.

April 10, 1886.

EVIDENCE — PAUPER SUPPLIES — ACCOUNT BOOK OF DECEASED PHYSICIAN.

In a suit for supplies furnished to a pauper of the defendant town, a selectman of the latter testified to having employed a physician to attend upon the pauper, and to his having been afterward paid by the town, but he could not fix the date of the attendance, which became important. *Held*, that entries upon the account-book of the physician—who had since become mentally incompetent—made in the regular course of his business, charging the town for his attendance upon the pauper, with the date, and crediting the town with payment, were admissible, (1) for the purpose of showing the time when the service was rendered; (2) to corroborate the testimony of the selectman, and (3) as evidence of the fact that medical service was rendered.

Action to recover for pauper supplies, the defendant had judgment below. The opinion states the case.

L. D. Brewster and *J. H. McMahon*, for appellant. *J. Huntington* and *A. D. Warner*, for appellee.

LOOMIS, J. This is a complaint to recover for supplies furnished *Esther A. Snyder* and her three minor children.

The alleged pauper was born in the defendant town in 1853, of parents, *Chauncey* and *Patty Wilmot*, who at the time of her birth had their settlement in *New Milford*. *Chauncey Wilmot* died in 1858 in the town of *Roxbury* without having gained a settlement there. Soon after *Patty*, the mother, with her minor children, moved from the defendant to the plaintiff town, and remained there until May, 1860, and then with her children returned to the defendant town, where she lived in a shanty built by her son *Daniel* for her and her children to occupy, and there remained for about twenty years. *Esther A.*, the pauper in question, was married November 27, 1871, to

La Fayette Snyder, a person of full age, but who had at the time no settlement in any town in this State.

Upon these facts it was conceded that the pauper in question would take the settlement of her mother, if the latter had gained one by comorancy in the defendant town after the decease of her husband. And it was also conceded that such settlement had been made by the mother unless prevented by two payments made by the town for medical attendance upon Patty in the years 1865 and 1866.

Upon this subject the court finds: "In 1865 Patty being sick and needing medical aid, Dr. Downs, a physician of Roxbury, informed a selectman of Roxbury that she was sick, and that he, the doctor, could no longer attend to her unless the town would pay him. The selectman thereupon directed the doctor to render her medical assistance and charge the same to the town, she being unable to pay the doctor and having no property. Afterward the doctor, on the 26th day of April, 1865, rendered to her medicine and attendance, and charged therefor \$1.50 to the town of Roxbury, which was paid to him by the town September 29, 1865. On the 16th of July, 1866, the doctor rendered a like attendance upon Patty while sick, and charged therefor \$1.50, which the town paid him in 1867, she having no property."

The question whether medical aid was needed and furnished, being a question of fact exclusively for the trial court, has thus been settled. Whether the evidence was of sufficient weight to justify such finding is not a question which this court can review in this proceeding, but the admissibility of the evidence, if objected to, is properly before this court.

To prove the facts found by the court the defendant offered as a witness one who was a selectman of the defendant town for the years 1865 and 1866, who testified in substance that he was selectman during those years, and that he gave instructions to Dr. Downs to doctor Patty during that time; that the doctor came to him in 1865 or 1866, he thought it was in 1865, and stated that Patty was sick, and that he could no longer attend upon her without pay for further services, and that thereupon he directed the doctor to attend her, and told him the town would pay him; that the doctor brought in his bill afterward for the year, and it was paid; that the selectmen had no record of it, but that he thought the bill was \$1.50. No error is predicated upon the admission of this evidence. But the defendant further offered, and the court admitted against the plaintiff's objection, the entries in the account books of Dr. Downs, after proving that the doctor at the time of trial had become mentally incompetent to testify or transact any business, and that the books offered were his books, kept by him in his own hand, and that the charges were made in the regular order and course of business, with like charges and credits against divers other persons and patients; that the charges were entered first in a day book and posted into a ledger; that the entries in question were:

"April 26, 1865. Town of Roxbury, Dr. To visit Patty Wilmot and med., \$1.50.

"Sept. 29, 1865. Cr. By town order to balance account to this day \$16.98."

Also, "July 16, 1866. Town of Roxbury, Dr. To visit Patty Wilmot, \$1.50." "1867 Cr. By town order, \$8.00."

Were these entries admissible? We think they were. 1. To show the time when the services were rendered, and the fact and date of payment. In these respects it was necessary to supplement the testimony of the selectman, who left the date uncertain even as to the year. The time was quite important in order to break the six years' self-supporting commorancy after May, 1860, and again before March 27, 1871. 2. It was admissible to corroborate the testimony of the selectman. Suppose the defendant had rested upon the testimony of the selectman alone, and there had been no such entries on the doctor's books, would not the absence of such entries furnish very strong inferential evidence that there was no such medical attendance ever rendered or paid for? *Morrow v. Ostrander*, 13 Hun, 219. If then the absence of such entries would greatly impair the selectman's testimony, their existence must necessarily furnish strong support.

If the evidence was admissible for either of these purposes the ruling of the court is sufficiently vindicated. But the question discussed by counsel was whether these entries were admissible as tending to show the fact that medical services were rendered to Patty Wilmot and paid for by the town? It is highly probable that the court below gave effect to the evidence as the question assumes, and, therefore, we will discuss it as if it was of controlling importance.

We think the evidence was admissible for these purposes, in addition to those mentioned previously. In *Abel v. Fitch*, 20 Conn. on p. 96 this court—ELLSWORTH, J., delivering the opinion—stated the rule as follows: "Entries by persons deceased, having full and peculiar means of knowledge, made at the time, in the regular course of business, in the usual proper place and manner, especially if in the discharge of one's duty, are admissible to the jury as part of the *res gestæ*." In *Abb. Trial Ev.* 322, it is said: "An entry or memorandum, whether in a book or any other form, made in the usual course of business, and at about the time of the transaction, by a person not a party to the action, who is shown to have had means of personal knowledge of the fact recorded, is competent evidence of such fact. 1. If the person who made it is produced and verifies the handwriting as his own, and testifies that it was so made, and correct when made, although he may have no present recollection whatever of the transaction; or, 2. If the person who made it is dead, and his signature or handwriting is proved, and he does not appear to have had any interest to falsify." A distinction applicable to this last qualification will be referred to hereafter. See, also, 1 *Greenl. Ev.*, § 116. There is some disagreement in the authorities as to the necessity of calling the person who made the entries, if he is living, though he may be without the jurisdiction. But in this State, and in several other jurisdictions, the reasonable rule has been adopted that if the person making the entries is beyond the reach of process, or is incompetent to testify, it is the same as if he were dead. *Bartholomew v. Farrell*, 41 Conn. 109; *New Haven & Northampton Co. v. Goodwin*, 42 id. 280; *Livingston v. Tyler*, 14 id. 499; *Aller v. Berhaus*, 8 Watts, 77; *Crouse et al. v. Miller*, 10 Serg. & Rawle, 158. We do

not see why the case at bar does not fall directly within the rules referred to.

As a case analogous in principle and illustrative of the application of the rule in this jurisdiction, we cite *Ashmead v. Colby*, 26 Conn. 289, where the petitioners claimed that the respondents had combined to defraud them in the sale of land in Virginia as containing gold, and that B. one of the respondents, at different times when the petitioners were about to examine the tract, had mingled gold dust with the soil in particular places, and then caused them to examine the soil in those places and find the gold thus placed there. As a part of the evidence going to establish this fact, they offered an account book kept at a neighboring mine by a clerk since deceased, containing entries of sales of gold dust to B. just before the times when they made the examinations, for the purpose of showing that B. had gold dust in his possession at those times which he might have so used. Now if the entries on the books of this mining company, of which the respondents had no control, containing charges of the sale of gold dust, would prove the delivery to and possession of the gold dust by the person referred to, why will not the charges for medical attendance and medicine furnished to Patty Wilmot prove that she was the recipient of these things?

But we are here reminded of one of the claims in behalf of the plaintiff, that this kind of proof can only apply where the transaction is directly between the original debtor and creditor. This limitation, however, was first made as one of the numerous rules that have obtained in the United States regulating the admission of the party's own entries in his own books, which were to be supported by the suppletory oath of the party himself in cases where originally he could not otherwise testify in his own behalf. See *Poultney v. Ross*, 1 Dall. 138, decided by the court of common pleas in Pennsylvania in 1788. and *Deas v. Darby*, 1 Nott & McC. 436, decided in 1819.

The principle can have no proper application to contemporaneous entries by third parties in the usual course of business. But even under the former system, if an order to deliver goods to a third person was proven by evidence *aliunde*, the delivery could be proven by the books and suppletory oath. *Mitchell v. Belknap*, 23 Me. 475.

In the case at bar there was independent evidence as to the order to render medical services and medicine to Patty Wilmot; and moreover it was the statutory duty of the selectmen to order such relief if she was a pauper. *Welton v. Wolcott*, 45 Conn. 329. In *Coffin v. Cross*, 3 Dane Abr. 322, decided in Massachusetts in 1800, the plaintiff's books and oath were held admissible to prove the fact that medicine and medical attendance were furnished to a third person, not the defendant. In *Buy v. Cook*, 2 Zab. 343, a suit was brought by a physician to recover for medicine and attendance for one Sharp, a pauper of the township of Washington, who fell sick in the town of Independence. The defendant was overseer of the poor for the township of Washington, and employed the plaintiff to administer to the pauper's necessities. The plaintiff could not recover of the town because no order for relief had been obtained as specially required by the statute then in force. Upon the trial it was held that the physician's book of account

was admissible, even where the items on the face of the book were not charged on the same day when the services were rendered. In *Leland v. Cameron*, 31 N. Y. 115, it became important to prove that an execution in a certain case had been delivered to the sheriff, who was dead, and whose papers had all been burned with his house. The only evidence was the entry by an attorney in his register, which was held to be competent evidence to prove the fact. In *Warren v. Greenville*, 2 Stra. 1129, the book of a deceased attorney containing charges relating to a common recovery were admitted as tending to prove a life estate, where it appeared by the book that the charges had been paid. In *Doe v. Robson*, 15 East, 32, entries of charges made by an attorney in his books showing the time when a certain lease, prepared for a client of his, was executed, which charges were shown to have been paid, were held to be evidence after the attorney's death to show that the lease—executed under a power to lease in possession and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term from the twenty-ninth of September then next ensuing—was not in fact executed till after the twenty-ninth of September, inasmuch as the charge for drawing and engrossing the lease was under date of October, 1770. This entry was considered as one against interest, and put upon this ground by Lord ELLENBOROUGH, Ch. J., and BAILEY, J., who delivered the opinions, and it was found to be against interest because the attorney who entered the charge had also entered a credit showing that a debt to him from another was discharged. Upon the same ground the entries of Dr. Downs might be treated as against interest. There is, however, the other fact that he was an inhabitant of the defendant town, which we will advert to in another connection.

But it must not be supposed that the admissibility of the entries in question depends on the fact that they were against interest. Many cases give great prominence to this fact because they belong to that class of entries, but a clear distinction was long ago made, as laid down by PARKE, B., in *Doe v. Turford*, 3 Barn. & Ald. 890, to this effect, in case of an entry against interest proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case—namely, an entry in the course of business—it is essential to prove that it was made at the time of the transaction to which it relates. In 1 Greenl. Ev., § 120, the same distinction is more elaborately treated and explained.

The contemporaneous character of the entries in question appears on the face of the books, the original entries being made daily in a regular day-book, in which were entered daily visits and charges coming up on both sides to the dates in question.

In a note by Mr. Hare, the American editor of the Exchequer Reports, to the case of *Percival v. Nanson*, 7 Exch. 4, it is said: "Entries by a third person in the course of business are in general admissible in this country—United States—after his death, whether they were for or against his interest when made; and the entries of a deceased agent may consequently be read in support of a suit brought by the principal, even where they are of payments made by and not to the principal."

This proposition is fully supported by the case of *Dow v. Savage*, 29 Me. 117. In *Inhabitants of Augusta v. Inhabitants of Windsor*, 19 id. 317, it was held that entries by a deceased physician in the regular course of his business are admissible in evidence when corroborated by other circumstances to render them probable, and that it was not necessary that entries to be admissible should be against the interest of the deceased person making them.

We discover a tendency to more liberality in the courts respecting the admission of entries by both parties and third persons.

In 1 Whart. Law of Ev., § 246, it is said: "Original entries of deceased parties in their own books are held — in several jurisdictions of the United States — admissible, even though self-serving, when contemporaneous, and when confined to a transaction within the business of the party."

The distinction previously adverted to disposes of any objection arising from the fact that Dr. Downs was interested as an inhabitant of the defendant town. But we do not think, under any rule that has ever obtained in this State, that the court upon this finding could say that the deceased physician had such an interest to pervert the fact as ought to exclude his entries. No controversy with any other town respecting this pauper had arisen or was contemplated. The acts both of the selectman and the physician are consistent with a belief on their part that Patty belonged to the defendant town to support and that no other town could be compelled to reimburse it. Indeed the expense at the time was apparently against the interest of the town. True, some twenty years later in a controversy with the plaintiff town respecting the settlement of a child and grandchildren of this pauper, the facts became important to exempt the defendant from liability, but is it reasonable to suppose that the physician made these entries in anticipation of any such resulting benefit to the town? A possibility of a corrupt motive always exists in respect to human acts, but some probability of it ought to appear in order to exclude entries fairly and regularly made as these were.

But the further claim is made in behalf of the plaintiff, that though the evidence we have been considering was properly received and the fact established that the town did furnish aid to Patty at the times and in the manner claimed, yet it was not effectual to prevent her gaining a settlement in the defendant town for two reasons — first, because it was not shown that she was in a condition to require aid, and second, because it does not appear that she received the aid knowing that it was furnished to her as a pauper.

As to the first point, the facts found specifically by the court are that Patty at the time was sick, that she needed medical aid, that she was unable to pay for it, and that she had no property. It is difficult to conceive what fact is lacking to make her a pauper.

These facts must be accepted by this court as conclusive, unless indeed they are vitiated through an erroneous admission of evidence whereby they were found, which was objected to in the trial court. Though this court may consider the evidence insufficient yet the finding must remain. The only question for review in this connection is

whether evidence was improperly received, and even this is not properly reviewable unless it was objected to in the trial court.

Now in addition to the evidence we have been considering, it was further proved, "that from May, 1860, to 1867, she had no visible estate; that she lived in a house eighteen feet by twenty in dimensions, the sides of which were covered with unmatched hemlock boards; the roof was covered in part with shingles, the remainder with boards; only one room, a part of which only had any flooring; the ceiling was the roof; and her only business was to work for her neighbors and gather and sell berries in their season. There was no evidence that her children or any one rendered her any aid, except that her son Oliver disposed of some things for her which she brought into the house."

Now, this evidence was not objected to, and if it had been, it would have been admissible as tending to show that Patty had no property. Indeed, it would do more, it would make a very good *prima facie* case, for the absence of all visible estate for seven years would ordinarily indicate the non-existence of an invisible estate, so far as it related to this world. All the surroundings of this person indicated great destitution, not only of property, but of friends to aid as well.

The second reason for rendering the supplies furnished ineffectual is, that it is not shown that Patty received aid as a pauper or knew the town was to pay the doctor. Now, it is quite true that the selectmen of a town cannot create a pauper by any mere act of their own; they can relieve one who is a pauper and in need, and they are required to do so by the statute. But no rule of law has ever obtained in this State requiring supplies to be labeled "pauper supplies," or the recipient to be labeled "pauper," or to acknowledge the receipt of supplies as a pauper. An acquiescence on the part of the recipient may be presumed from circumstances showing need and destitution; and where the court is satisfied that relief was furnished to a needy pauper pursuant to duty created by the statute, the town may have the benefit of it, either to interrupt a settlement by commorancy or to lay the foundation of a claim over against another town.

There was no error in the judgment complained of.

All concur.

Judgment affirmed.

HAMILTON v. LAMPHEAR.

July 20, 1886.

PRACTICE — PARTIES — ADMINISTRATOR NON-RESIDENT — FILED IN PLEADINGS EVIDENCE.

Contract for compensation for services as attorney. The plaintiff had judgment below. The opinion states the case.

E. P. Arvine, for appellant. *C. S. Hamilton*, for appellees.

LOOMIS, J. It appears from the record that the defendant had a claim against the insolvent estate of the American Mutual Life Insurance and Trust Company, and that on the 20th day of February, 1878, he entered into a written contract with one Charles T. Shelton, a counselor at law, that the latter should attend to the collection of the claim,

for the compensation of twenty-five per cent of the net amount recovered in lieu of all other charges.

Shelton did not, except to a limited extent, attend personally to the matter, but with the assent of the defendant substituted Hamilton, the plaintiff, to prosecute the claim. The agreement between Shelton and Hamilton in substance was, that the latter was to assist in making and presenting proofs of this claim and other like claims, for which he was to receive two per cent of all the moneys collected on the claims, and was to render other professional services in relation to the same and other matters for a fair compensation; and it was agreed that Hamilton might retain out of the twenty-five per cent mentioned in the agreement between the defendant and Shelton a sufficient sum, not only to pay him the two per cent, but also to compensate him for other services rendered and to be rendered, more particularly mentioned in the agreement between Hamilton and Shelton. And to forward this last-mentioned agreement, the defendant executed and delivered a power of attorney to the plaintiff — Hamilton — authorizing him to prosecute the claim, to collect dividends and give receipts therefor, etc., but providing that he should look to Shelton for his compensation and pay over dividends collected to him. To secure Hamilton, Shelton delivered to him the written contract he had made with the defendant, to hold until he had been fully paid.

Hamilton, with some assistance from Shelton, fully performed the services contemplated in the agreement between Shelton and the defendant and in the power of attorney from the defendant to Hamilton, and obtained before the commissioners on the insolvent estate of the life insurance company an allowance in favor of the defendant and against the insurance company of the sum of \$1,862.64, upon which a dividend of \$93.15 has been allowed and paid by the receiver to the defendant. The defendant has never paid the twenty-five per cent, or any part of it, either to Hamilton or to Shelton.

This suit was originally brought in the name of Hamilton alone. Shelton died July 29, 1885, intestate, and afterward, during the pendency of the suit, at the April term of the city court, 1886, Cyrus M. Shelton, as administrator of his estate, made formal application in writing to be admitted a party, alleging, among other things, that Shelton died intestate, that the applicant had been duly appointed such administrator and had qualified as such, and also setting forth the substance of the agreement between the defendant and the intestate, and between Hamilton and the latter, and that Hamilton was to hold and own the former contract for the purpose of paying his percentage and other claims in his favor against Shelton, and that whatever balance of the twenty-five per cent was left was to belong to Shelton and be paid to him or his assigns, and praying that as such administrator he be allowed to become a party plaintiff in this action with Hamilton, and be allowed as such co-plaintiff to prosecute the action to effect. The court granted the application and afterward rendered a joint judgment in favor of Hamilton and the administrator.

The first question for review is, whether the court erred in granting this application by the administrator to be made a party.

One prominent objection is, that the intestate at the time had no interest in the contract which forms the basis of the action.

But it must be conceded that at first the sole interest was in Shelton, and at the commencement of the suit it was still in him, or in Hamilton, or in both; so that at most the error, if any, was a mere case of misjoinder, in regard to which the provisions of the practice act—§ 16—are so liberal as to offer poor encouragement for such technicalities. The provision is as follows: "No action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the cause, as it may deem the interests of justice to require."

But the objection may be more directly met and disposed of. Although the verbal arrangement whereby Hamilton acquired an interest is rather vaguely stated in some particulars, both in the application to be made a party and in the finding, yet, in either case, it seems very clear that the transfer to Hamilton was not absolute of all Shelton's right and interest, but left remaining in him still an interest, so that the joinder may be justified under the rules as to the practice act as established by the judges. Chapter 1, section 5, provides that "if a part interest in a contract obligation be assigned, the assignor—retaining the remaining interest—and assignee may join as plaintiffs." And, of course, if Shelton, the intestate, could have joined in the suit with Hamilton, his personal representative may do the same.

But the defendant goes back a step farther in his technical line of defense, and insists that it was error to admit the administrator as a party without first compelling him to prove his legal appointment to that office. The objection would seem to deny to the court its ordinary discretion as to the order of proof, and to apply to the added party a rule that he would not have been subject to if he had originally brought the suit with Hamilton. The application by the administrator contained, as it should, all the essential allegations as to the capacity in which he desired to prosecute the suit. In the progress of the suit this fact was to be established. It could not prejudice the defendant to admit the new party prior to such proof, for the matter was still open to inquiry. The defendant, by denying the fact in his answer, could have offered evidence to show that the allegation was untrue, but he neither pleaded any denial nor did he attempt to prove it. The plaintiff, however, waiving for the benefit of the defendant the requirement of the third section of the practice act, that the defendant must deny in his answer the right of a plaintiff to sue as administrator if he would contest the fact, assumed the burden of proof, and produced in court the appropriate record evidence of his appointment.

Again, the defendant claims that, as he is a non-resident of the State, nothing but Hamilton's attachment of funds in the hands of the receiver in New Haven could give the city court of that city any jurisdiction of the case, and that, the administrator having made no such attachment, there was no jurisdiction as to him. But the practice act, section 19, provides that no change of parties made by order of the court shall impair any previous attachment. The attachment inures to the benefit of all the joint parties who obtain judgment.

Neither is there any thing to the objection that, as the administrator did not reside within the city of New Haven, the city court could have no jurisdiction over his part of the case. If one of the joint plaintiffs resides within the city it is all that can be required. Otherwise it would happen that a joint obligation in favor of two persons, residing in different cities, could not be sued in either.

Another claim made by the defendant is that as the administrator filed no pleadings after his admission as a party, no judgment could be rendered in his favor, either alone or jointly with Hamilton. There is nothing to this point, unless it is true that in every case where a third party is admitted as a co-plaintiff in a pending suit he must file a new complaint. This cannot be reasonably required in a case like the present, where the claim of the third party is based on the identical obligation which the other plaintiff is seeking to enforce. The prayer of the administrator was to be admitted a co-plaintiff to prosecute the suit then pending. He adopted the allegations of that complaint except so far as he supplemented and modified them by the allegations contained in his application. The allegations as to Hamilton's exclusive right and interest in the contract referred to are of course modified by the administrator's averment of an interest in his intestate at the same time. The fact that Hamilton originally alleged that the sole interest in the contract belonged to him does not render invalid a judgment founded upon proof of a joint interest. Had the defendant desired to raise any appropriate issue relative to the administrator's interest, or right to sue, he could easily have done so by tendering pleadings of his own, but he chose to prosecute his defense against the co-plaintiffs without changing his answer at all.

The defendant also seeks to obtain a new trial on account of the ruling of the court admitting in evidence certain declarations of Charles T. Shelton, deceased. The declarations were offered to prove the execution by the defendant of the contract with Shelton. The administrator having become a party to the suit, the declarations of his intestate, if otherwise relevant, were admissible under the act of 1881, which provides that "in suits by or against representatives of deceased persons, declarations of the deceased relevant to the matter in issue may be received as evidence." Session Laws of 1881, chap. 99, § 1. No claim is made that the evidence was not relevant to prove the execution of the contract, but the sole objection is that there was no issue in the pleadings between any representative of the intestate and the defendant, which is the same groundless objection we considered in another connection.

There was no error in the judgment complained of.

All concur.

Judgment affirmed.

DAMON v. DENNY.

July 20, 1886.

Parol evidence is admissible to show that the cause of action of a pending suit is the same as that of a suit subsequently begun for the purpose of abating the same.

Action for breach of a warranty of the condition of certain apples sold, and for false representations with regard to them, brought to the city court of the city of New Haven. Plea in abatement of the pendency of another suit for the same cause of action; plea sustained, and judgment for the defendant — PICKETT, J. Appeal by the plaintiff. The case is fully stated in the opinion.

H. Daily, for appellant. *A. D. Penney*, for appellee.

PARDEE, J. On March 30, 1855, the plaintiff instituted a suit against the defendant, alleging that he had expended for him \$300; had sold and delivered to him goods, wares and merchandise of the same value; had bargained and sold to him goods, wares and merchandise of the same value; and that he had never paid therefor; demanding \$200 damages.

On December 29, 1885, that suit still pending, the plaintiff instituted this, alleging in effect in the first count that on March 27, 1885, the defendant warranted to the plaintiff that certain apples were in good marketable condition; that relying upon the warranty the plaintiff purchased them and paid the defendant \$367.50 therefor; that the apples were not marketable, and that the defendant knew that fact; that the plaintiff sold and delivered some of the apples to his customers as marketable; that he was compelled to take them back; that his reputation suffered thereby; and that he expended \$225 in sorting, packing and carting them. In the second count, that the defendant falsely and fraudulently represented the apples to be marketable; that induced thereby the plaintiff bought and paid therefor \$367.50; that the defendant knew his warranty to be false and untrue; that the apples were of no value; and that he suffered in reputation and expended money as set forth in the first count.

The defendant pleaded in abatement the pendency of the first suit, and that it is for the same cause of action as that set forth in this. The plaintiff replied, in effect, that the first suit is not for any of the causes of action set forth in this, but for an entirely different cause. The defendant reaffirmed the truth of his plea. Upon the trial the defendant introduced the file in the first suit, and then offered himself as a witness for the purpose of proving that he never had more than one transaction with the plaintiff, and that previous to that suit. To this evidence the plaintiff objected as irrelevant, immaterial and inadmissible; that it tended to contradict the file in the first suit; that the file must speak for itself; and that the issue must be tried solely upon the comparison of files in the two suits. The court admitted the evidence, and the defendant testified in effect that the only transaction between them occurred on the 23th of March, 1885, and concerned a car-load of apples. No other evidence was offered by either party. The plaintiff asked the court to find as a fact that it had not been proven that the suits were for the same cause; but the court found as a fact that the first suit was pending, that it was effective, and for the same cause as this, and adjudged that this abate. The plaintiff appeals because of the admission of evidence, and of the finding and ruling aforesaid.

Under our practice act a plaintiff can attach the property of a defendant and summon him into court, upon a complaint which, while it must disclose a good cause of action, may do so in a very general way and be almost barren of details. It rests with the defendant to say whether the plaintiff shall have judgment without more, or whether he shall supply full details. The allegation in the first suit is in words as few and general as possible; it is in effect that the plaintiff has expended a sum of money which it is the legal duty of the defendant to repay; it is sufficient to sustain a judgment without more if the defendant refrains from requiring more.

If the service of a complaint thus drawn fails to effect an adjustment and a trial must ensue, the act enables the defendant to require and the plaintiff to supply the omitted details, so that the complaint shall have the fullness, precision and truthfulness of ancient pleadings without their prolixity.

If the act permits a plaintiff to ask for and receive and enforce a judgment upon so general a statement of his claim, if he should thereafter institute a second suit, and in his complaint state a cause of action with particularity of detail, there must remain to the defendant the right to prove, even by oral testimony, that this last cause of action was the only one existing at the time of the first judgment, and was the foundation upon which that rested. *Supples v. Cannon*, 44 Conn. 424, and cases cited in the reporter's note thereto; *Dutton v. Woodman*, 9 Cush. 255; *Bigelow v. Winsor*, 1 Gray, 299; *Phillips v. Berrick*, 16 Johns. 136; *Washington Packet Co. v. Sickles*, 5 Wall. 592. The law no more permits a plaintiff to have two suits pending against a defendant for the same cause than it permits him to have two judgments. Therefore there is equal necessity for parol testimony as a defense against the former as against the latter wrong. In his first suit the plaintiff alleged that he had paid out and expended \$300 for the benefit of the defendant, and that the latter justly owed him that sum. To this the practice act permits him to add, by way of amplification, that the defendant received money from him for worthless apples and imposed upon him the expenditure of an additional sum by reason of the delivery of the same to him; and that in equity and good conscience he should repay the money. A judgment based upon the cause alleged in the second suit was legally possible in the first. If so, and if to redress that wrong was the purpose of the first, it was the duty of the plaintiff to exhaust the possibilities of that before subjecting the defendant to the cost of a second. And if the latter can prove that the transaction which is the basis of the second suit occurred before the bringing of the first, and is the only one which has occurred between the parties, and the plaintiff omits to add any thing to the general allegation in the first, or offer evidence upon the plea interposed in the second, it remains legally possible to the court to find that the latter is for a cause for which the plaintiff had a pending suit.

There is no error in the judgment complained of.

PARK, Ch. J., and GRANGER, J., concur; CARPENTER and LOOMIS, JJ., dissent.

BISHOP v. BISHOP.

July 27, 1886.

A payment by a partner on the partnership account, in the regular course of the partnership business, cannot be made the basis of a legal claim for contribution against his copartner before the partnership accounts are settled.

Action for an account. The facts are sufficiently stated in the opinion.

W. L. Bennett, for plaintiff. *L. Harrison* and *E. Zacher*, for defendant.

PARK, Ch. J. The controversy in this case presents the question whether a sum of money paid by one partner, in the due course of partnership business, can be made the basis of a legal claim for contribution against his copartner, before the accounts of the partnership are settled.

The facts upon which the question arises are substantially as follows: The plaintiff and defendant in this suit, together with certain other parties, were the owners of an oil producing farm in the State of Pennsylvania, called the Foster farm, and were partners in carrying on the business of the farm, under the firm name of the Foster Farm Oil Company. The business consisted in procuring oil from the oil wells on the farm, and in storing and selling it. The defendant was the superintendent and managing agent of the company, and as such agent made an arrangement with one Bronson, who was a lessee of one of the oil wells on the farm, and who was working it for his own benefit, to store his oil in one of the company's tanks on the farm. Bronson stored a large quantity of his oil in the tank. The defendant, acting for the company, sold Bronson's oil, and divided the proceeds among the members of the company in proportion to their interest in the company and farm. Bronson afterward brought a suit for the value of his oil against the company, describing them as partners doing business under the firm name of the Foster Farm Oil Company, and had service of the process made upon such members of the company as were within the jurisdiction of the court, including the plaintiff and defendant in this suit. He obtained judgment against the company for a large amount; which the defendant, with the knowledge and consent of all the members of the firm, afterward succeeded in compromising for the sum of \$8,000 and some costs. Of this amount one of the members of the firm paid the sum of \$2,500, and the defendant paid the balance, and the latter now brings one-half of the sum paid by him, namely, the sum of \$2,818.75, into his account against the plaintiff in this suit. No settlement of the accounts of the partnership of the Foster Farm Oil Company has ever been made.

These are the principal facts regarding the Bronson judgment; and we think the defendant is not entitled to recover of the plaintiff in this suit one-half or any part of the sum paid by him to settle that judgment. The law governing the matter is well settled.

In *Mickle v. Peet*, 43 Conn. 65, the marginal note is as follows: "Until the affairs of the partnership are settled, its assets disposed of,

and the avails applied to the payment of all demands against it, it cannot be known what balance will be due from the partnership to any partner. When this balance is ascertained, then, and not before, the law implies a promise on the part of the other partner to pay his proportion of it." The cases of *White v. Harlow*, 5 Gray, 463; *Harris v. Harris*, 39 N. H. 45; *Odiorne v. Woodman*, id. 541; *Dowling v. Clark*, 13 R. I. 134, and *Arnold v. Arnold*, 90 N. Y. 580, are to the same effect.

The reasons why one partner is not entitled to contribution in regard to some item in the partnership account favorable to himself, before the affairs of the partnership are settled, are numerous and cogent. In addition to other reasons that might be given, it is obvious that if one partner may do this in regard to an item favorable to himself, so may another partner in regard to an item favorable to himself, and there might be an interminable litigation over the account, and at last all the partners might be compelled to refund the money thus obtained in the final settlement of the partnership accounts; for until then, in the language of our court, it cannot be known whether such partners do not owe the company, notwithstanding the money paid by them on partnership account.

So in this case, it is manifest that until the accounts of the Foster Farm Oil Company are settled, it cannot be known whether the defendant does not owe the company, notwithstanding the money paid by him to settle the Bronson judgment.

Again. This suit was brought to settle the affairs of a partnership between the plaintiff and the defendant alone, and was not brought to settle the accounts of the Foster Farm Oil Company. That company included other partners besides the parties to this suit. It is clear, therefore, that no item of that account can be considered in this case, even in connection with the agreement of the parties made on the trial that all accounts between them, whether they pertained to the partnership then under consideration or otherwise, should be considered or settled by the committee. Indeed, both parties to the agreement then claimed that the affairs of the Foster Farm Oil Company could not be gone into in this suit; and surely the defendant cannot now be permitted to claim the contrary, even if there was ground otherwise for the claim.

The defendant claims that the payment by him to settle the Bronson judgment was not a partnership transaction, and consequently it is not properly an item in the partnership accounts of the Foster Farm Oil Company, but is separate and distinct therefrom. We think there is no foundation for this claim. The defendant, as managing agent of the company, sold the Bronson oil, and divided the proceeds of the sale among the members of the company. The Bronson suit and judgment were against the company, on the ground that the company was liable. The defendant, acting for the company, and with the knowledge and consent of all its members, paid and satisfied the Bronson judgment, and charged the amount in his individual account against the company. The transactions were equivalent to buying and selling the Bronson oil for the company, and charging them with the sum paid.

We think the transactions were company transactions, and that they must be regarded as belonging to the company's accounts.

In relation to the Abbot and Harley item, so called, the defendant insists that, inasmuch as the committee allowed that item in the defendant's account, and there having been no remonstrance against the committee's report, its allowance is not the subject of consideration here. But the report of the committee states all the facts in regard to that item, and the superior court having reserved the case and all questions of law arising thereon for the advice of this court, we think that item is a proper subject of consideration here. All the foregoing considerations apply with the same force to that item as to the Bronson judgment, and it needs no further comment.

We advise the superior court to disallow the sum of money paid on the Bronson judgment by the defendant, and the Abbot and Harley claim.

PARDEE, LOOMIS and GRANGER, JJ., concur.

CARPENTER, J., dissenting. It seems to me that the money paid by E. C. Bishop to satisfy Bronson's judgment ought not to be treated as money paid on account of the partnership of the Foster Farm Oil Company. E. A. Skinner, David Harris, E. C. Bishop and R. L. Bishop were the defendants in that suit. It is true they were described as partners, but it is conceded that several other persons were also interested as partners in that concern, who, being out of the jurisdiction of the court, were not made defendants and were not served with process. The judgment, therefore, was in effect only a joint judgment against the four defendants. They were the only persons liable on that judgment; and if one of them had been compelled to pay the whole, it is clear that he could have maintained a suit for contribution against the other three. When that judgment was satisfied Bronson had no claim against the partners not made defendants. Payment of that judgment resulted in taking Bronson's claim out of the list of partnership liabilities. The parties paying it doubtless have a remedy against the other partners, but that ought not to deprive them of a remedy as against each other.

Moreover of that judgment Skinner paid nothing. Harris paid \$2,500. The balance Bronson could have collected of E. C. and R. L. Bishop, or either one of them. E. C. Bishop, acting, not for the Foster Farm Oil Company, but for himself and R. L. Bishop, paid that balance. It seems to me that the payment ought to be regarded as having been made on the joint account of the plaintiff and defendant alone, and that one-half the amount so paid (assuming that Skinner is irresponsible) should be allowed to the defendant in this action.

WHEELER v. BEDFORD.

September 11, 1886.

INJUNCTION — ENCROACHING ON TOWN COMMON.

Plaintiffs and defendant were adjoining owners of lands and dwelling-houses fronting on a town common. Defendant undertook to inclose a large part of the common for his own use. The common added greatly to plaintiffs' property. *Held*, that plaintiffs were entitled to an injunction restraining defendant from proceeding.

Suit for an injunction against an encroachment upon and inclosure of a part of a town common. The defendant had judgment below. The opinion states the case.

H. S. Sanford and C. Thompson, for appellants. *G. Stoddard and W. D. Bishop, Jr.*, for appellee.

PARK, Oh. J. This case presents the question whether the owner of a dwelling-house and the land on which it stands, fronting on a town common or public park, its situation upon which greatly enhances its value, can maintain injunction proceedings against his neighbor, who seeks to destroy the common by inclosing a large part of it for his own use.

Although in this case the intended appropriation is confined to a part only of the public ground, still the principles of equity that would restrain the attempted appropriation of the entire common would restrain the attempt to appropriate a substantial portion of it; for the injury to the plaintiffs in each case would be the same in kind, the difference being only in degree.

The complaint alleges that the "public green or town common is of great and special value to the plaintiffs, and their property in affording a wide and pleasant prospect, an abundance of pure air, and a situation on a public square, and increasing the use to which the land of the plaintiffs may be put." And again, it alleges that "said encroachments, if allowed to be completed and to remain, will be of special and irreparable injury to the plaintiffs and their said property, in that it will destroy the said public green, and be of great damage to their said land, diminishing its market value, and depriving the plaintiffs of all the advantages derived from having a frontage on the public square and green aforesaid."

The demurrer to these allegations requires us to assume them to be true, and to consider the case accordingly.

We have then a case where it appears that the common in front of the plaintiffs' land and dwelling-house adds greatly to the beauty of the outlook from the house and to the value of the property, and the question is, have the plaintiffs the right to an injunction to prevent the destruction of this enhanced value of their property, and of the enjoyment which the common affords to the inmates of their dwelling-house?

We fully agree with the counsel for the defendant, that to entitle the plaintiffs to maintain this proceeding they must show that the contemplated acts of the defendant, if committed, will be of special damage to them, a damage in which the public will not share.

Suppose the common in front of the plaintiffs' premises adds, for the reasons mentioned, \$1,000 to their value. It follows that, if the common is destroyed, the plaintiffs will be injured to that extent in the diminished market value and diminished enjoyment of their property. But the public will not participate in that loss or be in any way affected by it.

The plaintiffs' right to maintain this suit is limited to the prevention of such loss as would be special and peculiar to themselves. Story, in his work on Equity Jurisprudence, § 927, in describing the cases where

injunctions will be granted, among other things says: "Where privileges of a public nature, and yet beneficial to private estates, are secured to the proprietors contiguous to public squares, or other places dedicated to public uses, the due enjoyment of them will be protected against encroachments by injunction." High on Injunctions, § 551, says: "The right which it is sought to protect by injunction may result from a dedication of land to public uses, as well as from express grant or adverse possession. Thus where land has been dedicated to the use of the public as a public square, the owners of lots adjoining, who have purchased their lots and made improvements relying upon such dedication to public use, are entitled to the aid of equity to restrain the erection of private buildings on the square. Nor will the original proprietors who have dedicated land to be used as a public square afterward be allowed to appropriate it to their own private use. And an adjoining lot-owner is a proper party complainant to a bill in equity to enjoin such appropriation. Such a complainant, being one of the inhabitants of the town, and holding property contiguous to the square, is not a mere volunteer assuming to protect the rights of others, but is injured in his individual rights, and is entitled to the aid of equity to protect his own interests."

If this can be said of public squares recently dedicated to public use, how much more strongly can it be said of squares that have existed for many generations, like the present one. See, also, *Brown v. Manning*, 6 Ohio, 298; S. C., 27 Am. Dec. 255; *Hills v. Miller*, 3 Paige, 254; S. C., 24 Am. Dec. 218; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Trustees of Watertown v. Cowen*, 4 Paige, 510; S. C., 27 Am. Dec. 80.

But the defendant's main defense against this proceeding is based upon the claim that the plaintiffs have adequate remedy at law, arising from the fact that ample provision for the removal of nuisances and encroachments from highways by the public authorities is made in the statutes of the State, and it is said that the plaintiffs can have redress by application to those authorities.

But suppose the authorities are unwilling to institute proceedings. Where then will be the ample remedy? They are not bound to redress the plaintiffs' private grievances. They act solely for the public, induced by public considerations, when they act at all.

"Adequate remedy at law" means a remedy vested in the complainant, to which he may, at all times, resort at his own option, fully and freely, without let or hindrance. This has been held many times by the superior court.

We think the court below erred in adjudging the complaint to be insufficient.

There is error in the judgment appealed from and it is reversed.

All concur.

Judgment reversed.

ALFRED S. DICKINSON AND WIFE'S APPEAL FROM PROBATE.

October 5, 1886.

The General Statutes, page 872, section 5, provides that intestate estates shall be distributed by three distributors or any two of them under oath appointed by the probate court, "unless all the persons interested shall be legally capable to act, and shall make and file in court a division of the same, made, executed and acknowledged like deeds of land, which instrument being recorded in said court shall be a valid distribution of said estate." *Held*, that a division of such an estate made in writing among the heirs and next of kin, all being of age and all joining, but where the division was not "made, executed and acknowledged like a deed of land," and was not filed and recorded in the probate court, did not supersede or preclude a regular probate decree ordering a distribution of the estate.

A distribution will not be set aside where the only objection thereto is that the amount was not large enough; the distribution may be good so far as it goes, and a further order of distribution made of the remainder.

An appeal from probate does not of itself vacate a decree appealed from; the decree remains in full force until the appellate court otherwise determines; but the probate court ought properly to be advised as to the action of the appellate court, although a judgment of the court below affirming the decree is unnecessary.

Appeal from probate decrees. The opinion states the case.

C. J. Cole, for appellants. *W. F. Willcox*, for appellees.

LOOMIS, J. The statute with regard to the division of intestate estates among the heirs and next of kin provides that "intestate estate, after deducting expenses and charges, shall be distributed by three disinterested persons, or any two of them, under oath, appointed by the court of probate, unless all the persons interested in said estate shall be legally capable to act, and shall make and file in court a division of the same, made, executed and acknowledged like deeds of land; which instrument, being recorded in said court, shall be a valid distribution of said estate." Gen. Stats., p. 372, § 5. The question in the present case is — whether a division of such an estate made in writing among the heirs and next of kin, all being of age and all joining, but where the division is not "made, executed and acknowledged like deeds of land," and is not filed and recorded in the probate court, supersedes or precludes a regular probate decree ordering such a distribution.

It is not important to the question whether deeds have passed between the heirs, releasing to each his agreed share, or whether the matter rests wholly in a written contract. The mere contract would be binding on the parties executing it, though it would of course require an exchange of deeds to make the title complete on the public records. That heirs may make such a contract and such conveyances, and that they will be valid and binding, was settled by the decision of this court in *Baxter v. Gay*, 14 Conn. 119, and is no longer an open question. All the heirs could unite in conveying their rights to a stranger, or one heir could convey his interest to a stranger. If this is so they could certainly convey to one another.

But the question is not whether they could convey to each other; but whether such agreement or conveyances would supersede and exclude a later formal distribution by the probate court. As such formal distribution is not necessary to make a valid title on the public records, where all the heirs have executed and delivered to each other cross-deeds con-

veying all their interest, it may at first blush seem strange that the law should allow the probate court to incumber its records with nugatory decrees of distribution which cannot be enforced. This anomaly arises from the mandatory terms of the statute and from the inability of the probate court, under its limited jurisdiction, to hear and enforce the claims of parties founded on contracts made between them after the estate shall have vested in the heirs upon the death of the intestate.

In *Holcomb v. Sherwood*, 29 Conn. 418, this court decided that where one of the heirs has conveyed away his interest in the real estate before distribution, the court of probate is to ignore the conveyance, and order the distribution made to the heirs as if no conveyance had been made. The conveyance of course stands good, and operates either by way of estoppel or as an assignment of the heir's interest.

We see no reason why the same rule should not be applied here. The distribution, we think, would ordinarily be made in accordance with the division made by the parties themselves; but if it should not, any heir who should get what by the agreement he was not to take, would be bound to convey to the party who took it under the agreement, and any heir failing to get under the distribution what he had taken by the agreement, could by a proceeding in equity compel a conveyance of the agreed part to himself.

It is clear that, if this were not so, a court of probate would have many questions to try which it could not entertain or dispose of, and which would be entirely foreign to probate jurisdiction as now recognized. If, for instance, there had been a voluntary division by written agreement or by deeds, the question might be made whether the agreement or deeds had been obtained by fraud or duress, or executed under mistake, or, as suggested by the pleadings in this case, whether the agreement, if originally valid, had not been lawfully rescinded, or whether the agreement ought not to be set aside upon equitable considerations. Indeed we can hardly conceive a case where, after such a division had been made by the heirs themselves, any one of the heirs would apply to the probate court for an order of distribution, unless he was prepared to attack the voluntary division upon some of the above-mentioned grounds. The recent case of *Hewitt's Appeal*, 53 Conn. 24; S. C., 3 East. Rep'r, 548, has settled the point that the probate court cannot go into these inquiries. The court of probate has before it the statutory duty of ordering a distribution of an intestate estate, "unless all the persons interested . . . shall make and file in court a division of the same, made, executed and acknowledged like deeds of land; which instrument being recorded in said court shall be a valid distribution of said estate." We think that the court must ignore any division not made in full accordance with this statute requirement.

It is not, however, to be inferred that the probate court in every case is to disregard such a division and proceed on its own motion to order a distribution. The court will be justified in waiting for some person interested to apply for the order; and, as already suggested, it can hardly be conceived that any heir having made and concurring in such a division would apply for such an order. Where, however, he does apply, and the order is granted, and on the distribution the voluntary division is

ignored, the case becomes one for a court of equity, which, upon the complaint of any party aggrieved, could set aside or establish the conveyances previously made or enforce the written agreement. That court, having full jurisdiction, could hear all the evidence and act finally upon it.

Our conclusion that there was no error in the matters assigned would ordinarily preclude discussion as to other errors. But in this case there is an error and inconsistency in the finding of the trial court that might mislead the probate court in revising the administration account and in ordering another distribution.

It was our first impression that the error could not be fully corrected without a reversal of the judgment of the superior court, but on further consideration we have concluded that such reversal may not be necessary after the matter is fully explained. The appeal from probate was from the decrees accepting the administration account, appointing distributors, and accepting their doings. In the reasons for appeal, among other things, the balance of account found due the administrator of \$784.61 was particularly mentioned. In schedule B the items of the administrator's charges against the estate appear, and they amount to the sum of \$1,984.56. Upon this was a credit of \$1,200 for rent of a factory in the hands of the administrator and the above balance was obtained by deducting the latter sum from the former.

Now the finding of the superior court is as follows: "The decree of the court of probate in accepting and allowing the said administrator's account as to all sums and items stated and appearing in schedule B in said account, except the last two items therein, to-wit, except items of 'funeral expenses, \$144.73' and 'estimated expenses settling estate, \$75.00,' is reversed, and all said items stated and claimed in said schedule B, except as above stated and accepted, are found not to be due, and are disallowed and rejected. The sum of the items hereby disallowed and rejected is \$564.83, and in all other respects and particulars said decree is confirmed and established."

The meaning of the court as to the items to be deducted cannot well be mistaken. All the items on the debit side of the account are rejected except the last two, which are named with the amounts. Deducting the two items excepted, which amount to \$219.73, from \$1,984.56, the whole amount, and we have, as the correct sum of the items disallowed and rejected, \$1,764.83. But the court manifestly errs in stating the sum of the rejected items to be \$564.83. The court makes no mention of the credit of \$1,200 in the hands of the administrator. It is absurd to suppose that what the administrator acknowledged to be in his hands would be rejected in his favor, and besides, the court rejects all the items except the last two, which are named, and we see that they are the last two items on the debit side of the account, which shows that the deduction has reference to that side of the account. How the mistake on the part of the trial judge occurred it is not necessary to conjecture. We think, however, the footing given may be rejected and corrected by the more certain data contained in the finding, and that the court of probate may and should revise the account accordingly. Upon such revision the result will be as follows: The property

mentioned in schedule A for distribution amounts to \$7,275.28. The probate court allowed the administrator to deduct \$784.61 from this sum as a balance due him, but the finding of the superior court shows that instead of the estate owing him he owed the estate. His account credits \$1,200 as being in his hands; the court allows him only two items, which together amount to \$219.73, which, being deducted from the \$1,200, leaves in his hands belonging to the estate the sum of \$980.27, which sum must be added to the amount of property first mentioned — viz., \$7,275.28 — which makes the entire amount to be distributed \$8,255.55. The amount distributed was only \$6,490.67. The difference, viz., \$1,764.83, represents the remaining estate which the court of probate must now order to be distributed upon a just revision of the account according to the data given by the superior court. This we think may be accomplished without setting aside the distribution already made. The only objection to that distribution is that the amount was not large enough. It may, we think, be treated as good so far as it goes. One distribution does not preclude the making of another. The property now to be distributed being all in money, there is not the slightest difficulty in doing equal and exact justice to all the heirs without disturbing what they have already. The court of probate should, therefore, find the additional amount to be distributed and order its distribution.

There are other defects apparent on the record which it may be well to advert to, although, for reasons to be given, we consider them immaterial. The court, in its finding and judgment, takes notice only of the decree accepting and allowing the administration account, and after specifying what items are to be rejected in that account, it is found that "said decree is confirmed and established in all other respects." The other decrees appealed from, namely, the order of distribution, and the appointment, doings and return of the distributors, are not referred to at all in this connection. But as an appeal from probate does not of itself vacate the decrees appealed from, they remain in full force until the appellate tribunal otherwise determines; but the probate court ought properly to be advised as to the action of the higher court in respect to all the decrees appealed from, although a judgment by the superior court affirming them is not strictly necessary. In this case the only objection to the decrees respecting the distribution—other than the amount to be distributed—was that the distribution already made by the parties would render any further distribution by the probate court illegal and void, and when that objection was overruled it was obvious that the superior court intended to affirm the distribution in all respects, except as it was incidentally affected by increasing the amount to be distributed, and, as that was found too small rather than too large, it may stand as so far good.

The finding of the court may be criticised in another respect. The record shows a departure from the issue raised by the answer to the sixth reason of appeal. The answer admitted a verbal agreement to divide the personal property—except some articles not appraised—and also the real estate, and that deeds were drawn and executed by all the heirs to consummate the agreement as to the real estate which were

never delivered or exchanged, and that, in consequence of certain acts in violation of the agreement by the appellants, the appellees refused to carry the agreement into effect. But upon the trial, when the appellants offered evidence to prove the alleged agreement, the appellees objected, upon the ground, in substance, that as there was no pretense that the agreement was made and executed in the manner prescribed by the statute, the evidence was not admissible. The counsel for the appellants, instead of claiming the evidence as admissible to prove the issue, claimed it upon the sole ground that under the equity powers of the court of probate the agreement, if proved, would supersede any other distribution. If the appellant had then claimed the evidence because it would tend to prove the issue raised by the pleadings, there might have been an amendment to avoid the question. Under the circumstances we think the appellant waived his right—if any he had—to stand on the form of the pleadings. The court very naturally decided the question which the counsel submitted, and we do not think that the party should now be allowed to claim that the ruling of the court in rejecting the evidence was erroneous merely on account of the form of the issue raised by the pleadings.

For these reasons we conclude that there was no error in the judgment complained of.

All concur.

Judgment affirmed.

SUPREME JUDICIAL COURT OF MAINE.

MARTIN v. MASON.

December 7, 1886.

TROVER — CONVERSION — LOGS WITH SAME MARK — DEMAND.

Where two lots of logs of the same kind, quality and value, and having the same mark, though owned by different parties, become intermixed without the fault of either party, each owner will be entitled to his proportional part of the whole lumber sawed from the logs, and if one owner converts to his own use more than his proportional part, he will be liable to the other in trover for the amount so converted; and in this case it was held that the liability attached without a special demand.

On exceptions. Trover to recover the value of a certain quantity of logs claimed by the plaintiff to have been converted by the defendant.

(1.) Upon the matter of the similarity of the marks and the respective right of the parties, the presiding justice instructed the jury as follows: "We find these two gentlemen each with an interest in a body of logs of the same mark. As soon as they ascertain this fact it is the duty of each, in justice to the other and everybody, to take extra measures for the care of his own logs and to avoid trespassing upon the rights of the other. And they are bound, if they cannot make mutual arrangements to distinguish their logs, to keep them apart so that they

will not become mixed. Now, in this case, I will give you this rule : If, as soon as this similarity of marks was ascertained by the two parties, it appears to you that Mr. Martin undertook by arrangement, or that he undertook and gave notice accordingly, and that it was understood by the other side that he undertook to change the mark upon his logs, and he gave the other side to understand that he was going so to do and would so do, and in pursuance of that arrangement between the two he undertook to do it, then he thereby gave the other party to suppose that all his logs would be so changed, and if he allowed any of his logs to remain without the change and allowed them to run without any care on his part into the river, and if without any care on his part or any oversight on his part they escaped, and without any fault of Mason's or any design on his part got mixed with Mason's logs, Mr. Mason not being obliged at his peril to separate these logs from his own, but he might assume that they were his logs and Mr. Martin could not afterward sue him for the value of them, at least until he, Martin, had made a demand upon him for the logs."

(2.) The presiding justice further instructed the jury as follows : "So it is simply this : If you should find that Martin after talking with Mason as to what should be done, and it was finally understood, either by language or words in any way, that this difficulty was to be settled and this embarrassment got rid of by Martin changing the mark upon his logs, and he undertook to do it, and Mr. Mason so understood it, and Mr. Martin did change part of them, and he left part unchanged to run in the river loose, without any care on his part to keep them separate from Mason's, and they got mixed with Mason's logs without his fault, he would have a right to regard them as his logs, at least till demand was made, and no proof of any demand being made in this case, Mason would not be liable in this case whatever he might be under other and different state of affairs for using those logs as his own."

(3.) The presiding justice further instructed the jury as follows : "I instruct you that the fact that these logs came into Mason's boom is not proof enough, because they may be there now for that matter. It is not enough that they went into his mill, or that they were sawed by him, but to make out the conversion it must appear that after they were sawed Mason appropriated the lumber to his own use by selling it, hauling it away for himself or putting it upon his own pile, thereby indicating that he took it for himself."

Wiswell & King, for plaintiff. *John B. Redmond*, for defendant.

DANFORTH, J. In this case the first and second instructions excepted to are in substance the same. They were given upon a supposed state of facts which, if found by the jury as supposed, would leave them no option but to return a verdict for the defendant, as they did. The language used, so far as it relates to the facts, may be susceptible of different interpretations when taken by itself. We must, therefore, ascertain its meaning by applying it, as the jury must have done, to the evidence and admitted facts as shown by the case.

The case shows that during the same winter the two parties were

separately engaged in cutting logs upon Union river. The logs cut were in all respects, including the value, similar, and each party used the same mark, being ignorant of the use of it by the other. When this fact became known, Mason, the defendant, requested the plaintiff to put an additional mark upon his logs, which he refused to do. He did, however, subsequently attempt to make the change and succeeded in part, but before completing the work the logs escaped from the boom and run down the river without any fault on his part. Of this attempt on the part of the plaintiff the defendant had knowledge.

The logs of the two parties run down the river the same season. Subsequently the plaintiff's logs were sawed under a contract by the thousand at the mill owned by the defendant and one Cushman. The defendant testified that he presumed that all the logs which came to the mill with the unchanged mark "were sawed for him, and that he received, shipped and sold the lumber." The plaintiff claimed that either by accident or design a large portion of his lumber had not been accounted for, and for this portion he claims to recover in this action.

To these facts must the instruction be applied; by them must their accuracy be tested. With these facts before them the jury must so have understood and acted upon the instructions given. Nor does it require any great straining of the language used by the court to so understand them. There was an attempt on the part of the plaintiff, after talking with the defendant, partially successful, to put an additional mark upon his logs, and the defendant might have inferred that the "difficulty was to be settled in that way." But the case not only fails to show any contract, or even promise to make the change, but distinctly negatives any such supposition. Nor does it appear that any representations were at any time made to defendant that the change in the mark had actually been made, so as to raise any question of estoppel. The plaintiff did leave "part of his logs with the mark unchanged to run loose in the river without any care on his part to keep them separate from Mason's." But that want of care was under such circumstances as to show no fault on his part and the case so finds. So far it appears affirmatively that the plaintiff was not in fault for any mixture of the logs, if any took place before their arrival at the mill. Nor does it appear that up to that time any fault rests upon the defendant. Under the circumstances attending the cutting and running these logs the same rights and obligations would rest upon each party, and from the facts in the case if the mixture occurred before their arrival at the mill, neither party would forfeit any right to the logs to the other, but each might claim and would be entitled to his specific quantity of the lumber, though he might not be able to identify his specific logs. Hence the instruction that under the given facts the defendant "would have a right to regard the logs as his" even without a demand must be deemed erroneous. *Loomis v. Green*, 7 Me. 386; *Hesseltine v. Stockwell*, 30 id. 237; *Ryder v. Hathaway*, 21 Pick. 298; *The Idaho*, 93 U. S. 585; 2 Kent (12th ed.), 364.

True, the instruction does not necessarily imply that the plaintiff, under the given facts, had forfeited all title to his logs, but it must mean all that is said in the first instruction, that the defendant "would not be

obliged at his peril to separate these logs from his own, but he might assume that they were his logs . . . at least until demand was made." But if he could assume they were his until demand, he could make any conversion of them without liability, and in the second instruction the jury are told that in this case the defendant would not be liable in the absence of any proof of a demand. But if the plaintiff had not forfeited his title to his logs it is clear, from the authorities cited, especially *Ryder v. Hathaway*, that in such case any use of the property inconsistent with the owner's title will prove a conversion without a demand and refusal.

In this case the defendant admits that all the logs which came into his mill without the additional mark "were sawed for and received, shipped and sold by him." If this included any of the plaintiff's logs, it would certainly be a sufficient conversion to enable the plaintiff to recover for so much of his lumber of the unchanged mark as he can prove went into the mill and has not been accounted for.

The third instruction, though unobjectionable in itself, does not purport to supersede, or in any way modify the second; it does not appear whether it was given as applicable to the same or a different state of facts; nor were the first and second withdrawn. They must, therefore, stand as they are, and thus standing, must be deemed erroneous.

The case seems to assume rather than to show any confusion of these two lots of logs; and if such mixture did occur, leaves it uncertain whether before or after their arrival at the mill. If after, an additional obligation would devolve upon the defendant by virtue of his contract for the sawing. If not already mixed before the arrival, it would be his duty to keep them separate, and if he did not succeed, he might not perhaps forfeit his logs, but it might, to some extent, change the burden of proof or the amount required to prove a conversion.

Exceptions sustained.

PETERS, Ch. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

PHIPSBURG v. DICKINSON.

December 6, 1886.

COLLECTORS OF TAXES—BONDS—APPROPRIATION OF DEFICIT—AUDITOR'S REPORT—EVIDENCE.

Where the same person was collector of taxes for three years in succession, and there appeared a deficiency not accounted for and paid over by him, the deficit should be divided between the three bonds in the proportion of the sums collected by the collector on each commitment, when there is no evidence showing the time the deficit commenced, or when it occurred, or of appropriation of payments either by the collector or by the town.

By Revised Statutes, chapter 82, section 71, an auditor's report may be properly admitted in evidence.

On exceptions. The case is stated in the opinion.

Washington Gilbert, for plaintiffs. *Charles W. Larrabee*, for defendants.

LIBBEY, J. This is debt on the bond of A. Dickinson as collector of the plaintiff town for 1880. The plea is the general issue, with brief statement of performance of the condition of the bond by Dickinson.

The case went to an auditor, who heard the parties and made his report to the court. At the trial the auditor's report was offered in evidence by the plaintiff. It was objected to by the defendants on several grounds, but it was admitted and exception taken. It was properly admitted in evidence. Rev. Stat., chap. 82, § 71.

Whether, in adjusting the accounts between the parties, the rules of law applied to the case by the auditor were correct or not was for the court, but the exception fails to show whether the court in that respect sustained the auditor or not. But the case is argued by the counsel for the defendants on the assumption that the court sustained the auditor in the law. Assuming this is the fact, that the court gave the jury the same rule of law which the auditor acted upon, we think there was no error.

Dickinson was collector for 1880, 1881, and 1882, with different sureties on his bond each year. Actions were brought and pending in court on each bond, and they were all committed to the auditor and heard together. The pleadings were the same in each case. The only elements given us by which appropriation of payments can be made, or the deficiency apportioned among the bonds, are as follows: The taxes assessed each year were duly committed to the collector, and on the commitment for 1880 he collected \$11,466.32; for 1881, \$11,484.99; for 1882, \$8,118.95. The deficiency not accounted for and paid over by the collector for the three years was \$789.76. There is no evidence showing when the deficit commenced, or in which year it occurred. There is no evidence of any appropriation of payments by the collector or by the town. The rules adopted by the auditor divided the deficit between the three bonds, in the proportion of the sums collected by the collector on each commitment. We think this rule is correct. It is claimed by the learned counsel for the defendants in this case that, it appearing that the collector paid over during the three years more than he collected on the assessment for 1880, the law presumes, in the absence of proof, that he performed his legal duty and paid over all he collected for that year. But the legal presumption is just as strong as to each of the other years, and, as he could not legally appropriate as against his sureties, what he received on one assessment in payment of what he received on another, the law will not apply the payments to the oldest debt. *Porter v. Stanley*, 47 Me. 515; *Orono v. Wedgwood*, 44 id. 51.

In the absence of any evidence of appropriation of payments or of the source from which the moneys paid come, we know of no more equitable rule of appropriation and of dividing the deficiency than the rule adopted by the auditor. It is at least sufficiently favorable to the defendants under the plea of performance; it being proved how much the collector received on the assessment for 1880, the burden is on the defendants to prove that he accounted for it and paid it over, as it was his legal duty to do. *Small v. Machaisport*, 77 Me. 109. This they fail to do.

There is a motion to set the verdict aside as against the evidence, but it nowhere appears in the case how much the verdict was, and if there was no error in the law the motion is not insisted on.

Exceptions and motion overruled.

PETERS, Ch. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

FLETCHER v. HARMON.

December 11, 1886.

PLEDGE — CONTRACT OF PLEDGE — SET-OFF — RECOUPMENT.

A pledgor cannot recover from the pledgee in *assumpsit*, as money had and received, nor by set-off, the value of securities pledged, when they have been voluntarily surrendered by the pledgee to a third person.

The contract between pledgor and pledgee is collateral, and damages for its breach cannot be allowed by way of recoupment in defense of a suit to recover the debt.

Merrill & Coffin, for plaintiff. *D. D. Stewart*, for defendants.

HASKELL, J. *Assumpsit* on a promissory note, signed by the defendants, and payable to the plaintiff on demand. The defendants plead in set-off, that the plaintiff had sold certain notes which they had pledged to him to secure the payment of the note in suit, and had received the full face value thereof exceeding the amount sued for.

When securities pledged to secure the payment of a debt are legally sold by the pledgee, he sells for his own account so far as necessary to pay his debt, and the proceeds when received to that extent become his own and operate as payment; but the balance is money "had and received" by him for the pledgor's use, and may be recovered as such by action or by set-off in an action by the pledgee against the pledgor. *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Potter v. Tyler*. 2 Metc. 58; *Howard v. Ames*, 3 id. 308; Rev. Stat., chap. 82, § 56.

When such securities are illegally sold by the pledgee and he has actually received money therefor, the pledgor may waive the tort, and require the money so received to be applied in payment of the debt secured, and may recover any balance of the same by action for money had and received, or by set-off; but he can only avail himself of these remedies when money or its equivalent has been actually received from the tortious sale, and he must be content with the money received as his measure of damages. *Androskoggin Water Power Co. v. Metcalf*, 65 Me. 40; *Ware v. Percival*, 61 id. 391.

The evidence adduced does not tend to support the defendants' plea, but rather shows that the plaintiff wrongfully, and without receiving any consideration therefor, surrendered the securities pledged to a stranger who claimed to own the same. In no way have the securities been applied to the payment of the debt. The parties have not agreed to so apply them, nor have they been so dealt with by the plaintiff that the law so applies them. The statement of the case negatives the right of set-off, inasmuch as the securities have not been sold or in any way applied to the payment of the plaintiff's debt, leaving a balance in the plaintiff's hands for the defendants' use.

Nor can the defendants recoup the value of the securities pledged to the extent of the amount due upon the note in suit. Recoupment would arise for some breach by the plaintiff of the contract sued, whereby the damages claimed by him are reduced or extinguished. The contract in suit is a promissory note containing no stipulation whatever for the plaintiff to perform. The reciprocal rights and liabilities of the parties touching

the pledge, a collateral contract as its name implies, depend upon the performance or breach of the principal contract and are incident to it, but not a part of it. Stipulations touching a loan and a pledge to secure it may be inserted in one contract, if the parties desire, so that reciprocal duties and liabilities touching both loan and pledge would flow from it, and all controversies touching both might be settled in the same suit, but that is not the case at bar. In a case in all essentials like the present it was held that neither set-off nor recoupment could be allowed. *Stare decisis. Winthrop Bank v. Jackson*, 67 Me. 570.

Exceptions overruled.

PETERS, Ch. J., DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

GRANT v. BODWELL.

December 11, 1886.

HEIRS—DISTRIBUTION OF PERSONAL ESTATE—ALABAMA CLAIMS.

Personal estate of an intestate, after the payment of debts, expenses and allowances, should be distributed among the heirs living at the time of the death of the intestate.

The decree of distribution of the personal estate of an intestate among the heirs should name each one and his share, and, if any have died, the share of each one so deceased should be decreed to be paid to the executor or administrator of such deceased heir.

Money received upon an Alabama claim by an administrator becomes assets in his hands to be administered and distributed by him as a part of his intestate's estate; and where it is thus distributed to an executor of an heir, it would pass to the residuary legatee under the clause giving to the son of the testator "all the residue and remainder of my estate, real and personal and mixed, wherever found and however situated."

Trus P. Pierce, for plaintiff. *Charles E. Littlefield*, for defendant.

HASKELL, J. Priscilla E. Cables died intestate, leaving an only daughter, who died in her minority, unmarried, without issue, and prior to distribution of her mother's estate, leaving a grandmother, Priscilla E. Prescott, her sole heir. *Cables v. Prescott*, 67 Me. 582.

The grandmother, Mrs. Prescott, died testate, and afterward, the administrator of Mrs. Cables settled his account in the probate court, showing a balance of personal estate in his hands for distribution, amounting to \$2,092.46, which, on petition, the judge of probate ordered distributed among all the heirs of Mrs. Cables.

From that decree an appeal was taken to this court, and, at *nisi prius*, the decree was reversed, and the administrator of Mrs. Cables was ordered to pay the balance named to the estate of the grandmother, Mrs. Prescott; and the case comes up on exception.

At the death of Mrs. Cables her real estate descended to her heirs, and her personal estate to her administrator to be administered, and the balance distributed among her heirs; heirs living at her decease, instead of such only as may have survived at the time of distribution.

The judge of probate could only decree distribution among the heirs of the intestate as they existed at her death, and this he should do by naming each one in the decree; and if any heir had died prior to distribution, then its share should have been ordered to be paid to its

representative, that it might be administered and subjected to the payment of any debts existing against the estate of such deceased heir: for, without administration upon the estate of such deceased heir, it cannot be judicially known what sum ought to be distributed, and to whom it should be paid.

If the decree of the judge of probate had directed the estate in question to be paid to the legal representative of the intestate's deceased daughter and sole heir, no fault could be found with it, but it is treated as meaning that distribution shall be made among the intestate's next of kin, living at the date of the decree, as they are entitled by the law of descent; given such meaning, its scope was beyond the power of the judge of probate to decree, and it could not protect an administrator who should obey it. True, in this case the sole heir was a minor, who died unmarried and without issue, and there can be little or no risk in the administrator disposing of the estate in his hands in the same manner that her administrator would do if there had been one, that is by paying it to the executor of the grandmother's will, who would then dispose of it lawfully; but the rule is inflexible; an heir takes his share of the realty at the death of his ancestor, and then acquires a right to his distributive share of the personalty, whatever it may prove to be; and, when acquired, it becomes subjected to his debts by means of the proper administration upon his estate. If the share of one heir may be treated as extinguished in a decree for distribution, why may not all be imperiled for such prudential reasons as have weight with a judge of probate. The decree must conform to the statute, and order distribution among the heirs of the deceased, who were living at his death, and, if any of them be dead, then the share of that one be paid to his legal representative. Rev. Stat., chap. 65, § 27; chap. 75, §§ 1, 8; *Knollton v. Johnson*, 46 Me. 489.

In this view of the case the exceptions must be sustained, and a decree should be entered below, ordering payment to the estate of, or legal representative of Carrie E. Cables, with costs as before provided. After such decree the administrator, under the peculiar circumstances of this case, may conclude to assume the risk of paying directly to the executor of Mrs. Prescott, and thereby save the trouble and expense of an apparently needless administration, but of this, he must judge, as the risk, if any, which he assumes in doing it will be his own. *Cables v. Prescott*.

Mrs. Cables in her life-time had lost by a Confederate cruiser a part of the brig "*Joseph*," and under the act of congress touching the Alabama claims, her administrator recovered on account of that brig, the sum now held by him, ready for distribution, and it is contended by the appellees, that the same cannot become a part of the estate of Mrs. Prescott and pass to her devisees, but that the same should be distributed among the kindred of Mrs. Cables, who are identical with the kindred of Mrs. Prescott, and some of them are persons not her devisees.

Mrs. Cables suffered the loss of her property by the act of a foreign enemy, in defiance of the sovereign power of the people of the United States, under a Constitution declared, in the preamble thereof, to have

been ordained to provide for the common defense. To the government she had a right to look for protection, and from it, hope for redress, even though it be so long deferred as to make the "heart sick." Twenty years elapsed and relief came. The government found itself in possession of a fund, received from a foreign power, to indemnify citizens of the United States, who had suffered loss by certain Confederate cruisers, for whose acts that power was responsible, and after fully satisfying such losses, a balance of the fund remained in the Federal treasury. Inasmuch as other citizens had suffered loss by other Confederate cruisers, engaged in the same business of destroying vessels belonging to citizens of the United States, congress, regarding its duty to procure indemnity to all citizens for losses suffered at the hands of an enemy, applied the balance of this fund to such purpose, and the legal representative of Mrs. Cables, by judgment of court, recovered in her behalf the money now in his hands. He recovered it in satisfaction of a loss that she had suffered, and not as a gratuity, or bounty given to her living kindred. *Comegys v. Vasse*, 1 Pet. 193, 215-17; *Erwin v. U. S.*, 97 U. S. 392; *Phelps v. McDonald*, 99 id. 298, 304; *Buchanan v. Lawson*, 109 id. 659; *Leonard v. Nye*, 125 Mass. 455.

Although collected after her death, it was in satisfaction of a loss that she had sustained and in payment of it. She would not recover it in her life-time, but her right to recover it was a constituent part of her estate, and vested in her administrator at her death, and is to be distributed as personal estate. *Thurston, Adm'r, v. Lowder, Adm'r*, 40 Me. 197.

When received by the executor of the grandmother, Mrs. Prescott, it becomes a part of her estate, and must be distributed according to her will. She declares that she makes her will, "intending hereby to dispose of all my estate." The residuary clause devises to the appellant, her son, "all the residue and remainder of my estate, real, personal and mixed, wherever found and however situated." The intention is manifest, that all the estate, whether actually received before or after her death, should pass under the will. The act under which the fund was recovered was passed the same day that the will was made, and the granddaughter had died many years before, leaving the testatrix her sole heir. It is unlike the case of *Blaisdell v. Hight*, 69 Me. 306, where the language used was held insufficient to pass certain after-acquired real estate, or the case of *Dunlap v. Dunlap*, 74 Me. 402, where the testator made a schedule of his property, and devised the residue, after certain legacies to a niece.

Exceptions sustained

Decree according to this opinion.

PETERS, Ch. J., DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

BURNHAM v. PECK.

December 8, 1886.

PLEADINGS — DECLARATION.

A declaration will not be adjudged bad on demurrer which is sufficiently formal to make known to the defendant and the court the claim set up by the plaintiff.

On exceptions to the ruling of the court in overruling a demurrer to the declaration.

The declaration and demurrer were as follows :

DECLARATION.

In a plea of the case for that the said defendant on the 12th day of May, A. D. 1885, was indebted to one James A. Martin in the sum of \$115, according to the account annexed, which account the said James A. Martin thereafterward on said 12th day of May, 1885, for a valuable consideration, assigned and transferred to the plaintiff as by copy of the assignment to be filed in court with this writ will appear, whereby the said defendant became liable, and in consideration thereof promised the plaintiff to pay him the said sum on demand; yet though requested, the said defendant has never paid the same to the said James A. Martin, or to the plaintiff, but neglects and refuses so to do.

Also for that the said defendant at said Sanford, to-wit, at said Augusta, on the 12th day of May, A. D. 1885, was indebted to one James A. Martin in the sum of \$100, for so much money before that time had and received to the use of said James A. Martin; and the said James A. Martin thereafterward on said 12th day of May, 1885, for a valuable consideration assigned and transferred said sum of \$100 to the plaintiff as by copy of said assignment to be filed in court with this writ will appear, whereby the said defendant became liable, and in consideration thereof then and there promised the plaintiff to pay him the said sum on demand; and yet though requested, the said defendant has never paid said sum to the said James A. Martin, or to the plaintiff, but neglects and refuses so to do.

DEMURRER.

And now the said defendant comes and defends the force and injury, when, etc., and says that the plaintiff ought not to have or maintain his action against him, because he says that the declaration aforesaid, and the matter therein contained, are insufficient in law to have and maintain the action aforesaid of the plaintiff against him, and this he is ready to verify.

Wherefore he prays judgment and that the plaintiff be barred from having his action aforesaid against him.

And for special demurrer the defendant says that the plaintiff's declaration in his writ is not in due form in this :

1. In the first count in plaintiff's writ there is no venue alleged.
2. There is no allegation in either count that the assignment of James A. Martin to the plaintiff was "in writing."
3. There is no allegation in either count that the said demand

assigned by James A. Martin to the plaintiff was "a chose in action not negotiable."

4. There is no allegation in either count that the defendant had due notice of said assignment, or that said defendant was liable by force of the statute in such case made and provided.

5. That the plaintiff's declaration is otherwise defective and insufficient in law.

H. Blake, for plaintiff. *Asa Low*, for defendant.

PER CURIAM. The defendant's motion and demurrer are based upon objections to the declaration in the plaintiff's writ, and are of the most formal and technical kind.

The declaration is sufficiently formal to make known to the defendant and the court the claim set up by the plaintiff, and to meet the requirements of law. *Wills v. Churchill*, 78 Me. 286.

The assignment appears, both by the declaration and from the printed case, to have been in writing and is sufficiently definite.

A judgment in this action will be a bar to any action hereafter by the assignor for the same claim.

Exceptions overruled.

SUPREME COURT OF VERMONT.

STATE v. EMERY.

December 20, 1886.

CRIMINAL LAW — PLEA IN ABATEMENT — DUPLICITY — GENERAL DEMURRER.

A plea in abatement must be certain to every intent; and it must stand or fall on its own allegations, unless there be an express reference to the indictment; thus it was *held*, on general demurrer to a plea purporting to raise the disqualification of one of the grand jurors and the illegality of the organization of the grand jury, that the plea was bad, in that it was not properly alleged that the objectionable grand juror acted with the panel in finding the indictment; in that the allegation, that he was not "a legal voter of the county," was lacking in certainty as to what county; in that the allegation, that he was not one of the "judicious men of the county," that the panel did not constitute a legal grand jury, present conclusions of law; that the mere reference in plea to "said indictment" did not show, except by inference, what indictment had been pleaded to; and that duplicity could be reached by general demurrer.

JEOPARDY.

The trial had commenced and the evidence nearly in, when one of the jurors was taken sick and the panel was thereupon discharged. *Held*, that the prisoner had not been in jeopardy.

CIRCUMSTANTIAL EVIDENCE.

The respondent was charged with burning a barn; and it was claimed that he was hostile to the husband of the owner of the barn. *Held*, that circumstantial evidence was admissible to show that the respondent knew that the husband had cattle in the barn when it was burned — to prove a motive.

GOOD CHARACTER.

Proof of good character, by the rules of evidence, is limited to general reputation, and more is matter of favor.

Indictment for arson and burning in three counts. Trial by jury, December term, 1885, Orange county, ROWELL, J., presiding. Verdict guilty. The first count alleged setting fire to a dwelling-house; the second and third counts alleged the burning of a barn. It was averred that the said barn was the property of Sarah Emery, who was the wife of Harry Emery, a half brother of the respondent. Harry Emery was called as a witness by the State, and having testified that certain cattle were burned with the barn, it was proposed to ask him whose property the cattle were. On objection by the respondent, the State's attorney stated that he offered it to show motive in connection with threats of the respondent against said Harry.

At the June term, 1885, a plea in abatement was filed, to which was a general demurrer. The demurrer was sustained. The respondent was then arraigned and pleaded not guilty, and was put upon trial. One of the jurors was taken sick during the trial, and thereupon the panel was discharged. The respondent then moved that he be discharged, for that he had been in jeopardy. This motion was denied.

The allegation in the plea as to the action of the objectionable grand juror was: "He saith that Daniel Emery, a person who acted and served as one of the grand jurors, finding said indictment, was summoned to fill up the panel . . . was not one of the judicious men of the county . . . that said Daniel Emery . . . was . . . related to the said Charles Emery within the fourth degree of consanguinity," etc.

E. W. Smith, State's attorney, and *S. B. Hebard*, for State. *John H. Watson* and *Heath & Willard*, for respondent.

Ross, J. I. The demurrer to the plea in abatement was properly sustained. The plea is wanting in the necessary certainty for a good plea in abatement in not alleging several necessary matters. "Though a plea in bar being certain to a common intent is good, every dilatory plea or in abatement must be good to every intent." 4 Bac. Abr. 31. The indictment is not referred to nor made a part of the plea. Hence the plea must stand or fall upon the allegations therein made. There is nothing in the plea which makes it with certainty a plea to this indictment. The offense charged in the indictment, referred to as "said indictment," is not named in the plea. For aught that is alleged the plea referred to some other indictment pending in the court against the respondent. It is only inferentially that the court can know that it is a plea to this indictment. Again, there is no certain direct allegation that the objectionable grand juror acted with the panel in finding the indictment. What is alleged on that subject is by way of recital and insufficient. *Landon v. Roberts*, 20 Vt. 286.

The allegation that the panel was not legally selected, qualified and summoned, and did not constitute a legal grand jury without alleging wherein the illegality consists, presents a conclusion of law supported by no traversable facts and is wholly insufficient in such a plea. The allegation that Daniel Emery was not one of the "judicious men of the county," is similarly faulty. The allegation that he was "not a citizen nor legal voter of the county," lacks the certainty required in

such a plea. It is not alleged of what county he was not a citizen or legal voter. It might be the county of some other State or country. There is too much uncertainty, and too much left to be inferred in all these particulars to make a good plea in abatement. Then the plea is open to the objection of duplicity, in that it alleges — not with the certainty required in such plea, but sufficiently to present an issue of fact — the non-citizenship of Daniel Emery and his relation by consanguinity to the respondent. Non-citizenship would be a legal disqualification of the alleged objectionable grand juror, and so would his alleged relation to the respondent. The respondent contends that the defect of duplicity cannot be taken advantage of by general demurrer to a plea in abatement even. He cites several authorities to support this contention. The question in the authorities cited arose in civil actions and in no instance on a plea in abatement. The authorities cited sustain the contention that in that class of pleas at common law duplicity could be reached by special demurrer only; but in reference to pleas in abatement, says Mr. Chitty, vol. 1, p. 465 of his work on Pleading: "*If the plaintiff demur it is not necessary to assign any special causes.*" The same was held in *Landon v. Roberts*, 20 Vt. 286. In speaking of duplicity in pleading, Judge ISAAC F. REDFIELD, in delivering the opinion of the court on page 288, says: "To correct any misapprehension on the subject, it may be well to say that all defects in abatement may now be reached by general demurrer." In *Culver v. Balch*, 23 Vt. 618, it is held without discussion that duplicity in pleas in abatement may be reached by general demurrer. Whatever the rule at common law, we think it is settled by the decisions in this State that duplicity in pleas in abatement is bad when encountered by general demurrer. Hence, for various good reasons the county court sustained the demurrer to the respondent's plea in abatement.

II. After the panel were sworn and the trial had commenced and proceeded until the respondent's evidence was nearly in, one of the jurors was taken sick and unable to go on with the trial. The jury thereupon were discharged. The respondent then moved to be discharged from further answering the indictment, for that he has once been put in jeopardy thereon. To the denial of this motion the respondent excepted. There was no error in the denial. The books speak of a jeopardy of a prisoner commencing when a jury are sworn and are discharged with his trial. His jeopardy then arises from the fact that the court and the jury and a full tribunal are fully organized, have taken the prisoner in charge and have entered upon the trial, which, if nothing intervenes, may result in an acquittal or conviction. But in the event the jury, or court, or prisoner, in the progress of the trial, become unable to proceed with the trial, his jeopardy at once ceases. If it were known, when the trial was entered upon, that the judge would be stricken down or die so that there would be no competent court to finish the trial; or that the panel would become disqualified by the sickness or death of one of the jurors; or that the jury would be unable to find a verdict; or that the respondent would be unable to proceed with the trial because of sickness or escape from custody, the respondent would not be put in peril or jeopardy by such commencement of the trial. The jeopardy of

the respondent by the commencement of such trial is dependent upon the presumption that the tribunal will continue legally organized, with the respondent in charge to the end of the trial, and in the end pronounce a valid judgment for or against the respondent. In case some matter accrues in the course of the trial which conclusively rebuts this presumption, it also rebuts the conclusion or presumption of the jeopardy of the prisoner by reason of the commencement of the trial. If the respondent takes the case to the higher courts on exceptions, and the trial is found erroneous and a new trial granted, it was never heard that he could not be retried because he had been once in jeopardy on the same charge. Yet on the respondent's contention he was in jeopardy the moment the jury were duly charged with his trial, and whatever might intervene to prevent a legal judgment of acquittal or conviction, he could not be further tried because he had once been in jeopardy on the same charge.

State v. Champeau, 52 Vt. 313, is full authority that no such doctrine prevails in this State, and for the action of the county court in holding the respondent for full trial.

III. There was circumstantial evidence tending to show that the respondent knew that Harry Emery owned the cattle burned. The respondent's only exception to the testimony to show Harry Emery owned the cattle is that it must be found directly and not by inference that the respondent knew he owned them. If it is meant by the exception that the proof must come from a living witness on the stand, instead of from circumstances tending to show such knowledge, it is without foundation. Circumstantial evidence may be of the most forcible and reliable kind, fully equal to that given by a witness. If it be meant that the circumstances relied upon were not potent and weighty to show such knowledge, it furnishes no just ground of exception. It was not for the court to pass upon the weight to be given to the circumstances adduced. It was only called upon to determine whether they had a legitimate tendency to show such knowledge. It was the province of the jury to determine their weight and potency. This exception cannot be sustained.

IV. The only other exception now relied upon is to the refusal of the court to allow Frank Wilton, who had testified that he had known the respondent four years, and had heard no such report against him, to be asked whether or not he had been an orderly, industrious citizen. The rule in regard to the admission of evidence of general good reputation and character is stated in 1 Best on Evidence, 486, as follows: "It is competent to him to defend himself by proof of previous good character reference being had to the nature of the charge against him." Quoting from the 1 Phillips on Evidence (10th ed.), 502: "On a charge for stealing, it would be absurd to inquire into the prisoner's loyalty or humanity; or on a charge of high treason it would be equally absurd to inquire into his honesty and punctuality in private dealings. . . . The inquiry should be to his general character among those who have known him, with a view of showing that his general reputation for honesty is such as to render unlikely the conduct imputed to him. And even the individual opinion of a witness, founded upon his

own personal experience of the accused, is inadmissible." Quoting again from Phillips on Evidence: "It frequently occurs, indeed, that witnesses after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted it is rather from favor to the prisoner than strictly as evidence of his general character." The authorities cited by the respondent's counsel, when carefully read, are not in conflict with the above rule, but support it. By this rule the court properly excluded the offered evidence. The witness had already testified to the general opinion in regard to the respondent's character. The offered testimony called for the witness' own knowledge not that of general opinion; besides, it had no particular relation to the crime charged. Though many judges, as a matter of favor, might have admitted it, the respondent was not entitled to it as a matter of right.

The respondent's exceptions are unsustained and judgment rendered that he takes nothing thereby.

NEW JERSEY SUPREME COURT.

MARVIN SAFE COMPANY v. NORTON.

November 29, 1886.

By the law of this State, upon a conditional sale of chattels, followed by delivery of possession to the vendee, the reservation of title in the vendor, until the contract price is paid, is valid as against creditors of, and *bona fide* purchasers from, the vendee, unless the vendor has conferred upon the vendee *indicia* of title beyond mere possession or has forfeited his rights by conduct which the law regards as fraudulent.

By the law of Pennsylvania, the reservation of title in the vendor upon such a conditional sale is valid as between the parties, but is invalid as against creditors of the vendee or *bona fide* purchasers from him.

S. purchased of the Marvin Safe Company a safe on credit, under a contract that the safe was to be the property of the company until the contract price was paid. The purchase was made at the company's office in Philadelphia and the safe was delivered there to a carrier to be transferred to Hightstown, in this State, where S. resided. Subsequently S. sold the safe to N. and delivered possession to him. The safe was then at Hightstown, and the sale and delivery to N. were made at that place. N. was a *bona fide* purchaser and paid his purchase-money without knowledge of the contract between S. and the company. In trover by the company against N. for the safe, *held*, (1) that the contract of purchase by N. having been made in this State the legal effect of his contract and his rights under it were to be determined by the law of this State; (2) that N. by his purchase acquired only such title as his vendor had when the property was brought into this State, and became subject to the laws of this State, and that, therefore, the title in the safe was in the company.

On *certiorari* to Mercer common pleas.

On May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there in the office of the prosecutors executed the following instrument:

“ May 1, 1884.

“ **MARVIN SAFE COMPANY** — Please send as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars (\$84) \$7 cash, balance \$7 per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said installments or notes when same shall become due, then all of said installments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may at their option remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith.

“ **SAMUEL N. SCHWARTZ.**

“ **Mark** — Samuel N. Schwartz, Hightstown, New Jersey.

“ **Route** — New Jersey.

“ **Not accountable for damages after shipment.**”

Schwartz paid the first installment of \$7 May 1, 1884, and the safe was shipped to him the same day. He afterward paid two installments of \$7 each, by remittance to Philadelphia by check. Nothing more was paid.

On July 30, 1884, Schwartz sold and delivered the safe to Norton for \$55; Norton paid him the purchase-money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe and removed it to his office. Schwartz is insolvent, and has absconded.

The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment on the ground that the defendant having bought and paid for the safe, *bona fide*, the title to the safe by the law of Pennsylvania was transferred to him.

Argued at February term, 1886, before Justices **DEPUE**, **DIXON** and **REED**.

A. S. Appleget, for plaintiff in *certiorari*. *S. M. Schanck*, contra.

DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally, the vendor reserving the title notwithstanding delivery until the contract price should be paid. The courts of Pennsylvania make a distinction between the bailment of a chattel with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of that State held that a bailment of a chattel with an option in the bailee to become the owner on payment of the price agreed upon is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee, and *bona fide* purchasers from him; but that upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title

in the vendor until the contract price is paid is void as against creditors of the purchaser, or a *bona fide* purchaser from him. *Clow v. Woods*, 5 S. & R. 275; *Enlow v. Klein*, 79 Penn. St. 488; *Haak v. Linderman*, 64 id. 499; *Staatfield v. Hudson*, 92 id. 53; *Brunswick v. Hoover*, 95 id. 503; 1 Benj. Sales (Corbin ed.), § 446; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*. In the most recent case in the supreme court of Pennsylvania, Mr. Justice SHERRETT said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but as to creditors, the latter is good while the former is invalid." *Forest v. Nelson*, 19 Rep'r, 38; 108 Penn. St. 481. The cases cited show that the Pennsylvania courts hold the same doctrine with respect to *bona fide* purchasers, as to creditors.

In this State and in nearly all of our sister States, conditional sales — that is, sales of personal property on credit, with delivery of possession to the purchaser and a stipulation that the title shall remain in the vendor until the contract price is paid — have been held valid, not only against the immediate purchaser, but also against his creditors and *bona fide* purchasers from him, unless the vendor has conferred upon his vendee *indicia* of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Coles v. Berry*, 13 Vr. 308; *Midland R. R. Co. v. Hitchcock*, 10 Stew. 550, 559; 1 Benj. Sales (Corbin ed.), §§ 437-460; 1 Smith Lead. Cas. (8th ed.) 33-90; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*, 15 Am. Law Rev. 380, "Conversion by Purchase." The doctrine of the courts of Pennsylvania is founded upon the doctrine of *Twyne's* case, 3 Cow. 30, and *Edwards v. Harbin*, 2 T. R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud — a doctrine repudiated quite generally by the courts of this country, and especially in this State. *Runyon v. Grosnon*, 1 Beas. 86; *Broadway Bank v. McElrath*, 2 id. 24; *Miller v. Pancoast*, 5 Dutch. 256. The doctrine of the Pennsylvania courts is disapproved by the American editors of Smith's Leading Cases in the note to *Twyne's* case, 1 Smith Lead. Cas. (8th ed.) 33-34, and by Mr. Landreth in his note to *Lewis v. McCabe*, 30 Am. Law Reg. 224; but nevertheless the supreme court of that State, in the latest case on the subject — *Forest v. Nelson*, decided February 16, 1885 — has adhered to the doctrine. It must, therefore, be regarded as the law of Pennsylvania that upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid, is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him *bona fide* by a levy under execution or a *bona fide* purchase, will acquire a better title than the original purchaser

had—a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction it must determine the right of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done every thing that he has to do with the goods, the contract of sale becomes absolute. *Leonard v. Davis*, 1 Black, 476; 1 Benj. Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract was thereupon complete.

The validity, construction and legal effect of a contract may depend either upon the law of the place where it is made or of the place where it is to be performed, or if it relate to movable property, upon the law of the *situs* of the property, according to circumstances; but where the place where the contract is made is also the place of performance and of the *situs* of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. *Frederick v. Frazier*, 4 Zab. 162; *Dacosta v. Davis*, id. 319; *Bulkley v. Horrold*, 19 How. 390; *Souder v. Union National Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 id. 124; *Morgan v. M. O. N. & T. R. R. Co.*, 2 Woods, 244; *Simpson v. Fogo*, 9 Jurist (N. S.), 403; Whart. Conf. Law, §§ 401, 403, 418, 341, 345; *Parr v. Brady*, 8 Vr. 201. The contract between Schwartz and the company having been made and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company, Schwartz's title will be determined by the law of Pennsylvania. By the law of that State, the condition expressed in the contract of sale that the Safe Company should not relinquish title until the contract price was paid, and that on the failure to pay any of the installments of the price the company might resume possession of the property, was valid as between Schwartz and the company. By his contract Schwartz obtained possession of the safe and a right to acquire title on payment of the contract price; but until that condition was performed the title was in the company. In this situation of affairs the safe was brought into this State, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe was made at Hightstown, in this State. The property was then in this State, and the contract of purchase was executed by delivery of possession in this State. The contract of purchase, the domicile of the parties to it, and the *situs* of the subject-matter of purchase, were all within this State. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase and the rights of the purchaser under it are determined by the law of this State. By the law of this State Norton, by his purchase, acquired only the title

of his vendor — only such title as the vendor had when the property was brought into this State, and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the Safe Company, that, therefore, his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the Safe Company to the rights of a *bona fide* purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the Safe Company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain a title against the Safe Company, Norton must build up in himself a better title than Schwartz had. He can accomplish that result only in virtue of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts, that a reservation of title in the vendor upon a conditional sale is void as against creditors and *bona fide* purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that State. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud and a forfeiture of the vendor's reserved title as in favor of creditors and *bona fide* purchasers. The doctrine is founded upon consideration of public policy accepted in that State, and applies to the fact of possession and acts of ownership under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract. In *McCabe v. Elymyry*, 9 Phila. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid, though the mortgagor retained possession. The chattel was afterward brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the State where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that State; that the mortgagee, by allowing the mortgagor to retain possession of the property and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right under the mortgage as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that State. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another State, as against a *bona fide* purchaser who had bought the property of the mortgagor in this State, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this State. *Parr v. Brady*, 8 Vr. 201.

The public policy which has given rise to the doctrine of the Penn-

sylvania courts is local, and the law which gives effect to it is also local and has no extra-territorial effect. In the case in hand the safe was removed to this State by Schwartz as soon as he became the purchaser. His possession under the contract has been exclusively in this State. That possession violated no public policy—not the public policy of Pennsylvania, for the possession was not in that State; nor the public policy of this State, for in this State possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser under a purchase in this State to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this State; for by the law of Pennsylvania creditors and *bona fide* purchasers are put upon the same footing. Neither on principle nor on considerations of convenience or public policy can such a right be conceded. Under such a condition of the law confusion and uncertainty in the title to property would be introduced and the transmission of the title to movable property the *situs* of which is in this State would depend not upon our laws, but upon the laws and public policy of sister States or foreign countries. A purchaser of chattels in this State which his vendor had obtained in New York or in most of our sister States under a contract of conditional sale would take no title; if obtained under a conditional sale in Pennsylvania his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the State of Pennsylvania. Whatever might impair that title—the continued possession and exercise of acts of ownership over it by Schwartz and the purchase by Norton—occurred in this State. The legal effect and consequences of those acts must be adjudged by the law of this State. By the law of this State it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this State Norton by his purchase acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which by our law will give him a better title. The judgment should be reversed.

Judgment reversed.

CARY v. THE MAYOR AND COMMON COUNCIL OF THE BOROUGH OF NORTH PLAINFIELD.

December 18, 1886.

The prosecutor was licensed as a cartman in the city of Plainfield, where he resided. At his stand there he was hired to go into the borough of North Plainfield for two loads of furniture, to be carted from the borough into the city. For fulfilling this contract without paying a revenue tax to, and obtaining a license from, the borough, he was fined under a borough ordinance. *Held*, that he had not become subject to taxation in the borough, under the provisions of the act respecting licenses, approved May 2, 1885—P. Laws 1885, p. 317—and that the fine was illegal.

On *certiorari* to the mayor of the borough of North Plainfield.

Argued February term, 1886, before Justices DEPUE, REED and DIXON.

W. L. Hetfield, for prosecutor. J. H. Jackson, for defendants.

DIXON, J. The prosecutor was a resident of the city of Plainfield, where he had a stand as cartman, to conduct which business he was licensed by that municipality. On November 2, 1885, he was hired in the city to go into the borough of North Plainfield for two loads of furniture, to be carried from the borough into the city. For fulfilling this contract he was charged with a violation of an ordinance of the borough "for the licensing and regulation of cartmen," etc., which forbade any person to drive any truck for hire within the limits of the borough without being licensed therefor, and exacted a tax for each license granted. The prosecutor's conviction on this charge is now before us for review.

The ordinance was passed under the following statute, viz.:

A supplement to an act entitled "An act respecting licenses in cities, incorporated boroughs, or police, sanitary and improvement commissioners, and incorporated camp-meeting associations, or seaside resorts," approved March 25, 1881.

1. *Be it enacted* by the senate and general assembly of the State of New Jersey: That section one of the act to which this is a supplement be amended so that the same shall read as follows:

(1. *Be it enacted* by the senate and general assembly of the State of New Jersey: That it shall be lawful for the common council, board of aldermen, or other governing body of any city, incorporated borough, or police, sanitary and improvement commission, incorporated camp-meeting association, or seaside resort in this State, to make and establish ordinances for the following purposes: To license and regulate cartmen, porters, hacks, cars, omnibuses, milk wagons, stages, and all other carriages and vehicles used for the transportation of passengers, baggage, merchandise, and goods and chattels of any kind; and the owners and drivers of vehicles and means of transportation, also auctioneers, common criers, hawkers, peddlers, pawn brokers, junk shop keepers, keepers of bath-houses, boarding-houses, and news stands, sweeps, scavengers, traveling, and other shows, circuses, theatrical performances, plays, exhibitions, concerts, skating rinks, itinerant venders of medicines and remedies, and persons professing and practicing the healing art, and also the place or places and premises in which, or at which, the different kinds of business or occupation mentioned herein, are, or may be carried on or conducted; and to fix the rates of compensation to be paid therefor, and to prohibit all persons and places, and all vehicles unlicensed from acting, using or being used in said capacities, and for such uses and purposes, and to fix and prescribe penalties for the violation of any such ordinance or ordinances, and that the fees for such licenses may be imposed for revenue, provided that no person or persons shall be required to take out a license for the selling of any product of his farm situated in this State.)

2. *And be it enacted*, That this act shall take effect immediately.

Approved May 2, 1885.

The substantial question raised is whether this statute authorizes a municipality to require a license tax for revenue from a person driving his truck for hire into, or through the borough in the occasional pursuit of his business as cartman, established elsewhere. If the statute warrant such an exaction, the borough ordinance seems sufficient to enforce it; but if the statute does not, the ordinance is so far inoperative.

The inconvenience attendant upon the exercise, by every municipality in the State, of the power of excluding from its limits all unlicensed vehicles engaged in transporting goods or passengers for hire is manifest. Its legitimate operation would require the owners of such vehicles to obtain licenses, not only from the authorities of the place where their business had its head-quarters, but also from every neighboring town into which their casual engagements might call them, or else to unload their vehicles at the border line. A general law having effects so burdensome or so absurd is not to be anticipated, and only unequivocal language could convince a court that such legislation was intended. The statute now under review is not of this character. Its terms are satisfied by holding that license taxes are to be imposed only by that municipality in which *the business or occupation is carried on or conducted*. It is the business, and not the mere accidents of the business, which constitutes the subject of taxation. Hence the situs of the business is the proper place for levying the tax. Of this purport was the decision in *Commonwealth v. Stodder*, 2 Cush. 562, where the employment of an inhabitant of Roxbury, who ran an omnibus from Roxbury into Boston and back, was deemed not within the authority and control of the mayor and aldermen of Boston, to such extent as to authorize them to require him to be licensed before exercising the enjoyment. So far as mere regulation while within the borough limits is concerned, the power of the municipality is not questioned; all persons and things within its boundaries are subject to reasonable provisions of that nature. But when a power to tax for revenue is claimed, something more than temporary presence in the borough must be shown. It must appear that the business to be taxed is carried on in the municipality, and occasional passage or transportation into, through, or out of the borough, incidental to the pursuit of a business elsewhere established, cannot fairly be regarded as localizing the business there so as to bring it within the taxing power granted by the statute now in question.

We think the borough could not legally exact an employment tax from the prosecutor, and his conviction for not paying such a tax and obtaining a license should be set aside, with costs.

NEW JERSEY COURT OF CHANCERY.

MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK v. DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY.

November, 1886.

Where the charter of a railroad gives the corporation the right to cross highways, but makes it the duty of the corporation to construct and keep in repair good and sufficient bridges or passages over or under the railroad, so that travel over the highway shall not be impeded, an obligation is thereby imposed, which requires the corporation to keep the highway, where it is crossed by the railroad, at all times and under all circumstances, in a condition fit for safe and convenient use.

Nothing short of legislative authority can deprive the public of their right in a highway, and no legislation will be understood to take away public rights unless such purpose be plainly expressed.

The mayor and common council of the city of Newark being charged with the duty of keeping the streets of the city in a condition fit for safe and convenient use, are the proper persons to file a bill to prevent either the obstruction or destruction of a street.

On application for an injunction, heard on bill and affidavits.

Joseph Coult and *John R. Emery*, for complainants. *Joseph D. Bedle*, for defendants.

VAN FLEET, V. C. This is an application for an injunction. The special ground on which the court is asked to exercise its prohibitory power is, that if the defendants are allowed to use four railroad tracks, which they have recently laid across Spring street, in the city of Newark, for the purpose for which they were laid, Spring street, at the point in question, will be destroyed as a public highway, the contention being that the street, in consequence of the large number of railroad tracks now at that point, will, for the purpose of ordinary travel, be rendered so extremely dangerous that no prudent person will incur the risk of using it.

Before the last four tracks were laid, the defendants had already five others at that point, which were in daily use. They now have nine. The whole nine lie within a space of less than one hundred and fifty-seven feet. The gaps between them extend from six feet to thirty-nine feet. So many crossings within so small a space will, if frequently used for the passage of trains, render the place one of extreme peril. The danger will unquestionably be greater than if a single track was placed longitudinally over the street. In that case, a person using the street for the purposes of ordinary travel would need to guard himself against but a single danger, but with nine tracks there, running transversely, his peril will be multiplied almost nine times. It is settled that the defendants have no right to lay a single track longitudinally over a public street in the city of Newark without the consent of the proper public authority. *Morris & Essex R. R. Co. v. Newark*, 2 Stockt. 352. The reason that they will not be permitted to make such use of a street is, that such use would destroy it as a public highway. A highway, to answer the purposes for which it

is created, must be free, safe and convenient. It is obvious that a street may be more effectually destroyed, in its most essential attributes, by running several tracks transversely over it, than by occupying a part of it by tracks running longitudinally.

The charter of the defendants gives them the right to cross public highways, but this right is coupled with a duty. Their charter makes it their duty to construct, and keep in repair, good and sufficient bridges or passages over or under their railroad, where any public road crosses their railroad, so that the passage of carriages, horses and cattle, on such public road, shall not be impeded thereby. The obligation imposed by this provision makes it the duty of the defendants — and the supreme court have so decided — “to keep at all times and under all circumstances the public highways, where they cross their railroad, in a condition fit for safe and convenient use;” and to this end, the defendants have power, if the public emergencies so require, to alter the grade of a public highway so as to pass it under their railroad. *N. Y. Central R. Co. v. Clate*, 3 Vr. 220. The defendants have a right to lay tracks across public streets, where necessary, subject, however, to such reasonable regulations as the municipality having control of the streets may see fit to prescribe, but this power must always, and under every condition of circumstances, be exercised in subordination to the rights of the public, and in such manner as shall not destroy the street. In my judgment neither the act of 1867 nor that of 1879 relieves the defendants in the slightest degree from the duty just mentioned. In the language of Chief Justice WHELPLEY: “Public highways ought not to be destroyed, even in part, under pretense of legislative authority, unless it be conferred either in express words, or by necessary implication. If the words are ambiguous the construction ought to be in favor of the common right of highway, and not against it.” *Warren R. R. Co., Adm., v. State*, 5 Dutch. 353. The act of 1867 — P. L. 145 — gives the defendants authority to straighten their road and reduce its grade, and as incidental to such grant of power, they are authorized to lay additional tracks and sidings, but the act expressly declares that they shall exercise such additional power subject to the duties imposed by their charter. The act of 1879 — P. L. 236 — confers authority upon any railroad corporation, authorized to exercise its franchise in this State, and which may own or possess lands lying on the opposite sides of a public highway and fronting on such highway, to construct tracks across such highway, that the power thus conferred shall not be construed so as to give any railroad corporation power to prevent the use of such highway for the purposes of ordinary travel, nor to unnecessarily impede the use thereof for that purpose. By neither act are the defendants relieved from the duty which their charter imposes, namely, to keep the public highways, where they cross their railroad, in a condition fit for safe and convenient use by the public.

The use which the defendants intend to make of that part of Spring street, where the four additional tracks have been laid, will, in my judgment, result in making travel at that point, to those who may desire to use the street for the ordinary purposes of a public highway, so

extremely dangerous as to effectually destroy the street as a public highway. Such use cannot be permitted.

There can be no doubt about the right of the complainants to file this bill. *Newark & New York R. R. Co. v. Newark*, 8 C. E. Gr. 522. By the charter of the city of Newark, the complainants are given the control and supervision of the streets within the city limits, and they are also charged with the duty to keep and maintain them in a condition so that they are constantly fit for safe, free and convenient use by the public. The neglect of this duty is a crime for which they may be indicted and punished. *Morris & Essex R. R. Co. v. Newark*, *supra*.

An injunction will be granted prohibiting the defendants from making any use of the four additional tracks, recently laid across Spring street, which will render the street at that point unfit for safe and convenient use by the public.

WILKINSON v. DODD ET AL.

Charges in a bill that the managers of a savings institution petitioned the court, showing financial embarrassment and asking the aid, direction and protection of the court, and that they accepted an order from the court based on such petition, and that they proceeded to manage the affairs of the institution under said order and the law of the land; and charges of what the duty of said managers was under the charter, the law and of said order, and that, in repeated instances, the said managers or some of them, as a committee, or as agents of the rest, made several illegal loans, from which, however, no loss resulted, which illegal loans all had knowledge of or ought to have had, even though they did not join in making them, and that they were guilty of negligence if they did not know; and that afterward some of said managers made a loan to F. and H. which was illegal and which resulted in loss, followed by a prayer that all of the said managers may be held liable for the loss, because of committing such illegal act, or because of their negligence in permitting it to be committed. *Held*, that such charges showing the condition of the institution and the unlawful management of it, prior to the time when the act was committed from which loss resulted, are not impertinent or scandalous.

On exceptions to bill.

F. W. Stevens, for complainant. *John H. Pitney*, for H. B. Darcy, defendant. *John W. Taylor*, for Baldwin and others. *George W. Hubbell*, for Miller and others. *Henry Young*, for Shanley & Young. *C. Borcheling*, for Reeve's executors. *F. Frelinghuysen*, for Mercer. *John R. Emery*, for Dodd and others. *Thomas N. McCarter*, for Dodd and others.

BIRD, V. C. This cause has been before the court on demurrers to the bill; demurrers general and special for misjoinder.

The principal allegations of the bill appear in the discussions of the issues raised by such demurrers. See *Wilkinson, Rec'r, v. Dodd et al.*, 13 Stew. Eq. 123, and they will not be repeated here. The rights of the complainant, under such allegations, have been settled by the court of errors and appeals—S. C., *Dodd et al. v. Wilkinson, Rec'r*, 14 Stew. Eq. 566.

Now the cause is before the court on exceptions to portions of the bill; the exceptions are twenty-three in all. The portions excepted to are said to be scandalous or impertinent.

Before stating the exceptions, that they may be better understood, I

will state that the main purpose of the bill is to charge all the managers of the Newark Savings Institution with the loss which resulted from an illegal loan of a large number of the securities of said institution to Fish & Hatch, by a portion only of said managers, without explicit directions from all of them as a body. Other illegal loans had been made prior to this, one, to Fish & Hatch, but no loss resulted therefrom. These illegal loans are first stated in the bill, with the distinct charge that they became known to all of said managers, or ought to have been known by them, and that it was their duty to interpose and prevent any similar loans; but failing so to do, they were guilty of such negligence as to render them liable for the losses which thereafter resulted from such illegal loans. Among others, the allegations respecting these illegal loans are excepted to. The other allegations which are excepted to show the greatest necessity for caution and circumspection on the part of the managers, and, consequently, increase the demand for the highest watchfulness, and also an increased legal liability.

The first exception is to the allegation that on the 12th of December, 1877, the said institution, by petition, showing its assets, and stating the depreciation of its securities, and expressing the belief that it would not then be able to pay all of its depositors in full, prayed an order in this court restraining said managers from paying more than eighteen per cent to any depositor until the further order of the court, and that all deposits thereafter made should be treated as special deposits, and that its future management might be under the control of the court.

The second exception is to the allegations setting forth the order made by the court upon said petition, and in accordance with its prayers creating the special deposit and granting the injunction. This order, so set forth, covers about one page and a half.

The third exception is to the allegation that afterward the said institution realized enough to pay the depositors who were such prior to December 12, 1877, ninety-five per cent of their claims.

The fourth exception is to the allegations that a new account was at once opened under the title "special deposits," and that deposits were made there until the 15th of May, 1884; that said deposits were invested by the managers according to the directions of said order, but finding it difficult to invest all, on 2d of June, 1880, they asked leave and obtained an order allowing investments on bond and mortgage of fifty per cent of the new deposit, giving the restrictions contained in the order.

The fifth exception is to the allegations which declare that the institution had no power to issue stock, and that it had no capital other than the deposits, and that its managers were entitled to no part of its earnings for services, except as they might claim it as depositors under the act creating its charter, and that all of its assets, after payment of its debts, belonged exclusively to its depositors, and that the managers were the trustees of said institution, and of its depositors, and received compensation for their services as such.

The sixth and seventh exceptions are to the allegations that, in the year 1881, the managers began to loan money in deliberate disregard of said order, and of the statute regulating savings banks; and that large

portions of the money on the new account had been invested in government bonds, recognized as amongst the best of securities, but that they were sold, and the proceeds loaned either on collateral security or without any; and that often these securities were such as were not sanctioned by any law, nor by the order of the court; and that such collaterals were often left under control of the borrower; and that the losses which resulted, as in the bill thereafter stated, were the natural and legitimate consequences of this mode of dealing with the assets of the institution.

The eighth and ninth exceptions are to the allegations that, 22d August, 1881, the managers lent to Fisk & Hatch, brokers in the city of New York, \$500,000, and took, as security, government bonds, which were at first kept in the vaults of said institution at Newark, but afterward unlawfully lent or intrusted to the borrowers — Fisk & Hatch — to whom was given the exclusive possession and control, with the right to exchange them at the discretion of Fisk & Hatch for other collaterals.

The tenth exception is to the allegation that, 13th of May, 1882, said managers lent to Joseph A. Halsey \$70,000 on stocks of a gas company, and two banks, naming them.

The eleventh exception is to the allegation that, on 13th May, 1882, said managers lent to Stephen H. Condit \$85,000 on the stock and bonds of several banks, naming them, and of insurance companies, and of railroad companies, and of gas company, and of an ice and coal company.

The twelfth and thirteenth exceptions are to the allegation that, 26th April, 1883, said managers lent to E. H. Harriman & Company, of New York, \$800,000, and took notes of said firm, payable in eleven months, secured by stock of a large number of railroads, all being foreign corporations.

The fourteenth exception is to the allegation that the money thus loaned was, in March, 1884, converted temporarily into bonds of the United States, which, about April third following, were again sold, and \$801,575 loaned to said E. H. Harriman & Co. on securities similar to those above given.

The fifteenth exception is to the allegations that all of these loans, except to Harriman, could have been called in at any time on short notice; and that it is pretended by the managers, or some of them, that these loans were made by Daniel Dodd, the president, or some other member or members of the funding committee, and without their knowledge or consent; and to the charge that the sole purpose of said institution was the safe investment of the savings of those who, by reason of their humble condition in life or ignorance of business matters, were unable properly to invest for themselves, and that the said managers were, as a body, charged with the duty of making and caring for such investments, and that they held themselves out to the public, by advertisements and otherwise, as being so charged, and that it was their duty, as agents and trustees of said depositors, to invest and keep their deposits in a prescribed mode, not to abdicate their functions, or to impose duties upon one or more of their number, which had been,

by their charter and by-laws, devolved upon the entire board; and to the further charge that, if said managers committed to a single manager the execution of the duties resting upon them all, such manager became their agent, as well as the agent and trustee of the depositors, and that said managers are responsible for his negligent acts; and to the further charge that said managers could not commit the management of said institution, or of its funds and assets, to a single member without being themselves guilty of gross negligence and breach of trust, and that, if they did so, they are responsible for any loss that may ensue; and to the further charge of negligence on the part of the funding committee, and of the auditing committee, and of their liability for the acts of their agents.

The sixteenth exception is to the allegations that if any of said managers did not concur in making such illegal loans they had full knowledge of them after they were made, or ample means of knowledge from the books of the institution and from reports, both written and verbal, made at the meetings of the board, and from statements made to the secretary of State, and that they had the same knowledge or means of knowledge of the loans of bonds and money in the bill afterward mentioned, as of the ones already named, and that it was a gross breach of trust to permit the bond and money so lent to remain illegally secured and outstanding after they had such knowledge or might have had, had they not been grossly negligent in seeking and obtaining requisite information.

The seventeenth exception is to the allegation that both by law and the order of this court these bonds constituted an investment of the funds of the institution which it was the duty of the managers not to change or disturb, yet in disregard of said orders and of the statute and of the law of the land, being only a part of a sentence which is excepted to. The balance of said sentence showing that the funding committee on the 9th of August, 1882, passed a resolution in these words: "The sale of four per cent and four and a half per cent bonds at best rate was agreed to, and the loaning of proceeds upon collateral ordered," which resolution was read at a meeting of the board, 13th September, 1882, and which is given in this connection in order to show more fully what the pleader had in mind, in that part of the paragraph which is next excepted to by the eighteenth exception, and which paragraph contains the portion last excepted to and also said resolution.

The eighteenth exception is to the allegations that the aforesaid resolution was not only a violation of the aforesaid orders of this court and of the law of the land, but it was also a direct violation of the act entitled "An act for the better security of depositors in savings banks," and the supplements thereto, inasmuch as it ordered the loaning of the proceeds of said bonds of the United States whose market value considerably exceeded their par value, upon collateral security to an amount greatly in excess of fifteen per cent of the whole deposits held by said institution, and when, to the knowledge of said managers, more than said fifteen per cent had already been loaned; and that from the time of the passage of said resolution to said 15th of

May, 1884, the said funding committee, or some of them, with the consent of the said managers, constantly loaned from at least thirty per centum of the total deposits of said institution, on collateral security, in direct contravention of the said act, and that the fact that said illegal loans, upon pledge of collateral, were being made was known to all the members of the board, and that all said members assented to the making of the same.

The nineteenth exception is to the allegation that said committee or some of its members had sold of said four per cent bonds, bonds to the amount of \$200,000, par value; and two weeks after bonds to the amount of \$220,000, par value; and of said four and a half per cent bonds, bonds to the amount of \$5,000, par value; and that the said resolution of August ninth was intended to apply to and sanction said loan.

The twentieth exception is to the allegation that on the day of the sale of said bonds, to the amount of \$200,000, viz., 8th of August, 1882, the proceeds of said sale with other moneys, amounting in all to \$350,000, were unlawfully lent to Victor Newcomb upon the pledge of certain railroad bonds of foreign corporations and bonds of the United States of the par value of \$10,000.

The twenty-first exception is to the allegation that on the day of sale of bonds of the United States to the amount of \$225,000, viz., 23d August, 1882, \$270,000 were unlawfully loaned either to the Merchants' National Bank or to E. H. Harreman & Co., upon pledge of certain railroad securities, naming them, foreign corporations, which securities were allowed to remain with the said Merchants' Bank, and under their control.

The twenty-second exception is to the allegations that these two last-mentioned loans remain outstanding, when they were paid, and that the securities purporting to secure these loans were recorded in the books of the institution, and were known to and seen by the auditing committee when they made their quarterly examination in January, 1883, and were returned in detail under oath by three of the members of that committee, to-wit: Algernon S. Hubbell, Henry H. Miller and Francis Mackin, as well as by the president, Daniel Dodd, in their annual report to the secretary of State, made in that month.

The twenty-third exception is to the allegations that during all the time from January 1, 1881, to the time when the bank ceased to do business, they constantly published in the newspapers, for the purpose of attracting new deposits, that they were acting under and pursuant to the special order of this court; and that by the fourth article of the by-laws it was directed that the said funding committee should keep a minute of their proceedings and report the same to the stated meetings of the board; and that for twenty years prior to 1882 the said minutes contained a minute of such transactions, but that after that time the more important loans and investments, and particularly the illegal loans mentioned in said bill, were not recorded in said minutes; that these minutes continued to be read at the meetings of the board, and all the members of the board from statements handed them from the book, which were always put upon the tables at said board meetings, pursuant

to a resolution set forth in the bill, had sufficient information respecting such unrecorded transactions, to put them upon inquiry, and that their failure to prosecute such inquiry, that they might be able to approve or disapprove the course of the committee in making them, constitute such negligence as makes them answerable for all loss resulting from such failure on their part; and that by the charter the said managers had a right to agree to all removals and new appointments; by reason of which the depositors had no control over said managers, and no voice in the disposition of the assets of said institution; and that by the charter the management of said institution is intrusted to the whole board without power to devolve its duties upon any member, and that said depositors have a right to the judgment of the entire board as to how the fund should be invested, and that if said board sees fit to provide a particular committee to make investments, the ultimate responsibility, therefore, lies with the board, the said committee being only the agent of the board.

The twenty-fourth exception is to the allegation showing that in his dealings with F. and H. he did not intend to release the managers, and that F. and H. and the managers were severally and jointly liable.

I have thus given the substance of the matters excepted to, because there is no certainty of a just conclusion without such matters before the mind.

The view which seems to me to be the correct one renders it unnecessary for me, at this stage of the proceedings, to consider separately the exceptions presented by the executors of Reeves, or to make any distinction in their behalf, although their testator died before the main charge on which the bill rests. If I am right in my conclusions, then most especially ought the charges in the bill as to Reeves' negligence stand, for otherwise there would be nothing upon which to found any liability against his executors. I take it that this must have been the judgment of the court of errors on this point.

Are the matters so set forth subject to exceptions, because impertinent or scandalous? In *Camden & Amboy R. R. Co. v. Stewart*, 6 C. E. Gr. 484, 485, in delivering the opinion of the court of errors and appeals the chief justice said: "It is always to be remembered that a bill in equity has a two-fold purpose. The first is to bring before the court and to put in issue the facts upon which the complainant's right to relief rests; thus far the bill is equivalent to a declaration in an action in the common-law courts; but it is likewise an examination of the defendant for the purpose of obtaining evidence to establish the plaintiff's case, or to counterprove the defense which it is supposed may be set up in the answer. I think, therefore, the general rule must be, that the complainant must be permitted to set forth any fact, the admission of which by the defendant will go, either to establish the complainant's own case, or overturn that of his adversary . . . The testimony sought for must in some way appear to be of use to the parties seeking it, otherwise it is useless in the case and serves but to cumber the record . . . I fully concur in the view upon this subject of Mr. Vice-Chancellor BRUCE, in *Davis v. Cripps*, 2 Younge & Coll. Chy. 443, expressed in the following terms: "The court in cases of imperti-

nence ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record, for this reason, that the error on the one side is irremediable, on the other not. If the court strikes it out of the record it is gone; and the party may have no opportunity of placing it there again. Whereas if it is left on the record and is prolix or oppressive, the court, at the hearing of the cause, has power to set the matter right in point of costs. In the same case in the court below, the chancellor's expressions were in harmony with those above expressed. 4 C. E. Gr. 343. See, also, *Mechanics' Bank v. Levy*, 3 Paige, 606; *Hawley v. Wolverton*, 5 id. 522. In this case the court says the complainant may state any matter of evidence in the bill, or any collateral fact, the admission of which, by the defendant, may be material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature and extent, or the kind of relief to which the complainant may be entitled, consistently with the case made by the bill; or which may legally influence the court in determining the question of costs. And where any allegation or statement contained in the bill may thus affect the decision of the cause if admitted by the defendant or established by proof, it is relevant, and cannot be excepted to as impertinent. Chancellor KENT in *Woods v. Morrell*, 1 Johns. Ch. 103 says: "The best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue and would be matter proper to be given in evidence between the parties."

These principles must be my guide. Are the allegations excepted to material? Do they tend to establish the complainant's case? Are they pertinent to the main issue? What is the complainant's case, as made by the bill, supposing it to be complete, independent of the allegations excepted to? It is that the managers of this institution made illegal loans of the monies and bonds of the institution, to Fisk & Hatch, whereby loss resulted, and the prayer is, that said manager may be decreed, by their aforesaid negligence and illegal acts and breaches of trust, to have occasioned the loss suffered by said institution, at the hands of Fisk & Hatch. The bill is aimed at all of the managers. But I learn from the bill that all of the managers did not join in the physical act of handing over the money and bonds to Fisk & Hatch, nor did they all join, by voice or vote, in directing them to be handed over. How then can they all be charged? It seems to me, only by showing that, although not present in person, and not seeing or hearing the acts or speech of the parties immediately engaged, they had such knowledge, or ought to have had, of many other similar transactions recent and remote, as to render them liable to the charge of negligence in the principal act so complained of; only by showing that the institution had been placed in such imminent peril as to make it absolutely necessary for these same managers to invoke the aid of this court, in averting the threatened storm, which occasion was a warning that should not only never have been forgotten, but which was enough to arouse to the most constant vigilance; only by showing that they had been warned by repeated acts of their company's managers, most glaring and

conspicuous for their illegality and disregard of law ; only by showing, that after this warning, and after these illegal acts, the books of the institution, either by the record of events therein contained, or by the absence of such record, were daily advertising the illegal acts of the acting managers, to the professed non-acting, and admonishing the latter to be up and doing for the salvation of their trust ; only by showing in these and other ways that the non-acting managers were not only indifferent in the law as to their exalted trust, but turned their backs upon the light which would have unerringly led them to the truth, and walked in the darkness of ignorance from choice. It seems most clear that facts illustrating such principles can be proved to establish a charge of liability because of negligence. It seems equally clear that such facts are most pertinent. I cannot read any of the parts of this bill without some such important fact. No exception can prevail without striking from the record some material charge.

The argument is to the effect that it does not follow that the sentinel was asleep at his post on the occasion of a surprise and disaster, because he had repeatedly been caught sleeping before ; true, but if there be no other way of accounting for the surprise and overthrow, then the fact of daily indulging in the drowsy habit will lend great strength to the already strong conviction. Certain it is that if the sentinel had been at his post and awake to his duty there could not have been a surprise. The insistent is that every such illegal or fraudulent act is wholly independent of every other, and that there is no such thing as establishing the existence of the one because of the other, however much two or more of them may be similar, or however much they may spring from the same desires or conditions, or however much they may involve the same methods of accomplishment or the same elements of disaster and loss. While this is true ordinarily, it is not universally. There are well-established exceptions, resting not only on high authority but on sound reasoning, although the question of correct pleading was not involved. A useful general principle is forcibly presented in the case of *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30. One of the principal questions discussed was as to the liability of a corporation for the fraudulent issue of stock by one of its directors who was also its agent. The court said : " A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond, in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its granted power the wrongful transaction or act may be." *Id.* 49. Again : The law always imposes on every one who attempts to do any thing, even gratuitously for another, some degree of care and skill in the performance of what he has undertaken. . . . Mere negligence, where there is no obligation to use care, as where a man digs a pit upon his own land and leaves it open, affords no ground of action, but where there is any thing in the circumstances to create a duty to the individual or to the public, any neglect to perform that duty from which injury arises is actionable." *Id.* 52, 53. In that case Schuyler was the president of the company and a director.

In 1847 he was appointed transfer agent at New York, subject only to the by-laws. The board handed over to Schuyler all the power the directors themselves possessed. For more than seven years they left to him the unchecked and unquestioned management of the enormous business of this transfer office. The frauds commenced in 1848, and were carried on until 1854. In same manner the excessive and fraudulent issues were all made good in October in the year 1853. From that date excessive transfers again appear. From 1848 to 1854 all these frauds were written down in the books of the company. A proper examination of the books would have shown at any time the over-issue of certificates. It did not appear that any other director than Schuyler had personal knowledge of his personal acts. "But it was also found that the directors were guilty of negligence in not making any examination of the books, or of the conduct of the transfer office." Id. 59. The court adds: "It is apparent that the use of ordinary care and diligence at any time after March, 1848, would have disclosed that Schuyler's management was fraudulent, both as to the company and the public, and likely to lead to the disasters that have fallen upon it. It is a mistake to suppose that his frauds commenced in October, 1853. They were equally gross in turpitude, though not in amount, for a period of five years before that date, and nothing but the ability of the company to increase the capital, from two and a half to three millions, has prevented all excesses beyond the first-named sum from falling under the same ban of utter spuriousness. The arrangement, by virtue of which the transfer made on false certificates before the increase of the capital became genuine stock, may have been made in ignorance, but it was an ignorance based on negligence so gross that the fact becomes as potent as though the truth had been known. It may have been in ignorance that the company received the benefit of large sums raised by Schuyler indiscriminately on genuine and spurious certificates. Charity may grant that, but equity cannot disregard the fact, for it was a duty to be wise. It is transparent throughout the case that the board of directors, by passive submission or active surrender, handed over to Schuyler the substance of all their authority relating to the business in New York, and then, for nearly seven years, laid down to sleep in supine indifference at his feet. Aroused by the shock of the calamity which their folly has induced, are they now to look calmly over the wreck, with no answer to its innocent victims, but that of Macbeth to the Ghost of Banquo?"

If the managers faithfully perform their duty, said STRONG, J., in *Beers v. Phoenix Glass Co.*, 14 Barb. 360, they exercise constant and vigilant supervision over the acts of their officers, and where such acts are unauthorized or in opposition to their will, they should and probably do direct their discontinuance, and in case of willful and palpable violation of duty, dismiss the agent. If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of any want of authority as if the requisite power had been directly conferred. I cannot bring my mind to the belief that equity

attaches no consequences to such negligence upon the idea that it is not sufficiently proximate as a cause of the injury . . . A wrong which ordinary care will prevent is in a legal sense caused by the omission of that care where it is the duty to use it. At any stage a discovery of Schuyler's past frauds would have arrested his career of crime . . . An examination was a duty, because it was the obvious dictate of good sense as the easiest and safest check upon the agent's conduct. The long-continued and reckless omission was, therefore, a culpable negligence, without the concurrence of which Schuyler could not have committed the frauds by which the defendants have suffered." Id. 57, 58, 59. Although no questions arose as to the pleadings, I state the facts and the views of judges of great learning and experience, to show that they regarded acts of negligence during many years prior to the one complained of, not only as relevant to the main issue, but as most important. And being relevant and so important, the allegations of such facts cannot possibly be in conflict with the rules above laid down. See *Cutting, Rec'r*, v. *Marlor*, 78 N. Y. 454-458; *Bruff v. Mall*, 36 id. 205; *National Bank v. Graham*, 100 U. S. 699, and cases cited.

Beside the instances, so striking, just given, there are many other illustrations of like methods in establishing charges against defendants. In *N. Y. Mut. Life Insurance Co. v. Armstrong*, 117 U. S. 591, 598, the court allowed the company to show that Hunter's purpose was to cheat and defraud the company by showing that he had effected insurance upon the life of Armstrong in other companies at or about the same time. "A repetition of acts of the same character naturally indicates the same purpose in all of them." In this case are cited *Castle v. Bullard*, 23 How. 172, 186, where the defendants were charged with having fraudulently sold the goods of the plaintiff. Evidence that they had committed similar fraudulent acts, at or about the same time, was allowed, with a view to establish their alleged intent with respect to the matters in issue. To the same effect is *Lincoln v. Claffin*, 7 Wall. 132; *Cary v. Hotailing*, 1 Hill, 311; *Butler v. Watkins*, 13 Wall. 456, 464, in which case this language is employed: "In actions for fraud large latitude is always given to the admission of evidence. If a motive exists prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct toward another, at or about the same time and in relation to a like subject, was actuated by the same spirit." See, also, *Bottomley v. U. S.*, 1 Story, 135, 144; *Benham v. Cary*, 11 Wend. 83; *Jackson v. Timmerman*, 12 id. 299; *Neff v. Landis*, 3 East. Rep'r, 162; S. C., 1 Cent. Rep'r, 133; *Blake v. The Albion Life Assur. Soc.*, 4 C. P. Div. 94, and 30 Eng. Rep. 417. I think the argument of the judges in this case deserves special attention. See, also, *Hall v. Naylor*, 18 N. Y. 588; *Allison v. Mathew*, 3 Johns. 235.

But it may be said that none of these cases are analogous to the one under consideration; true, not precisely in all the facts or circumstances, but that does not impair or destroy the reasoning. The cases cited show that the courts allowed the introduction of evidence of other

similar transactions, with other parties, by the defendant to establish, by a general course of dealing, his mind, intent or purpose ; to establish that in every such transaction, before the one in question, the defendant intended to perpetrate a fraud or wrong ; and thus enable the plaintiff to make his case, or the defendant, as in the *Armstrong* case, *supra*, to make his defense. The reasoning is that the law is as full of examples of liability of individuals from non-action, silence, inattention, or passive submission, as from the most pronounced action. If the former conditions appear, then, in many cases, the law imputes the state of mind or the intent, with as little hesitation and with as great certainty as in the latter. If the owner of land set fire to his own straw or brush on his own land, and the fire is naturally communicated to his neighbor's buildings and destroys them, the law holds him who set his own brush on fire as liable for damages as though he had directly set fire to said buildings. Again, if the owner of an animal knows that it has a vicious propensity and has frequently indulged it to the injury of others, the law charges such owner with the intent to commit wrong and compels him to answer in damages. So in the case before me, if the allegations of the bill be proved, the law will impute to the defendants an intention to commit a wrong.

Hence, in my judgment, it is in the highest degree proper that the grounds on which the complainant rests his claim should appear in his bill. In such case the defendant is entitled to be informed, by the record, of the principle upon which he is charged and of the facts which bring him within such principle. I cannot recall any declaration at law or any bill in equity that has ever been deemed sufficient without both of these appearing in them ; in most cases the principle upon which the judgment rests arises from the facts as stated. In Addison on Torts it is said : " When the declaration is for a breach of duty, the facts creating the duty should be set forth in the declaration. It is not enough to state that it was the duty of the defendant to do the act which he is stated to have neglected to do." § 1338, p. 1147.

While it is time that the case of *Williams, Rec'r, v. McKay et al.*, 13 Stew. Eq. 189, was disposed of on demurrer and not on exceptions, it, nevertheless, seems to me that every word and line of the opinion of the chief justice go toward sustaining the bill in the case before me, and consequently to declare that the exceptions are not well taken. Note the explicit statements and reasoning of the chief justice : " Nor do I find any thing in the charter now before us that curtails or limits the responsibility thus defined. There appears to be neither provision nor expression in this law that indicates a legislative intention to absolve any of these managers from the duties and responsibilities generally inherent in the office filled by them. The charter required the defendants to meet at least twice a year as a board of managers, and such regulation was almost entirely useless, unless on such occasions it was their duty to supervise the conduct of their committees, and to look generally into the affairs of the company. There is no ground for the belief that it was the intention of the legislature that none but such managers as acted on committees should have the charge of the affairs of the bank. The only guaranty given to depositors con-

sisted in the reputation of its managers with respect to probity and fiscal ability, and such guaranty was a mere snare if more than two thirds of such officers were to have no substantial part in the management."

Nor did the court of error and appeals in this case consider that the inquiry was limited to the transactions which resulted in loss, but went so far as to brush away the statute of limitations that the inquiry might be extended over the widest field.

I, therefore, conclude that none of the exceptions are well taken. There may be a redundancy of expression of words or phrases, or parts of sentences within the portions of the bill excepted to, but the exceptions cover other matter pertinent to the issue, and, therefore, the whole must stand, since in such case all the ground covered by the exception must stand or fall together. Finding, as I do, that none of the exceptions are well taken for impertinence, I am not required to consider whether any of the same exceptions are well taken on the ground of scandal.

I will advise that the exceptions be overruled, with costs.

Exceptions overruled.

TROTTER v. HECKSCHER.

November, 1886.

The complainant agreed to mine and deliver to the defendants ore containing twenty-six per cent of oxide of zinc, which he did, and which they accepted, without objections on account of moisture in the zinc produced therefrom by the defendants, until after the expiration of three years. *Held*, that the defendants are estopped. *Held*, also, that the complainant was not accountable for the moisture which might appear in the zinc, as assayed by defendants since he only agreed to deliver ore containing a certain percentage of zinc, no other condition being agreed upon by the contract.

C. & R. Wayne Parker, for complainant. *C. D. Thompson and George Northrop*, for defendants.

BIRD, V. C. The defendants come in by their petition in a cause which has been pending for several years, and ask the court to award them compensation, to be paid or allowed by the complainant, for the moisture which is found in the oxide of zinc extracted from ore known as Franklinite, sold to them by the complainant. June 2, 1881, T. agreed with H. that he was in the undisturbed and undisputed possession of a certain mine containing said ore; that he held said mine by virtue of a lease for the term of thirty years from March 6, 1877. The contract between these parties covered all that period from June 2, 1881, a period of about twenty-seven years; this alone shows the question involved is one of great importance, since defendants claim that they suffer several thousand dollars loss every year.

By the contract, T. agreed to deliver twelve thousand tons of said Franklinite ore, in regular monthly shipments of one thousand tons or thereabout, each month to said H., on board the railroad cars at Franklin, a place hard by the mine. T. also agreed that all the said ore so delivered should contain at least twenty-six per cent of oxide of zinc.

It was agreed that H. should not be compelled to take or pay for any ore containing less than twenty-six per cent of oxide of zinc. Although there was a serious question between the parties as upon whom should devolve the responsibility of making the proper assays to determine the percentage of oxide of zinc, yet the defendants undertook this responsibility, to which T. submitted without complaint, for some time; which action upon the part of both T. and the defendants led the court of errors and appeals, in the cause wherein this petition is filed—*Trotter v. Heckscher*, 40 N. J. Eq. 612—to decide that the responsibility for, and the right to make, the assay belonged to H. As will appear in the principal case, disputes arose between the parties respecting the sampling and assaying of these ores. The case shows that hundreds of pages of testimony were taken upon these branches of the case. Fully two years elapsed before the question respecting moisture was raised.

For three years, at least, the defendants, who now raise this question, were in receipt of these ores, and had the assaying done at their own works, and, to some extent, under their own supervision. These facts, I think, are worthy of consideration; for it seems to me that the defendants are estopped from raising this question, under the circumstances of this case, after this lapse of time, and after they have received such large quantities of ore, and made the assays of the oxide of zinc therein.

But again, has T. fulfilled his contract, which was to ship ore containing at least twenty-six per cent of oxide of zinc? It seems to me that he has. He agreed to deliver upon the cars ore containing at least twenty-six per cent of oxide of zinc. The ore was to contain twenty-six per cent of the oxide of zinc. Nothing else is said about the zinc; its character or quality is not mentioned. It is not said whether the zinc shall be pure, fine or superfine; of a middling grade, or of the highest grade; nor whether it shall be absolutely dry; nor is any other condition agreed upon. I think that the defendants are in the same situation as though they had contracted for corn or other grain to be delivered to them as soon as threshed from the stock in the field, rather than grain which had been stored for a long time, or which had been kiln-dried; or had bought standing timber, or any unseasoned lumber, or any other material, in its native state. It is so plain that, in such case, the purchaser could not add another term to the contract, and insist that he bought the grain or lumber, or other material, free from moisture, that argument is unnecessary. So, with the matter now before me; H. purchased the ore in its natural state, to be taken from the bowels of the earth by T., sampled it, and had it assayed and reported that it produced a given percentage of oxide of zinc. All that T. agreed to do was to mine and deliver the ore on the cars. This he did. In my judgment T. performed his contract in this respect, and that the defendants are not entitled to any allowance on account of the moisture that the zinc may contain after it has been extracted by assaying.

I will advise an order denying the motion.

NEW YORK COURT OF APPEALS.

JEX AND ANO., *App'ls*, v. MAYOR, ETC., *Resp'ts*.

November 23, 1886.

NEW YORK CITY—SUIT IN EQUITY TO VACATE ILLEGAL ASSESSMENT—MONEY PAID ON, MAY BE RECOVERED—ASSESSMENT ACT 1874, CHAPTER 812.

The act of 1858, chapter 383, as amended by the act of 1874, chapter 812—Consolidation Act, § 897—relating to assessments for local improvements in the city of New York, provides as follows: "Hereafter no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended." *Held*, that said statute only applied where an existing lien was created by the assessment, and that a suit in equity was maintainable to vacate an illegal assessment, and to recover back the money paid thereon. The money may be recovered back although the assessment has not been formally vacated. If such vacation is necessary, the relief may be granted in an action like the present.

An appeal from a judgment of the general term, first department, affirming a judgment of the special term, sustaining the demurrer of the defendants to the plaintiffs' complaint.

The action is brought to recover the sum paid under coercion of law and mistake of fact for an assessment which had been imposed upon the lands of the plaintiffs' testator, and which assessment was on its face valid, and constituted an apparent lien upon said lands, but which said assessment was in fact illegal and absolutely void by reason of defects which were *dehors* the record.

The complaint set forth that the plaintiffs were the executrices of the will of Josiah Jex; that the lands described in the complaint belonged to and were part of the estate of said Jex; that on the 20th July, 1876, an assessment for regulating and paving Broadway was imposed upon said lands in the sum of \$1,487.02, which assessment was upon its face valid, but which was actually illegal and void by reason of certain defects which were and are *dehors* the record.

These defects are *in extenso* as follows:

That the improvement, for the expense of which the assessment in question was imposed, consisted of the repaving, re-regulating, etc., of Broadway between Thirty-second and Fifty-ninth streets, and that the work of said improvement was performed by virtue of an ordinance of the mayor, aldermen and commonalty of the city of New York, passed during the month of October, 1873; that said street had been once regulated, paved, etc., and an assessment for the expense thereof imposed upon said lands and paid; that this improvement was a repavement of the street, and was never petitioned for by a majority of the property-owners; that through fraud and conspiracy certain papers purporting to be such a petition were presented to the said mayor and aldermen, but said papers were a fraud and cheat, and not a genuine petition; that the work of repaving, etc., this street was not ordered by a three-fourths vote of the common council, to be done otherwise than by contract founded on sealed bids, in compliance with public notice by adver-

tisement as required by law; but, notwithstanding, the same was performed under a fraudulent, illegal and unlawful contract made by the commissioner of public works, at excessive prices, and without any competition; and that in ignorance of all these facts, said Josiah Jex, plaintiffs' testator, was compelled to and did pay the said assessment on said lands on the 11th June, 1877, under coercion of law and mistake of fact; and that the defendants now have said money in their possession.

Under the laws of this State — and especially of chapter 335, section 115, of the Laws of 1873 — no assessment could be imposed for repaving any street in the city of New York, unless such repavement was petitioned for by a majority of the owners of property on the line of such street. Without such a petition such an improvement, if made, would have to be paid for by the city at large. An assessment for such an improvement, made without such a petition, would be absolutely void.

Yet in this case there was no such petition? The board of assessors in levying this assessment, and the board of revision and correction of assessments in confirming the same, acted without any jurisdiction. Their acts were absolutely void for that reason.

This work was performed under the authority of an ordinance passed in October, 1873; but that ordinance did not authorize the commissioner of public works to have the work done in any manner otherwise than by a contract, let at a public letting, and founded upon sealed bids made in compliance with public notice by advertisement. Yet the commissioner did let the contract for this work at a private letting, without any public notice, without any, save the personal friends of the commissioner, having any opportunity to bid for the same, and at grossly excessive prices.

Neither the board of assessors nor the board of revision would have jurisdiction to levy or confirm an assessment for an improvement the work of which was performed under such a contract.

This was the plaintiffs' complaint. To this the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action.

Herbert A. Shipman, for appellants. *D. J. Dean*, for respondents.

ANDREWS, J. Upon the facts averred in the complaint, the assessment imposed upon the lands of the intestate for regulating and paving Broadway, although valid on its face, was nevertheless void for want of jurisdiction. It was an assessment for repaving, and the ordinance of the common council directing the improvement was not based upon a petition of a majority of the property-owners, as required by the charter — Laws of 1873, chap. 335, § 115. The work also involved an expenditure exceeding \$1,000 and was not let by contract, nor was it authorized by a vote of three-fourths of the members of the common council, which is essential to justify a departure from the general rule requiring work involving an expenditure exceeding that amount, to be done by contract founded upon sealed bids and proposals. The presentation of the proper petition is the basis of the jurisdiction of the common council to incur an expense for repaving, reimbursable by local assessment.

The statute requiring the presentation of a petition was designed for the protection of property-owners. The initiation of the improvement without a petition was not an irregularity merely, but was fundamental. It was a condition precedent to the right to make an assessment for the improvement, that it should have been petitioned for by the requisite number of property-owners. See *Matter of Emigrants' Savings Bank*, 75 N. Y. 389; *Matter of Weil*, 83 id. 543; *Matter of R. R. Co.*, 102 id. 302.

It is alleged in the complaint that the intestate, being ignorant of the defects in the proceedings, was required to pay and did pay under coercion of law, an assessment against his lands for the improvement amounting to \$1,487.02, and that the claim to have the money repaid had been duly presented to the comptroller and was rejected, and the complaint demands judgment vacating the assessment, and also for the amount paid thereon by the plaintiff, with interest.

It is not controverted, that if the assessment was illegal, a case was presented by the complaint, which, under the general rule of law, entitled the plaintiff to relief. *Strusburgh v. Mayor*, 87 N. Y. 452.

It is contended, however, that the vacation of the assessment must precede or accompany the remedy to recover back the money paid, and that the remedy by action to vacate the assessment has been taken away by chapter 812 of the Laws of 1874, amending chapter 338 of the Laws of 1858, which declares that "hereafter no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall hereafter be confined to their remedies in such cases, to the proceedings under the act hereby amended," and that this remedy being taken away the right to the other relief is gone.

The act of 1858 provided an easy and expeditious remedy for the vacation of an illegal or irregular assessment which constituted a cloud upon title, without subjecting parties affected thereby to the necessity of resorting to the dilatory and expensive remedy by action. The amendment of 1874 made this remedy exclusive. But the statute only applies where there is an existing lien created by the assessment. When the lien is removed by payment or otherwise the act has no application. *In re Lima*, 77 N. Y. 170; *In re Hughes*, 93 id. 513. The act of 1874 did not in terms and could not have been intended to take away all remedy to recover back money wrongfully extorted under color of an illegal assessment. It confines owners of property to the remedy given by the act "in such cases," that is where the remedy sought is the vacation of an assessment and the cancellation of an existing lien.

The right of action in this case arises out of the unlawful exaction of money from the plaintiff under illegal process, which on being paid operated to cancel the lien. It is not touched by the act of 1874. See *Strusburgh v. Mayor*, *supra*. The assessment having been imposed without jurisdiction, it was not essential that it should be first vacated in order to enable the plaintiffs to recover back the money paid thereon. A void assessment, like a void judgment, is a nullity, and when its collection has been enforced the money may be recovered back, although the assessment has not been formally vacated. *Bruecher v. Village of*

Port Chester, 101 N. Y. 240 ; S. C., 3 East. Rep'r, 736. If, however, the vacation of the assessment was necessary, that relief may be had in this action, in connection with relief for the recovery of the money which the plaintiff's testator was illegally compelled to pay.

The judgment should, therefore, be reversed, with leave to the defendant to answer on payment of costs.

All concur.

Judgment reversed.

CONNER AND ORS., *Resp'ts*, v. REEVES AND ANO., *Appl'ts*.

November 23, 1886.

BOND—INDEMNITY AGAINST JUDGMENTS—SURETIES—JUDGMENT BY CONSENT PRESUMPTIVE ONLY.

An indemnity bond was given to a sheriff conditioned to save, keep and bear harmless, and indemnifying him of and from all harm, let, trouble, damage, judgments, etc., which might be brought against him for or by reason of the levying, making sale, etc., under an execution issued to him. *Held*, that it could not be said, as matter of law, that the condition of the bond only covered judgments obtained upon hostile and adverse litigation, but that a judgment entered by consent in the absence of proof of fraud or collusion, was covered thereby.

Such judgment, however, is but presumptive evidence as against the sureties, and they are at liberty to show that it was not founded upon any legal liability to the plaintiff in the action.

Appeal by defendants Reeves and Kloppenburg from a judgment of the general term of the supreme court, first department, entered upon an order which affirmed a judgment entered on a verdict directed by the court, and affirming an order denying a motion for a new trial upon the judge's minutes.

The action was brought upon an indemnity bond, in the penalty of \$1,000, executed by the defendants above named to plaintiff's testator, as sheriff. The bond was to indemnify him, as sheriff, against the consequences of a levy and sale of personal property, under an execution in favor of defendant Dubee against one Fischer, said property being claimed by a third party.

In consequence of the seizure of said property under Dubee's execution, one Gustavus Kahrs sued plaintiff's testator in the court of common pleas, in an action for conversion, to recover the sum of \$700.

That action came to an issue, and appeared a long time on the day calendar for trial. Dubee could not find the witness so as to substantiate the defense, and a settlement of the action was directed to be made by Mr. Greensward, the attorney for Dubee in the execution. The terms of settlement were that judgment should be taken by Kahrs against Conner for \$500, which should include damages, interest and costs, and that if \$400 of the judgment be paid within ninety days after, the judgment would be satisfied. This settlement was signed by the attorneys for the plaintiff Kahrs, the attorneys for defendant Conner, the attorneys for the indemnitors, and by defendant Dubee, plaintiff in the execution, personally, and judgment was taken accordingly.

This action was thereafter brought against Dubee, Reeves and Kloppenburg, the obligors on said bond, by reason of plaintiff's liability under said judgment.

The court directed a verdict in plaintiff's favor for the amount of said judgment, with interest, and a counsel fee of \$125, the propriety of which is not disputed.

The defendant Dubee did not appear or defend the action. The defendants Reeves and Kloppenburg defended upon the sole ground that they had no personal knowledge of the settlement, and that the action of Mr. Dubee and his attorney, Mr. Greensward, did not bind them.

Edward D. McCarthy, for appellants. *Henry Thompson*, for respondents.

ANDREWS, J. The obligors undertook to well and truly save, keep and bear harmless, and indemnify the plaintiffs' testator, William C. Conner, "of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, that may at any time arise, come, accrue, or happen to be brought against him, for or by reason of the levying, attaching and making sale," under and by virtue of an execution issued to him as sheriff, on a judgment in favor of the defendant Dubee against one Fischer, of personal property claimed by third persons. The undertaking was not against damage merely, but was an indemnity against liability by judgment as well. *Rockefeller v. Donnelly*, 8 Cow. 628; *Chace v. Hinman*, 8 Wend. 452.

By the general rule of law a covenant to indemnify against a future judgment, charge or liability, is broken by the recovery of a judgment, or the fixing of a charge or liability in the matter to which the covenant relates. When the covenant is one of indemnity against the recovery of a judgment, the cause of action on the covenant is complete the moment the judgment is recovered, and an action for damages may be immediately maintained thereon, measured by the amount of the judgment, and this, although the judgment has not been paid by the covenantee, and although the covenantor was not a party, or had no notice of the former action. The covenantor, in an action on a covenant of general indemnity against judgments, is concluded by the judgment recovered against the covenantee, from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is an event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant to depend upon the result of the retrial of an issue, which as against the covenantee had been conclusively determined in a former action, "always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion for the purpose of charging the surety." COWEN, J., *Douglass v. Howland*, 24 Wend. 55. The general doctrine above stated is fully settled by authority. *Chace v. Hinman*, *supra*; *Gilbert v. Wiman*, 1 N. Y. 550; *Methodist Churches v. Barker*, 18 id. 463; *Rapelye v. Prince*, 4 Hill, 120; *Insurance Co. v. Wilson*, 34 N. Y. 280; *Douglass v. Howland*, *supra*.

This case, however, presents a feature which, so far as I know, is not

found in any of our reports. The judgment in the action of *Kahrs v. The Sheriff* was entered by consent. The action, after issue had been joined, was put on the calendar, where it remained for several months. Dubee, one of the obligors on the indemnity bond, and the plaintiff in the execution against Fischer, was notified of the action and was consulted by the sheriff in respect to the litigation. It was found that there was difficulty in securing witnesses to establish the defense, and it was finally agreed between Kahrs, the sheriff and Dubee, that judgment should be taken in the action in favor of Kahrs for \$500, and pursuant to this agreement, and by the consent of the parties thereto in open court, judgment was entered. The question is whether a judgment obtained under these circumstances established a breach of the contract of indemnity, and justified the court in directing a verdict for the plaintiffs.

The defendants neither proved nor offered to prove that there was any defense in fact to the action of Kahrs, or that the judgment exceeded the sum which Kahrs was entitled to recover against the sheriff, or that the agreement for the adjustment of the amount, or the consent to the entry of the judgment, was fraudulent or collusive. The appellants must fail on this appeal unless they can maintain the proposition that the judgment against the sheriff furnished neither conclusive nor presumptive evidence of a breach of the condition of the bond, or in other words, that a judgment rendered by consent was not a judgment or adjudication within the meaning of the bond. The question is not free from difficulty; but we are of opinion that the judgment, in the absence of any evidence of fraud or collusion, or any suggestion that there was a defense to the action against the sheriff, although entered upon consent of the parties to the action, presumptively at least established the liability of the defendants. The defendants executed the bond at the request and for the accommodation of Dubee. Its obvious purpose was to secure the sheriff against apprehended litigation as to the title to the property seized under the execution against Fischer. The bond was given to indemnify the sheriff against suits and judgments to which he should be a party growing out of that proceeding. The appellants did not make it a condition of their liability that they should have notice. They were satisfied that the sheriff should conduct litigations founded upon his seizure of the property, without reserving any right of intervention. They committed the matter to his discretion, not indeed by express words, but by necessary implication. It is true that the sheriff was not in a legal sense the agent of the sureties to manage suits brought against him, but the sureties agreed that no judgments should be recovered against him therein. They did not limit the indemnity to judgments obtained upon an actual trial or after a contest in court, and they did not undertake to divest the sheriff of the power incident to his position as a party to settle and adjust litigations instituted against him, in view of the exigencies of the situation. It might very well happen that a judgment founded upon a compromise or agreement, without actual trial, would best promote the interest of all concerned. Can it be affirmed as a matter of law that the conditions of the bond only covered judgments obtained

upon hostile and adverse litigation, and that no discretion was left in the sheriff to consent to a judgment, although he believed that by so doing money would be saved to the parties ultimately liable?

This, we think, would be a too strict interpretation of the contract. But at the same time to hold that a judgment entered by consent of the parties, and without notice to, or approval by, the sureties, is, in the absence of proof of fraud or collusion, conclusive against them, would open the door to the perpetration of secret frauds, and subject sureties to a most hazardous responsibility, and to the discretion and judgment of a third person, which might seriously imperil them.

A judgment by default has been held to be covered by an indemnity against judgments. *Lee v. Clark*, 1 Hill, 56; *Aberdeen v. Blackman*, 6 id. 324; *Annette v. Terry*, 35 N. Y. 256. But where default is made, the plaintiff must give proof to entitle him to judgment.

While we are of opinion that the sheriff was not excluded from the protection of the indemnity by reason of the fact that the judgment was taken by his consent, we think the reasonable rule is that a judgment so obtained is presumptive evidence only against the sureties, and that they are at liberty to show that it was not founded upon any legal liability to the plaintiff in the action. We are not aware that this point has been adjudicated in our court, but this conclusion is warranted, we think, by legal and equitable considerations. In this case there is an absence of any proof impeaching the fairness or justice of the claim of Kahrs, or tending to show that the judgment exceeded the legal liability of the sheriff.

The judgment should, therefore, be affirmed.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

MATTER OF CADY'S ESTATE.

November 28, 1886.

EXECUTOR AND ADMINISTRATOR — REMOVAL — IMPROVIDENCE AND DRUNKENNESS.

Appeal from a judgment of general term affirming a decree of the surrogate of Tompkins county, refusing letters testamentary to Charles Cady as executor of Elias W. Cady, deceased, and also removing him from the position of testamentary trustee under the last will and testament of said Elias W. Cady. Elias W. Cady died in the spring of 1883, leaving a last will and testament, executed in 1854, in and by which he devised the homestead property of nearly two hundred acres upon certain conditions to Charles Cady, and naming Charles and his brother, Oliver, as executors and trustees. Subsequently the testator made two codicils to his will, diminishing the devise to Charles by making increased charges thereon for the benefit of testator's daughter, Mary. In June and September, 1881, the testator conveyed to Mary Cady the homestead, being that property which has been devised to Charles, subject to certain payments to be made to her, thus leaving Charles without any interest in the will, except executor and trustee under the same. About four hundred acres of land, known as the

Cramer farm, were devised to Charles Cady and Oliver Cady in trust, to sell the same within five years, and out of the proceeds to pay their sister, Mary Cady, \$3,000, and divide the balance equally between Mary and her two sisters, Harriet S. Ferguson and Rebecca A. Dwight. Upon the probate of the will, Oliver refused to act as executor, thereby leaving Charles Cady as sole surviving executor; and thereupon the three sisters objected to their brother Charles acting as executor and their trustee upon the ground of his alleged drunkenness, improvidence, insolvency, and personal hostility and unfriendliness to them; and upon the further ground that he was seeking to injure the estate by inducing the creditors to levy upon all the personal property left by his father, claiming it belonged to him. The objections were in writing, and were verified. During the progress of the trial had thereon before the surrogate, Harriet S. Ferguson withdrew her objections.

The surrogate found, viz.: "That Charles Cady, for several years prior to the spring of 1880, had been in the habit of using intoxicating liquors, occasionally becoming intoxicated thereby; but that, about the spring of 1880, such use became much more frequent than theretofore, so that a greater part of the time he was under the decided influence of intoxicating liquors, sometimes indulging in protracted spees and ending in delirium tremens; but that for several months prior and especially during the pendency of the present proceedings that indulgence has been less open and excessive than heretofore." "That in the year 1879 Charles Cady was a man of means, he himself estimating his property at that time at about \$29,000; that since 1879 he has become insolvent and unable to pay his debts." As a conclusion of law, the surrogate found, first: "That said Charles Cady, by reason of improvidence and habitual drunkenness, is incompetent to act as executor and testamentary trustee under the will and codicils of the said Elias W. Cady, deceased; that a decree should be entered denying letters testamentary to said Charles Cady as executor, and also removing him from the office of testamentary trustee under said will." This decision was made and filed March 24, 1884.

Upon the hearing there was evidence tending to establish that Charles Cady induced the creditors to levy upon and sell the personal property upon the homestead, upon an avowal that it belonged to him, and that litigation would be necessary to settle the rights of the estate and the legatees in the property. Also, upon the hearing there was a great contrariety of evidence touching the habits, acts and conduct of Charles Cady covering a period of several years prior to the 28th of April, 1883, offered by the objectors to sustain their allegations, and also considerable evidence was offered by the appellant to overthrow the testimony offered by the objectors; and in this evidence very many contradictions are found, not necessary to be referred to in detail.

The following is the opinion at general term, HARDIN, P. J.: "Section 3 of the Revised Statutes, as amended by chapter 79 of the Laws of 1873, provides as follows, viz.: 'No person shall be deemed competent to serve as an executor, who at the time the will is proved . . . upon proof, shall be adjudged by the

surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding.' 3 Rev. Stat. 2289, 7th ed. Section 2636 of the Code provides that, after the proof of a will, letters testamentary shall be issued to the person or persons named in the will unless a person interested, or a creditor in the estate, files an affidavit, setting forth specifically one or more legal objections to granting the letters to one or more of the executors, stating that he is advised and believes there are such objections, and that he intends to file a specific statement of the same. It is provided in section 2637, that 'the surrogate must inquire into any objection filed, as provided in the last section, and for that purpose he may receive proof by affidavit, or otherwise, in his discretion. If it appears that there is a legal and sufficient objection to the person named in the will, letters should not be issued to him except as provided in the next section.' It may be observed that this section provides that investigation may be had upon proof by affidavit, or in such other manner as in the discretion of the surrogate shall be allowed. Manifestly it was the intention of the legislature to provide for a somewhat speedy and summary determination of the questions raised by objections made to the competency of a person to serve as executor. In *McGregor v. Buell*, there the question under consideration was whether special letters of administration should be issued or not, to preserve the property pending an appeal from the probate of a will; at page 169 of the 24th of New York, Judge DENIO observes, viz.: 'The statute, in terms, makes the granting of such letters discretionary, and the propriety of issuing or holding them is plainly dependent upon the exigencies of the estate, the amount and situation of the estate and other circumstances which require to be judged of summarily, and are not suitable to be litigated through the courts upon appeal. The determination of the surrogate upon such questions is, as it should be, summary and exclusive.' While that authority is not precisely in point upon the question now before us, we think the quotation not inopportune, as after a full consideration of the great volume of evidence taken before the surrogate in this case, we are disinclined to disturb the findings of fact made by the learned surrogate; he saw the witnesses, heard them testify, and upon a question involved in so much conflict, was better prepared to reach a correct result than we can be by scanning the evidence found in the appeal book. The primary question to be considered upon all the evidence before the surrogate was whether or not the improvidence of Charles Cady was shown to be such that the surrogate might properly adjudge that he was incompetent to execute the duties of the trust conferred upon him by the will. In *Coope v. Lowerre*, 1 Barb. Ch. 45, the chancellor says, viz.: 'That improvidence which the framers of the Revised Statutes had in contemplation as a ground of exclusion is that want of care and foresight in the management of property which would be likely to render the estate and the effects of the estate unsafe and liable to be lost and diminished in value by improvidence, in case administration thereof should be committed to the improvident person.' The principle of exclusion in this part of the

statute, is based upon the well-known fact that a man who is thus careless and improvident, or who is wanting in ordinary care and forecast in the acquisition and preservation of property for himself, cannot with safety be intrusted with the management and preservation of the property of another. In *McMahon v. Harrison*, 6 N. Y. 443, it was held that the fact that a man was a professional gambler is presumptive evidence of such improvidence as to render him incompetent to discharge the duties of executor or administrator, and the definition which we have quoted from the chancellor, quoted in *Coope v. Lowere*, *supra*, there approved, and the judgment of the court was, that such an improvident person ought not to be intrusted with an estate. In *Emerson v. Brown*, 14 N. Y. 449, the court, in speaking of improvidence, says: That term evidently refers to habits of mind and conduct which become a part of the man, and render him generally, and under all ordinary circumstances, unfit for the trust or the employment in question. That definition was referred to approvingly by the court in *Freeman v. Kellogg*, 4 Redf. 224. Under the interpretation of the statute given by the authorities to which we have referred, we think the evidence before the surrogate amply justified him in concluding that the executor, by reason of his improvidence, was incompetent to execute the duties of the trust, and that he was justified in withholding letters testamentary from him. It was urged, on the argument before us, that considerable force should be given to the fact that the testator had selected the executor. In considering this fact it must be borne in mind that subsequent to 1854, by virtue of codicils and conveyances made by the testator in his life-time, he gave a different direction to that portion of his estate which he originally intended for his son, Charles Cady, and that, at the time of the death of the testator, the only interest which remained under the will to pass to the executor was such as he might derive by virtue of the office as executor and trustee. However, it was decided by the chancellor in *Wood v. Wood*, 4 Paige, 299, that no great significance attaches to the circumstance that the testator had named the executor. He says in that case, viz.: 'It is not material to inquire whether the testator was aware of the degree of responsibility in the executor at the time of making the will, for if the testator had been so improvident as to commit the administration of his estate to one whose circumstances are such as not to afford adequate security for the faithful discharge of the trust, the court must interfere for the purpose of protecting the estate against the effect of such improvidence.' This language of the chancellor was quoted approvingly in the case of *Freeman v. Kellogg*, 4 Redf. 225. We are disposed to approve of the sentiment expressed by the surrogate of New York county in *Martin v. Drake*, 5 Redf. 601, wherein he says, viz.: 'Every case must be considered by itself; in each the question for the surrogate is, is it safe to put this estate in the hands of the person named as executor; can he be trusted to administer it faithfully and honestly as directed by the will?' We think in this case some attention should be given to the circumstance that two of the three beneficiaries under the will, who were adults and capable of understanding their legal rights, objected to the appointment of the person

named as executor; also, some attention to the threats shown to have been made by the executor in respect to his attentions in respect to the maladministration of the estate if he should obtain possession of it.

"While these considerations are not at all controlling, they may properly have had weight with the surrogate in considering the mass of evidence bearing upon the vital question submitted for his determination. We are not warranted in saying that the findings are erroneously reached by the surrogate, and that his determination in withholding letters testamentary was not in accordance with the weight of evidence before him. We, therefore, upon this branch of the case, sustain the result reached by the surrogate. Second, in respect to the removal of Cady as testamentary trustee, it may be observed that the surrogate came to the conclusion that he ought to be removed, at the same time that he reached the conclusion that he ought not to be appointed executor. Section 2817 of the Code of Civil Procedure authorizes the surrogate to make such a removal of a testamentary trustee, 'where, if he was named in the will as executor, letters testamentary would not be issued by reason of his personal disqualifications or incompetency.' We are of the opinion that the evidence before the surrogate warranted the conclusion reached by him upon the question appertaining to the removal. The surrogate had jurisdiction to make the removal — Code of Civ. Pro., § 2817; *Savage v. Gould*, 60 How. 254, and the citations found therein in the opinion of BOARDMAN, J. We are of the opinion that the rulings upon the hearing by the surrogate were sufficiently favorable to the appellant. Section 2637, as we have before intimated, provides for such an inquiry as was had before the surrogate, being upon affidavit or in such other manner as within the discretion of the surrogate should be ordered by him. We have found no error in the course of the trial calling upon us to disturb the conclusion found by the surrogate. We think the decree of the surrogate of Tompkins county should be affirmed, with costs against the appellant personally. Decree affirmed, with costs against Charles Cady personally."

George E. Goodrich and *H. V. Howland* for appellant. *S. D. Haliday*, for respondent.

EARL, J. We have carefully read and considered the evidence in this case, and find it to be abundant to sustain the findings of the surrogate; and those findings conclude us. We agree in the main with the opinions pronounced by the surrogate and at the general term, and it would be a waste of labor to travel over the same grounds in the exposition of the law applicable to the facts of this case in them so fully and ably set forth.

The judgment should be affirmed, with costs against the appellant.

All concur.

Judgment affirmed.

HOLCOMBE, *App't*, v. MUNSON, *Resp't*.

November 30, 1886.

APPEAL — PAROL EVIDENCE TO VARY WRITING — OBJECTION.

When the general term reverses a decision upon questions of law alone, and the party appeals to this court, if it appears from the record that any errors of law were committed on the trial which called for a reversal, whether such errors were considered by the general term or not, the judgment will be affirmed.

When a written contract is complete in all its parts, requiring nothing more to make it plain and intelligible, parol evidence is inadmissible to add to, contradict or vary its terms.

An objection to a conversation offered for such a purpose as immaterial and improper, and calling for a conclusion of the witness, is sufficient to raise the question of its admissibility.

When the objection to evidence could not be obviated by any means within the power of the party offering it, a general objection is sufficient to raise the question of its admissibility.

The fact that a written contract is unenforceable by reason of some vice expressed in it does not authorize the introduction of parol evidence to eliminate such objection. It is only where the contract is obviously incomplete and imperfect by reason of the absence of some provision which it is apparent that the parties must have contemplated as a part thereof, that parol evidence may be admitted to supply the defect.

Appeal from an order of the general term reversing a judgment entered upon the report of a referee in favor of the plaintiff. The facts appear in the opinion.

James Lansing, for appellant. *Esek Cowen*, for respondents.

RUGER, Ch. J. This action was brought by John F. Holcombe, as assignee of George P. Holcombe, to recover damages from the defendants for an alleged breach of contract by refusing to employ the assignor in cutting wood and manufacturing charcoal on certain lands owned by them, and also by refusing to accept and pay for certain coal agreed to be furnished by him. The complaint did not allege performance of the contract by the plaintiff's testator, or even a tender of performance, but claimed damages for its breach occasioned by defendants' refusal to make the advance payment of fifty cents a cord provided to be paid for wood chopped, and, by an alleged notification by defendants to plaintiff's testator, that they would "not perform the agreement upon their part to be performed, and would not accept any coal made or furnished by him, nor provide cars to transport the same."

The answer admitted the making of an agreement by the defendants with George P. Holcombe in the terms and to the effect particularly set out therein — and which accords with the written agreement thereafter produced in evidence by the plaintiff — but denied the making of any other or different contract. It also took issue upon the allegations of the complaint that they had refused to perform or carry out said contract or had prevented or discharged said George P. Holcombe from performing the same, and avowed their readiness and ability at all times to perform their part of said agreement.

Upon the trial the plaintiff produced in evidence a written contract executed by the parties referred to, reading as follows: "Articles of agreement made and entered into this 9th day of March, 1880, between George P. Holcombe of New Lebanon, N. Y., of the first part, and

Munson & Landon of Chatham village, N. Y., of the second part, as follows: The said Holcombe agrees with said Munson & Landon to take charge of and cut, coal and deliver all the timber to be taken from lots this day purchased from Aaron P. Sackett, Burton Jolls and Bernard Nelan, said wood to be cut and corded with good solid measure to be burned under earth in good workmanlike manner, and delivered at the railroad at a point where it can be shipped on board of sealed cars to be furnished by said Munson & Landon, cars to be well filled and due diligence made to keep the supply of coal without unnecessary delay. For such service said Holcombe shall receive from the Jolls and Nelan jobs the sum of nine cents per bushel, said Munson & Landon furnishing wood; for the Sackett job, said Holcombe shall receive for his services the sum of ten and one-half cents per bushel of coal delivered on the cars. Holcombe shall cut all the wood low and well trimmed, books of account shall be kept by both parties, subject to the inspection of both. Payments to be made on the fifteenth day of each month for all coal delivered on the cars the month previous. The parties of the second part agree to advance fifty cents per cord of all wood cut the month previous, which shall be taken from the price paid for the coal. Said Holcombe agrees to make from 40,000 to 75,000 bushels of coal and deliver the same on the cars up to November 15, 1880; said Munson & Landon will pay said Holcombe twelve dollars per hundred for good merchantable charcoal made from hard wood purchased by said Holcombe, the same being delivered on the cars and paid for on the fifteenth of each month, said Holcombe to complete the Sackett job by the 1st day of November, 1882, the parties of the second part to make punctual payments, and to furnish cars promptly that there may be no delay. In witness whereof these parties to these presents have hereto set their hands and seals the day and year first mentioned.

"GEORGE P. HOLCOMBE. [L. s.]

"MUNSON & LANDON. [L. s.]

"In the presence of H. C. BULL."

The questions mainly litigated upon the trial were, (1) whether there had been any refusal on the part of the defendants to perform the contract; (2) whether there had been a subsequent parol alteration of the terms of the written agreement, and (3) as to the quantity of coal which the wood on the lot in question was capable of producing and the cost of manufacturing it. Upon all of these questions the evidence was quite contradictory and conflicting and incapable of being harmonized or reconciled.

The referee found upon each of the questions referred to in favor of the plaintiff and assessed the damages at \$10,608. From the judgment entered upon the referee's report, the defendants appealed to the general term. That court, after an examination of the evidence in the case, came to the conclusion, as appears from its opinion, that the referee erred upon the facts in ordering judgment for the plaintiff. Instead, however, of determining the case upon this ground, its decision was placed, as we must assume from the order of reversal, upon questions of law alone, and it reversed the judgment entered upon the report of the referee and directed a new trial. The plaintiff declined the hazards

of a new trial, but elected to appeal to this court, giving the usual stipulation for judgment absolute.

The decision of the general term precludes us from reviewing the case upon the facts and confines us to the examination and decision of the questions of law presented by the record. In view of the repeated warnings given by this court of the hazard incurred by a party in taking this course, of encountering some objections and exceptions taken on the trial but not considered by the general term, which might prove to have been well taken, and especially in a case that bristles with exceptions, it was, to say the least, quite dangerous to risk the chances of an affirmance by us for such errors. *Cobb v. Hatfield*, 46 N. Y. 533; *People v. Supervisors*, 70 id. 228; *Mackay v. Lewis*, 73 id. 382. Upon such an appeal it is our duty to examine the whole record for the purpose of discovering whether there were any errors committed by the trial court which would have authorized an order of reversal by the general term, and if such are found it is the imperative duty of this court to affirm the order appealed from and order judgment absolute for the respondent.

We have carefully examined the case for this purpose, and while we find many grave and serious errors committed on the trial which were not at the time pointed out by sufficient and appropriate objections, we also find some that were properly raised and which must be considered and decided by us.

Among the most prominent of them was the admission by the referee, against objection, of parol evidence to add to and modify the written contract. With the view of relieving the last clause of such contract from the objection that it might be void for want of mutuality, the plaintiff sought to give in evidence an alleged conversation had between George P. Holcombe and said Landon on the same day, but after the execution of the written contract, Mrs. Holcombe, who was the first witness called to prove it, was asked the following question: "What, if any thing, was said there as to the amount of coal he wanted your husband to furnish under the twelve-cent clause of the contract?" The question was objected to by the defendants "as immaterial and improper and as it calls for the conclusion of the witness." The objection was overruled and the defendants excepted.

We are of the opinion that the question was objectionable, and that the grounds of the objection were sufficiently stated to raise the question of its admissibility. The question purported on its face to call for parol evidence qualifying, limiting and affecting the provisions of a written contract. It was plainly intended thereby to give proof of such parol agreement outside of the written contract varying or explaining its meaning and effect. Such evidence was both improper and incompetent. The grounds of the objection could not have been misunderstood either by the court or the parties, and the objection could not have been obviated so as to make such evidence admissible. The question in terms called for oral proof to supplement the provisions of a written contract, and to the proposition, plainly implied from the question, the defendants objected that such evidence was immaterial and improper, as it unquestionably was.

The object of the rule requiring objections to evidence to be made specific and to point out the precise defect existing therein, is to prevent surprise and enable the party offering it to obviate such difficulties as are merely formal and can be cured by reforming the question, or which by further proof can be removed and the question rendered competent. *People v. Beach*, 87 N. Y. 512; *Bergman v. Jones*, 94 id. 51. In a case where the objection could not be obviated by any means within the power of the party offering the evidence, in order to raise the question of its admissibility it is sufficient to make a general objection thereto. *Quinby v. Strauss*, 90 N. Y. 664; *Tooley v. Bacon*, 70 id. 34; *Merritt v. Seaman*, 6 id. 168.

The clause of the contract in question was complete in all its parts and needed no additional evidence to make it plain and intelligible. The plaintiff's assignor was to furnish coal to the defendants at cars furnished by them, and they were to receive all he should deliver, and pay for it at the rate of \$12 per hundred bushels on the fifteenth of each month after delivery. The proposed evidence tended to contradict the terms of the contract and limit the quantity deliverable by the vendor to one hundred thousand bushels. The fact that a written contract is unenforceable by reason of some vice expressed in it does not authorize the introduction of parol evidence to eliminate such objection. It is only where the contract is obviously incomplete and imperfect by reason of the absence of some provision which, it is apparent, the parties must have contemplated as a part thereof, that parol evidence may be admitted to supply the defect. This is a salutary and beneficial rule and should neither be disregarded or evaded.

It is a familiar and fundamental rule of evidence that a written contract cannot be explained, modified or contradicted, either as to its express or implied terms, by parol evidence, and it is immaterial whether the proposed parol modification purported to have been made before, at the time of or after the date of the execution of the instrument. *Mott v. Richtmyer*, 57 N. Y. 50.

The plaintiff made no suggestion that the evidence called for came within any of the exceptions to the rule, and even if he had it would not have availed him any thing, for the contract proposed to be proved is required by the statute to be in writing, and it is not competent by parol to add to such a contract any provision whatever. *Drake v. Seaman*, 97 N. Y. 230.

The further objection that the contract proved was void by the statute of frauds as embracing a sale of personal property amounting to more than \$50 in value, was not available until after the evidence had disclosed the nature of the contract, and we think that after that time, within the decision in *Bommer v. Am. Spiral Spring Co.*, 81 N. Y. 468, that objection was not properly taken.

That the admission of this evidence constituted a material error is manifest from the fact that the referee awarded damages to the amount of \$2,000 for a breach of this parol agreement.

We are also of the opinion that other evidence was improperly admitted in support of the plaintiff's cause of action. The case was tried upon the theory that the plaintiff was entitled to recover as dam-

ages the difference between the cost to him of cutting and manufacturing into coal all of the timber growing upon the several parcels of land described in the contract, and the prices therein provided to be paid for the coal manufactured therefrom. It, therefore, became a very material question on the trial to determine the quantity of wooded land embraced in these lots, the quantity of wood per acre growing thereon and the number of bushels of coal which it was capable of producing. The evidence differed widely upon each of these questions, some witnesses placing the quantity of wood as low as eighteen cords, and others estimating as high as forty cords per acre. Several witnesses who had examined a piece of land pointed out to them as the Jolls lot, were called to testify to the number of acres of wooded land therein contained and the number of cords of wood which in their judgment it would produce per acre. They gave material evidence in the case as to such quantities favorable to the plaintiff's contention. At the same time they testified that they had no knowledge of the location of the Jolls lot or its dimensions, and that their only information in regard to it was derived from statements made to them by a third person. There was no evidence that this person pointed out the Jolls lot accurately, or indeed that he had any knowledge of its location or dimensions, and he was not sworn as a witness upon the trial.

A motion was made by the defendants to strike out the evidence of these witnesses in respect to the location and estimation of quantities of wood on the lot upon the ground that they had no such knowledge of the facts as entitled them to give an opinion upon those subjects. This motion was denied by the court and the defendant excepted. We see no answer in this exception. The testimony of the witnesses constituted no legal proof of the facts testified to by them, and it should have been stricken out upon the defendants' motion. There was no attempt on the trial to supply by other evidence the manifest insufficiency of this testimony, and no suggestion that it could or would be done. The essential element of knowledge on the part of the witnesses of the facts testified to was wanting and rendered the evidence merely hearsay and incompetent.

We might specify other exceptions which appear to us to be well taken, but those already mentioned are sufficient to show that the order of reversal made by the general term was authorized by manifest errors committed by the referee and require the affirmance of its order for a new trial by this court. We have deemed it unnecessary to refer to the questions discussed in the opinion below, as we have serious doubts as to the sufficiency of the exceptions taken to some of those questions. The order of the general term is, therefore, affirmed, and judgment absolute for the defendants ordered.

MILLER and FINCH, JJ., concur; RAPALLO, J., concurs in result; EARL and DANFORTH, JJ., dissent; ANDREWS, J., not voting.

Judgment affirmed.

REINHAN, *App't*, v. DENNIN, *Resp't*.

December 7, 1886.

WILL — CAPACITY — PHYSICIAN AS WITNESS — CODE OF CIVIL PROCEDURE, §§ 834-6.

The provisions of sections 834-6, Code of Civil Procedure, are applicable to testamentary cases.

To bring a case within the statute it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity. On the trial of special issues in a will case the contestant called a physician as a witness, and offered to prove by him what he saw and learned of the condition of the deceased testator while he was attending him. Upon objection of the proponent the testimony was excluded as inadmissible under section 834, Code of Civil Procedure, and the ruling was affirmed at general term. *Held* no error; the witness was incompetent under the statute.

Appeal from a judgment of the general term, third department, affirming a judgment entered upon a verdict rendered at the Rensselaer circuit, upon special issues touching the testamentary capacity and execution of an alleged will of James Dennin, deceased, and of fraud and undue influence exerted over him.

E. Countryman, for appellant. *C. E. Patterson*, for respondent.

EARL, J. The surrogate of Rensselaer county admitted to probate the will of James Dennin, deceased. Upon appeal to the general term the surrogate's decree was reversed, and special issues as to the competency of the testator, and the due execution of the will were ordered to be tried before a jury. The trial came on, and it appeared that the will was executed in the evening, a short time before the testator's death, and that during the same evening, before the execution of the will, Dr. Bontecou was requested by the attending physician to be present at the testator's house for consultation with him relative to the testator's condition and treatment, and in pursuance of such request he did attend. He was called as a witness for the contestants, and testified that he saw the testator and advised a prescription for him. The following questions were put to him? "Will you describe the appearance and condition of the sick man when you got into the room?" "At the time you examined this man was he, in your judgment, in that state known to your profession as 'collapse'?" "Was he, in your judgment, in a dying condition?" "State whether in your judgment, at any time after that occasion when you were there, James Dennin was in such a condition that he was capable of understanding and taking into account the nature and character of his property and of his relations by blood and marriage to those who were or might become the objects of his bounty, and make an intelligent disposition of his property by will?" The same question was repeated, confining it to the time when the witness saw the testator. All the questions were objected to on behalf of the proponent as incompetent under sections 834 and 836 of the Code, and the objections were sustained, and counsel for the contestants excepted, and the sole question for our determination upon this appeal is whether that exception was well taken.

Section 834 is as follows: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which

was necessary to enable him to act in that capacity." And section 836 provides that that section applies to every examination of a person as a witness unless the provisions thereof are expressly waived by the patient.

Dr. Bontecou was a person duly authorized to practice physic. Whatever information he had about the condition of the testator he acquired while attending him as a patient. It is true that the testator did not call or procure his attendance. But he did not thrust himself into his presence or intrude there. He was called by the attending physician and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient or even by strangers about him, and the statute would be robbed of much of its virtue if a physician thus called were to be excluded from its provisions because, as contended by the learned counsel for the appellant, he was not employed by the patient nor a contract relation created between him and the patient. To bring the case within the statute it is sufficient that the person attended as a physician upon the patient and obtained his information in that capacity. Section 835 provides that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given therein in the course of his professional employment." Before that section can apply in any case a contract relation of attorney and client must exist based upon an employment by the client, and the decisions holding this, to which our attention has been called, have no bearing upon section 834. It is not disputed, and could not well be, that the information obtained by the witness was necessary to enable him to act in his professional capacity. Therefore, if the letter of the statute is to prevail, it cannot be doubted that the rulings of the trial judge were correct.

But it is claimed that the statute should be held not to apply to testamentary cases. There is just as much reason for applying it to such cases as to any other, and the broad and sweeping language of the two sections cannot be so limited as to exclude such cases from their operation. There is no more reason for allowing the secret ailments of a patient to be brought to light in a contest over his will than there is for exposing them in any other case where they become the legitimate subject of inquiry. An exception so important, if proper, should be engrafted upon the statute by the legislature and not by the courts.

It is also claimed that the statute should be so construed as only to prohibit the disclosures by a physician of any information of a confidential nature obtained by him from his patient, or while attending him in a professional capacity. Such was the view of the statute taken by me in my opinion in *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; but my brethren were then unwilling to concur with me in that view. When the same question again came before the court in *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, I again attempted to enforce the same view upon my brethren, and again failed, and it was then distinctly held that the statute could not be confined to information of a confidential nature, and that the court was bound to follow and give effect to the plain language without interpolating the broad exception contended for.

It is further contended that the rule laid down in *The People v. Pierson*, 79 N. Y. 424, should be applied to this case. We there held that the statute did not cover a case where its prohibition was invoked solely for the protection of a criminal and not at all for the benefit or protection of the patient who was dead, and a waiver of the prohibition had therefore become impossible. We are unable to perceive how the reasoning upon which that decision rests can have any application to this case. Here there is no allegation of crime, and there is a mere contest over the patient's property.

It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. In testamentary cases where the contest relates to the competency of the testator, it will exclude evidence of physicians, which is generally the most important and decisive. In actions upon policies of life insurance, where the inquiry relates to the health and physical condition of the insured, it will exclude the most reliable and vital evidence, which is absolutely needed for the ends of justice. But the remedy is with the legislature and not with the courts.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

KIP, Resp't, v. HIRSH, Appl't.

December 7, 1886.

SPECIFIC PERFORMANCE — DOUBTFUL TITLE — ASSIGNEE FOR CREDITORS NOT PARTY TO FORECLOSURE OF MORTGAGE.

In June, 1835, plaintiffs' testator conveyed certain vacant and unproductive lots in New York city to one D., taking from him a mortgage to secure part of the purchase-price. In 1840 D. made a general assignment, recorded June 6, 1840, conveying said lots . . . in trust, to sell the real estate, etc. In August, 1840, the testator foreclosed the said mortgage, but did not make the assignee of D. a party to the suit. On the foreclosure sale, the testator bought in the premises and received a master's deed, which was duly recorded, and he held the same until 1863, when he died, leaving a will, of which plaintiffs are the surviving executors. By the will the executors were given full power to sell and convey all vacant and unproductive lots. Plaintiffs, as executors, leased said lots from 1867 to 1883 in consideration of the payment of taxes thereon. In 1885 plaintiffs and defendant entered into a written contract of sale of said lots, but defendant refused to complete the purchase, on the ground that the title was defective, because D.'s assignee was not made a party to the foreclosure suit. *Held*, that plaintiffs were entitled to specific performance of the contract of sale.

Appeal from an order of the general term of the superior court of the city of New York reversing a judgment entered on decision of Chief Justice SEDGWICK, at special term, directing specific performance by defendant of a contract made between him and the plaintiffs for the sale by them and purchase by him of certain real estate in the city of New York, and directing a new trial.

Isaac L. Miller, for appellant. *John H. V. Arnold*, for respondents.

RAPALLO, J. In June, 1835, Leonard W. Kip, the plaintiffs' testator, was the owner of the lots of land in controversy, and in that

month he conveyed them to Daniel E. Delavan, taking from him a mortgage on the same lots to secure \$1,500, part of the purchase-money. The deed and the mortgage were recorded on the 29th of June, 1835.

On the 16th of May, 1840, Delavan made a general assignment to Walter J. Smith, conveying the lots in question, together with a very large amount of other real estate and personal property, in trust to sell the real estate with all convenient speed, and apply the proceeds of the real and personal estate to the payment first of certain specified debts of the assignor, next to the payment of all his other debts, and when the trust was fully executed to return the surplus, if any, to the assignor. This assignment was recorded June 6, 1840.

In August, 1840, Leonard W. Kip commenced a suit for the foreclosure of the above-mentioned mortgage, making Delavan a party defendant, but his assignee Smith was not made a party.

This foreclosure suit proceeded to a decree, and the mortgaged premises were sold under the decree, and bought in by Leonard W. Kip, and a master's deed was executed to him December 30, 1840, and recorded February 23, 1841.

The mortgaged premises consisted of three lots on the easterly side of Fourth avenue, between One Hundred and Twentieth and One Hundred and Twenty-first streets, in the city of New York. They were vacant and unproductive, and so continued until the death of Leonard W. Kip, which took place in 1863. He left a will, of which the plaintiffs in this action are the surviving executors. By this will, after making certain bequests, he devised the residue of his real and personal estate to his executors, in trust for the benefit of his wife during her life, directing them to let and lease all his productive real and leasehold estates, and empowering them, at any time after his decease, to sell all vacant and unproductive lots, and divide the proceeds among his children.

On the 15th of April, 1867, the plaintiffs, as executors of the will, leased the lots in question to John I. Reeber for the term of nine months from the date of the lease, he agreeing to pay, as rent, the taxes on said lots as soon as due and payable.

Reeber took possession of the lots under this lease and inclosed the same with a fence on all four sides, and occupied them for storing lumber, from April 15, 1867, until about the year 1883, when he relinquished his business to his sons, who have since then carried on the same business on the premises as his successors.

On the 17th of March, 1885, the plaintiffs and defendant entered into an agreement in writing whereby the plaintiffs agreed to sell, and the defendant agreed to purchase the premises for the sum of \$12,750, payable as set forth in the agreement. But the defendant now refuses to complete the purchase, claiming that the plaintiffs' title is defective by reason of the omission to make Walter J. Smith, the assignee of Delavan, a party to the foreclosure suit through which the plaintiffs' testator derived his title.

If the assignment and the title of the assignee were still subsisting, and the trusts unexecuted, the objection would be unanswerable, but we think that the circumstances of the case are such as to create a legal presumption that the purposes for which the trusts were created have

ceased, and that consequently the estate of the trustee has ceased, and the title reverted to Delavan, the grantor of the plaintiffs, or those claiming under him. 1 R. S. 730, § 67. His title was, of course, transferred to the plaintiffs' testator by the sale under the decree, Delavan, the mortgagor, having been a party to the foreclosure. The assignment to Smith was made in 1840, more than forty-five years before the trial of this action, and nearly forty-five years before the making of the contract of sale, and although the trust was to sell the real estate with all convenient speed for the purpose of paying the debts, it is found as a fact that no sale was ever made by the assignee of the property in question, or any part thereof. It does not appear that any of the property embraced in the assignment was ever sold, or that the assignment was ever acted upon in any manner. Walter J. Smith, the assignee, lived twenty-five years, and Daniel E. Delavan, thirty years after the making of the assignment.

It is found that no successor in the trust was ever appointed in place of Smith, and it does not appear that Smith ever claimed or asserted any title to the lots in question under the assignment, or that any creditor of Delavan, or any other person, has ever made any claim under the assignment, or attempted to enforce the trust, although the executors of Kip have been in actual possession, through their tenants, for nearly twenty years. After such a great lapse of time since the making of the assignment and the sale under the foreclosure, we think the presumption that the debts of Delavan, secured by the assignment, have been paid, or in some manner discharged, is so strong that the fact that the assignment once existed is no longer a substantial objection to the title. So much time has elapsed, that the presumption of payment would apply even to debts evidenced by specialty or by judgment; and it cannot be conceived that if the debts have not in fact been paid, there could be any now outstanding which would not be barred by the statute of limitations. We think there is no danger in holding that, independently of the act of 1875, chapter 375, the trusts created by the assignments should, under such a state of facts as exists in the present case, be decreed discharged, and that the estate of the trustee should be deemed to have ceased. No one but the successors of the trustee, if any should ever be appointed, can dispute the title which the defendant will acquire by the conveyance from the executors under the power contained in the will of the testator, and their right to redeem has long been barred by the statute of limitation.

We think the lots in question are embraced in the power of sale. They were unquestionably vacant and unproductive at the time of the death of the testator, and nothing that has happened since has materially changed their condition. The putting of a fence around them, and the storing of lumber or building materials thereon did not change their character of vacant lots, so long as they are not built upon. Neither did the lease change their character of unproductive lots, as no rent was reserved, the only agreement on the part of the tenant being to pay the taxes. But we think the testator intended to include in the power the real estate which was vacant and unproductive at the time of his death.

The title of Delavan, to which the testator succeeded by his purchase at the foreclosure, was subject only to the estate of the trustee. That was not an absolute estate, but only for the purposes of the trust. Whenever those purposes ceased, the trust ceased, and the assignor, or those who succeeded to his right, were in by their original title.

We are inclined to the opinion further, that the act of 1875, chapter 545, is applicable to this case. There is nothing in the act which confines its operation to assignments made after its passage, but, on the contrary, its language imports that it applies to trusts theretofore created. It purports to amend section 67 of the statute of uses and trusts—1 R. S. 730—which provides that “when the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease,” by adding the following words, “and where an estate *has been* conveyed to trustees for the benefit of creditors, and no different limitation is contained in the instrument creating the trust, such trust shall be deemed discharged at the end of twenty-five years from the creation of the same, and the estate conveyed to trustee or trustees, and not granted or conveyed by him or them, shall revert to the grantor or grantors, his or their heirs or devisees, or persons claiming under them, to the same effect as though such trust had not been created.”

To construe this act as relating only to assignments made after its passage would prevent its having any operation until the year 1900, which could not have been the intention of the legislature.

The intention to make it apply to past assignments appears clearly from its language, which is, “when an estate *has been* conveyed,” not “shall have been,” or “shall be conveyed.”

It is in the nature of a statute of limitation, and, if necessary to sustain its constitutionality, it should be construed as making the lapse of time *prima facie* or presumptive evidence that the trusts have been discharged, and permitting this presumption to be rebutted by evidence. In *Bellinger v. Shafer*, 2 Sandf. Ch. 293, 296, and cases therein cited, section 67, as originally enacted, was held applicable to trusts created before its enactment, as well as to those subsequently created, and we are inclined to think that the same construction should be placed on the section as amended by the act of 1875.

In the case of *McCahill v. Hamilton*, 20 Hun, 388, the supreme court held a similar outstanding assignment to constitute a valid objection to the title, and the act of 1875 not to remedy the defect. It must be observed, however, that in that case it appeared that the assignment had been acted upon, and some sales of real estate had been made under it, though the time when the last sale was made does not appear in the case as reported.

But it is not necessary now to finally decide this point as to the act of 1875, as in the present case nearly double the time prescribed by the act of 1875 has elapsed and no conveyance has ever been made by the trustee. The presumption of payment attaches to all the debts, and it can hardly be conceived that any facts can exist which would entitle any person to enforce the trust.

Under these circumstances we think that the defendant will acquire

a good and marketable title to the premises by a conveyance from the plaintiffs as executors, and he should be decreed to specifically perform his contract of purchase.

The order of the general term should be reversed and the judgment at special term affirmed but without cost on this appeal, the question being novel, and there having been one unreversed decision of the supreme court sustaining the views of the respondent.

All concur, except MILLER, J., dissenting.

Order reversed and judgment affirmed.

PEOPLE, EX REL. BRUSH, *Resp'ts*, v. BROWN, *App'l't*.

December 7, 1886.

JUDGMENT — DISCRETIONARY ORDER — APPEAL.

It is within the discretion of the supreme court to set aside on motion a void order entered in that court, or to leave the party to set up its invalidity whenever an attempt should be made to enforce it against him. No appeal, therefore, lies to this court from a refusal of the court below to set aside such an order on motion.

Appeal from an order of the general term affirming an order of the special term denying appellant's motion to set aside a former order of that court remanding an infant to the custody of the relators, on the ground that the court had no jurisdiction to make such an order.

E. H. Benn, for appellant. *John A. Deady*, for respondents.

RAPALLO, J. This appeal is brought upon the theory that the general term, on reversing the order at special term dismissing the writ of *habeas corpus*, had no jurisdiction or power to direct a new hearing on the writ at special term, and that consequently the order made at special term, on the rehearing, remanding the infant, Francis C. Brown, to the custody of the relators, was without jurisdiction and void.

On that ground the appellant moved at special term to set aside the last-mentioned order, and his motion having been denied and the denial affirmed at general term, he now appeals to this court.

We are of opinion that the appeal cannot be entertained. Even if it should be assumed that the order which the appellant sought by the motion to set aside was made without jurisdiction, and was void, the appellant would not have an absolute right to demand that it be set aside on motion. It was within the discretion of the court below whether to grant that relief or to leave the appellant to set up the invalidity of the order whenever an attempt should be made to enforce it against him, or to obtain any benefit thereunder. No appeal, therefore, lies to this court from a refusal by the court below to set aside such an order on motion. This precise point was decided in the case of *Foots v. Lathrop*, 41 N. Y. 358, and has been affirmed in several subsequent cases.

The appellant was constrained to base his motion as he did, on the ground that the orders were absolutely void, because if they were not void, but simply erroneous, his remedy was by appeal and not by motion to set aside. The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

*BLAKE, Resp't, v. GRISWOLD, App'l't.**

December 14, 1886.

Motion for reargument.*Wm. C. Holbrook*, for appellant. *A. Pond*, for respondent.

FINCH, J. This is a motion for a reargument. So far as our conclusions are criticised nothing more need be said. The suggestions made are not at all new, or outside of the consideration already given to the case.

But an affidavit is presented showing that when the appeal was argued and decided the plaintiff was dead. The fact seems to have been suspected by, though not certainly known to some of the counsel, but at least was not disclosed to the court. It will necessarily furnish a ground for some motion to be made in the case, but certainly furnishes none for a reargument. Until steps are taken for a proper substitution, the questions thence arising and now suggested are not before us, and the motion made is not in order. If we might treat those questions as presented informally by the consent to a substitution contained in the plaintiff's brief we could only do so by assuming that the person who claims in a letter to be administrator is such, and then disposing of the question of abatement raised upon the printed arguments without hearing counsel orally. We prefer that the questions involved should be raised in some regular and orderly manner, not likely to lead to further complications.

This motion should be denied.

All concur.

Motion denied.

ANDERSON, Resp't, v. GOLDSMIDT, App'l't.†

December 17, 1886.

INSURANCE — WIFE'S POLICY — ASSIGNABILITY.

A policy issued to a wife on her husband's life provided that in case of the death of the wife before her husband the amount should be payable after her death to her children The wife, her husband uniting therein, assigned the policy. In an action by the assignee to recover the amount due on the policy the wife was made a party and she resisted payment on the ground that she being a married woman having children who had an interest in the policy the assignment thereof was void, and further that the assignment was not executed in conformity with the statute. *Held*, that under the statute — act 1879, chap. 248 — the assignment was valid. (1) Under the act 1879, chapter 248, the joining in of the husband in an assignment of the policy by the wife is a sufficient consent in writing thereto; (2) she having survived her husband the contingent interest of the children had not vested and she was absolute owner.

Appeal from judgment of general term, second department, affirming a judgment in favor of plaintiff, entered upon the decision of the court on a trial at special term without a jury.

James D. Bell, for appellant. *C. L. Lyon*, for respondent.

EARL, J. On the 31st of May, 1870, the Germania Life Insurance

* See same case on merits, *ante*.

† Affirming 38 Hun, 360.

Company issued to Barbara Goldsmidt an endowment policy upon the life of her husband, Joseph Goldsmidt, for \$1,000, payable May 31, 1885, or within sixty days after due notice and proof of his death, should he die before that time. The policy, among other things, provided that "In case of the death of the said Barbara Goldsmidt before the decease of the said Joseph Goldsmidt, the amount of said insurance shall be payable after her death to her children, for their use, or to their guardian, if under age; or, if she shall have no children, to her executors, administrators and assigns." On the 15th of February, 1881, Barbara Goldsmidt and Joseph, her husband, united in a written assignment signed by them of all their right, title and interest in and to the policy to John Anderson. The policy matured on the 31st of May, 1885, and John Anderson having died, the plaintiff, as his executor, began an action to recover the amount of the policy from the insurance company, claiming under the assignment of the policy to his testator. An order was made substituting Barbara Goldsmidt as defendant, and the fund was deposited in court. She answered setting up that the assignment was void because she was a married woman with children having an interest in the policy, and because the assignment was not executed in conformity with the statute. A judgment for the plaintiff having been affirmed by the general term, the defendant has appealed to this court and attempts to sustain her appeal upon the two grounds mentioned in her answer.

It is provided in chapter 248, Laws of 1879, that "all policies of insurance heretofore or hereafter issued within the State of New York upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of the State, shall be from and after the passage of this act, assignable by said wife with the written consent of her husband; or, in case of her death, by her legal representatives, with the written consent of her husband, to any person whomsoever, or be surrendered to the company issuing such policy, with the written consent of the husband."

Objection is made that there was not in this case, within the meaning of this statute, the written consent of the husband to this assignment. But by uniting with his wife in executing the assignment he consented thereto in writing, and it would be taking a very narrow view of the statute, quite inadmissible, to hold that the purpose of the statute was not fully answered by the execution of the assignment in that way.

The mere fact that she had children at the time she executed the assignment does not render her assignment void. The statute, whether there be children or not, gives the wife, with the consent of her husband, the absolute power to assign or surrender the policy. It is quite true that the children had a contingent interest in the policy which would have become vested in case the wife had died before the policy matured. But here she survived that period, and hence the contingency did not arise which gave the children any interest whatever in the policy.

At the time of this assignment there was no law and no public policy which prohibited the wife from assigning any interest which she had in the policy, and by the assignment which she executed plaintiff's

testator became vested with the entire interest in the policy, and there is no defense in the plaintiff's claim to the amount due thereon.

The judgment should be affirmed.

All concur.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

STEEL & Co. v. GOODWIN & Co.

October 4, 1886.

FOREIGN ATTACHMENT — QUASHING WRIT.

The power of quashing writs is limited to proceedings that are irregular, defective or improper.

If it appears on the face of the record that foreign attachment proceedings are void or grossly irregular, or if it be clearly shown that a valid cause of action does not exist in that form, the court may, on motion of the defendant or of the garnishee in his behalf, quash the writ.

Error to the court of common pleas, No. 1, of Philadelphia county. The facts are set forth in the opinion.

George P. Rich and *Mayer Sulzberger*, for plaintiffs in error. "The declared object of the act was to prevent non-residents from withdrawing their effects from the State, leaving their debts unpaid." *Fitch v. Ross*, 4 S. & R. 564. This being the object of the act, the defendant is authorized to have the attachment of his effects dissolved, by entering security for the debt. When this is done, the action becomes merely a common-law remedy. *Albany City Ins. Co. v. Whitney*, 70 Penn. St. 248. The defendant has also the right to ask the court, as in the case of a *capias*, to inquire into the cause of action; and if no satisfactory cause be shown, to dissolve the attachment. *Vienne v. McCarty*, 1 Dall. 154. And in the absence of the defendant, the courts, in view of the hardship resulting from the attachment of his property, have permitted the garnishees, on behalf of the defendant, and for the protection of his interests, to make this motion. See remarks of SHARSWOOD, J., in *Morris v. Turner*, 3 Clark, 423. But a stranger, claiming that the property attached in the garnishees' hands belonged neither to the defendant nor the garnishees but to himself, was without any protection whatever, and was in danger of losing his property, or at least the enjoyment of it, without redress. To remedy this the act of June 10, 1881 — P. Laws, 107; *Purd. Dig.*, p. 1361, pl. 39 — was passed. In addition to dissolving the attachment where no cause of action is shown, the court may also on motion of the defendant, or of the garnishee in his behalf, quash it, where it appears on the face of the record that the proceedings are irregular and void. *Crawford v. Stewart*, 38 Penn. St. 34. The learned editor of *Brightly's Troubat & Haly*, volume 2, page 532, note 1, says: "Owing to the loose practice in our State, choses in action are bound by foreign attachment like other property." *Pholson v. Barnes*, 50 Penn. St. 230; *Warner's Appeal*, 13 W. N. C. 505. These decisions are the obvious interpretations of the act of May, 1855, section 1; P. Laws, 415. As to dissolving foreign attachment, *Murdock v. Steiner*, 45 Penn. St. 349; *Lorenz v. Orlady*, 87 id. 226. It is error for the court in a summary manner by motion or rule to quash, to pass upon the rights of one claiming to be assignee of the fund attached. The par-

ties have a right to appear and plead, and have the issue tried by a jury. *Pleasants v. Cowden*, 7 W. & S. 379; *Lancaster Co. Bank v. Gross*, 50 Penn. St. 224.

Sharp & Alleman, for defendants in error. Surely, if the garnishee can intervene, as is said by SHARSWOOD, J., in *Morris v. Turner*, 8 Clark, 425; or if a subsequent judgment creditor may do so, as was held in *Pfouts v. Comford*, 12 C. 420; the assignee for the benefit of creditors may be allowed that right. See *Reed's Appeal*, 71 Penn. St. 382. That a foreign attachment cannot be maintained in this State for a debt not due is too plain to require argument at this day. *McCullough v. Grishopper*, 4 W. & S. 202; *Coakes v. White*, 11 W. N. C. 171. See *Reed v. Ware*, 2 La. Ann. 498; *Hearns v. Keath*, 6 Mo. 84. And the suggestion of the witness, and of his counsel, that they might be able to show that the debt was fraudulently contracted does not help their case. Foreign attachment being an action *ex contractu*, it does not lie for a tort. Drake Attach., § 10, and cases; *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Jacoby v. Gogell*, 5 S. & R. 450; *Porter v. Hildebrand*, 14 Penn. St. 129; *Boyer v. Ballard*, 13 W. N. C. 301; Troub. & Hal. Prac., § 2257. And a motion to quash was the proper remedy. "If the defendant be an inhabitant of the State, or the attachment otherwise improperly issue, the remedy is, by a motion to quash the writ." Troub. & Hal. Prac., § 2269. The foundation of the action was the existence of a debt, due and payable; the right to the effect in the garnishees' hands depended upon the legal service of the writ and their attachable character. If any of these requisites were wanting it went to the foundation of the matter, and a motion to quash was the proper one. See Troub. & Hal. Prac., § 2269; *Downing v. Phillips*, 4 Yeates, 274; *Ross v. Clark*, 1 Dall. 354; *Doane v. Penhallow*, id. 218; *McCoombe v. Dunch*, 2 id. 73. In view of the severity of the remedy the courts have exercised the largest powers in the protection of the rights of those in interest, requiring the plaintiff to affirmatively prove his cause of action, and inquiring into it the same as on a *capias* where the defendant is in custody. Troub. & Hal., §§ 2271, 2272. See *Vienna v. McCarthy*, 1 Dall. 154. The sheriff's return shows a fatally defective service of the writ, and on that account alone it was properly quashed. Foreign attachment act of June 13, 1836, § 48, *Purd. Dig.*, p. 824, pl. 12. It has been well settled that it is the duty of the sheriff to show by the return a garnishment, in conformity to the statute. And if he fails to show this the writ will be quashed. Drake Attach., §§ 205, 451, *d.* See *Lambert v. Challis*, 11 Casey, 156; *Sterritt v. Howarth*, 26 Smith, 438; *Connell v. Godfrey*, 22 Pittsb. L. J. 136; *Norvell v. Porter*, 62 Mo. 809; *Hayes v. Gillespie*, 11 Casey, 155. The return should state specifically what the officer has done, that the court may judge whether the requirements of the law have been complied with. *Penn. R. R. Co. v. Pennock*, 51 Penn. St. 244. See *Gibson v. Wilson*, 5 Ark. 422; *Desha v. Baker*, 3 id. 509; *Jeffries v. Harvey*, 38 Miss. 97; *Rankin v. Dulaney*, 43 id. 197; *Moore v. Coates*, id. 225. The remedy of attachment is a special and extraordinary proceeding, in which all the requirements of the statute must be strictly observed. *Penn. R. R. Co. v. Pennock*, 51

Penn. St. 244; *Hayes v. Gillespie*, 11 C. 155; Drake Attch., § 194; *Rankin v. Dulaney*, 43 Miss. 197; *Morgan v. Watmough*, 5 Wh. 125. We submit that choses in action, which have no situs other than that of the owner, are not the subject of attachment after an assignment for the benefit of creditors. In making this proposition we are not ignorant of the decisions in *Philson v. Barnes*, 50 Penn. St. 230; or *Warner's Appeal*, 13 W. N. C. 505. It is first to be observed that prior to the passage of the act of May 3, 1855 — *Purd. Dig.*, p. 122, pl. 14 — assignments for the benefit of creditors made by debtors domiciled in another State had been recognized as valid in this State as to property located here, and as to choses in action, where the debtor lived here, even though the assignment were not recorded here. *Law v. Mills*, 6 Harr. 185, and cases; *Speed v. May*, 5 id. 91. And this was held to be so even where though the law of the domicile authorizes preferences to creditors, and the assignment provided for such preferences. See the last cited cases.

MERCOUR, Ch. J. This was a proceeding in foreign attachment against the defendants who resided in New York, with notice to garnishees who resided in Philadelphia. The writ was served on the latter. On the application of Bird, assignee for the benefit of creditors of the defendants, the court quashed the writ of attachment. This is assigned as error.

The assignment of the defendants was executed on the 11th December, 1884, and on the day following was recorded in the city of New York where it was made, but was not recorded in Pennsylvania until the twenty-fourth of the same month.

This writ of attachment was issued and served on the twelfth of December. The plaintiffs were then informed of the insolvency of the defendants, but had no knowledge of the assignment.

Neither at the issuing of the writ nor at any time thereafter was the assignee made a party to the record, nor did he pray to become such. He did not ask that the attachment be dissolved, nor that the service of the writ be set aside. He only asked that the writ itself be quashed. The court granted his request. Was this error? He certainly occupied no higher ground than the defendants under whom he held. He did not stand in the position of a good faith purchaser for value. *Ritter v. Brendlinger*, 58 Penn. St. 68; *Missimer v. Ebersole*, 87 id. 109; *Kent, Santee & Co.'s Appeal*, id. 165; *Morris' Appeal*, 88 id. 368.

The garnishees did not allege any defect in the service on them. On the contrary they admitted its validity and asked leave to pay into court the money attached.

The defendants resided in the State of New York. The plaintiffs resided in this State, and the property sought to be attached was here. Was it subject to foreign attachment for a debt due from the defendants? No service of the writ on them was required. The service on the garnishees was not set aside, nor was the attachment dissolved. It is not now necessary to decide any question relating thereto. The writ having been quashed the sole contention is whether the action of foreign attachment lies?

The act of 3d of May, 1855 — P. L. 415 — declares whenever any per-

son making an assignment of his or her estate, situate within this Commonwealth, for the benefit of creditors, shall be resident out of this State, such assignment may be recorded within any county where such estate, real or personal, may be, and take effect from its date. Provided that no *bona fide* purchaser, mortgagee or creditor having a lien thereon before the recording in the same county, and not having had previous actual notice thereof, shall be affected or prejudiced by said assignment.

The power of a State to regulate the transfer of all property within its territory is well established. Story Conf. Laws, par. 390; *Milne v. Moreton*, 6 Binn. 361; S. C., 6 Am. Dec. 466; *Green v. Van Buskirk*, 7 Wall. 151; *Warner's Appeal*, 13 W. N. C. 505. When this power is asserted by legislation of the State where the property is situated, any principle of comity in conflict therewith must not render the legislation invalid. *Ib.* When, therefore, a foreign attachment is issued in any county in this Commonwealth where the property of a non-resident is situated, after the execution of an assignment in another State, but prior to the recording thereof in this county where the property is found, the attachment has priority over the assignment. *Ib.*; *Philson et al. v. Barnes*, 50 Penn. St. 230.

The power of quashing writs is limited to proceedings that are irregular, defective or improper. *Cranford v. Steward*, 38 Penn. St. 34. If it appears on the face of the record that the proceedings are void or grossly irregular, or where it is clearly shown that a valid cause of action in this form does not exist, the court may, on motion of the defendant or of the garnishees in his behalf, quash the writ. No such case is presented here. This record does not show any thing irregular, defective or improper in the commencement of the action.

As we have declared the residence of the defendants and of the garnishees, and the debt due from the latter, were such as to make the action proper. The attempt of the assignee was to show by evidence *dehors* the record, that the indebtedness from the defendants to the plaintiffs was not yet due. This, however, was a disputed question which should be passed upon by a jury. The learned judge erred in determining it against the plaintiffs as matter of law, and thus putting them out of court. The right of the plaintiffs to maintain an action under all the evidence cannot be disposed of in this summary manner. An existing indebtedness from the defendants to the plaintiffs being unquestioned, the latter are entitled to have the other question which is controverted submitted to a jury. *Lancaster County Bk. v. Gross et al.*, 50 Penn. St. 224; *Lorenz v. Orlady*, 87 id. 226.

Judgment reversed, rule to quash the attachment discharged and a *procedendo* awarded.

Judgment reversed.

HAYES v. THE BALD EAGLE VALLEY R. R. Co. ET AL.

October 4, 1886.

STATUTE OF LIMITATIONS — PRESUMPTION OF PAYMENT — LIEN — EQUITY — DEMUR-
RER.

After the lapse of twenty years all evidences of debt excepted out of the statute of limitations are presumed to be paid. This is a rule of convenience and policy, the result of a necessary regard for the peace and security of society.

Where a bill in equity is so framed as to present the objection, that from lapse of time there is a legal presumption of fact that the debt has been paid, without any attendant circumstances to obviate it, courts of equity act on the analogy of the law as to the statute of limitations, and will not entertain a suit for relief if it would be barred at law, and this objection may be taken advantage of by demurrer.

A contractor had a lien of indefinite duration against a railroad company for the construction of its roadway, twenty-five years after the debt became due and payable, and twenty-three years after a judicial sale of the property of the company, he sought relief through the channel of a bill in equity. *Held*, that after twenty years there was a presumption of payment arising from the lapse of time.

Appeal from the decree of the court of common pleas, No. 1, of Philadelphia county.

This was a bill in equity filed by *Michael Hayes, Complainant, v. The Bald Eagle Valley R. R. Co., The Pennsylvania R. R. Co., Lessee, and the Fidelity Insurance, Trust and Safe Deposit Company, Mortgagees*. The following is an abstract of the bill.

"First. That the Tyrone and Lock Haven railroad, a corporation created by the Commonwealth of Pennsylvania, commenced the construction of its railroad from Tyrone to Lock Haven.

"Second. The plaintiff, as contractor for the said Tyrone and Lock Haven Railroad Company, in the years 1857, 1858 and 1859, did grading, bridging and masonry for it to the amount of about \$20,000; that he is unable to state the exact amount, because he never received final estimates and has never had access to the books of the said railroad company. The said Tyrone and Lock Haven Railroad Company, while indebted to plaintiff for said work, without his consent, executed a mortgage upon all its road-bed, franchises and property of every description, for \$500,000.

"On June 6, 1860, proceedings in foreclosure were instituted in this court, and on December 7, 1860, the court decreed that said premises should be sold.

"That on January 29, 1861, the said railroad and its franchises, pursuant to said order and decree, were sold to Philip M. Price for \$21,000, which was a grossly inadequate price; that the sale was fraudulently conducted, and bidders were intimidated, in order that said Price and his confederates might become the owners of said railroad for the smallest possible sum, and thus defraud the plaintiff and the other contractors and laborers of the money justly due them for work and labor done.

"By act of assembly, on March 25, 1861, the said Philip Price and his associates were created a body politic and corporate, under the name of the Bald Eagle Valley Railroad Company, one of the defendants herein.

"That upon the sale of said railroad and franchises, as aforesaid, the Tyrone and Lock Haven Railroad Company suspended business, and ceased from the ordinary business for which said corporation was created, and ceased to have an existence as a corporation.

"By the said act of assembly, all the rights, franchises and privileges, together with the property of the said Tyrone and Lock Haven Railroad Company, were transferred to and became vested in the said Bald Eagle Valley Railroad Company, and it became the successor of said

Tyrone and Lock Haven Railroad Company, and as such successor, took possession of said railroad, franchises and property, including the work and labor done by the plaintiff, and proceeded to equip and use said railroad without paying the plaintiff any part of the money due him as contractor, laborer and workman.

"On December 7, 1864, the Bald Eagle Valley Railroad Company leased its railroad franchises and property to the Pennsylvania Railroad Company for the term of ninety-nine years.

"On January 1, 1880, the Bald Eagle Valley Railroad Company, without the consent of the plaintiff having been previously obtained, mortgaged all its railroad property and franchises to the Fidelity Insurance, Trust and Safe Deposit Company for \$400,000.

"That the plaintiff is legally and equitably entitled to receive from the Bald Eagle Valley Railroad Company and the Pennsylvania Railroad Company the aforesaid balance or sum of \$20,000, with interest from March 8, 1859, or whatever sum may be found due the plaintiff upon a full settlement for said work and labor done upon said railroad as contractor, laborer and workman, as aforesaid, and because the said Tyrone and Lock Haven Railroad Company has ceased to exist, the plaintiff has no remedy in law.

"The plaintiff prays discovery :

"That an account be stated between the plaintiff and the Tyrone and Lock Haven Railroad Company, and that the amount of the liability of the defendants be definitely ascertained.

"That the court direct the defendants to pay the plaintiff such sum as may be due him, and further relief."

The respondents filed a general demurrer, which was sustained and the bill was dismissed.

Bertram Hughes, for appellant. The assets of an insolvent corporation are a fund for the payment of its debts. The holders of the property take it, charged with a trust in favor of creditors, which a court of equity will enforce. *Curran v. State of Arkansas*, 15 How. 307. The parties have been joined as defendants, in the manner approved by this court, in *Shamokin Valley, etc., Railroad v. Malone*, 85 Penn. St. 25-36. The plaintiff, being a contractor, has an absolute, indefinite lien upon the railroad and franchises of the Tyrone and Lock Haven railroad, in the possession of the Bald Eagle Valley Railroad Company and the Pennsylvania Railroad Company. As to the plaintiff, the mortgages and proceedings thereon are null and void: Act of assembly, January 21, 1843, Pamph. Laws, 367; *Shamokin Valley, etc., Railroad v. Malone*, 85 Penn. St. 35; *Tyrone & Clearfield R. R. Co. v. Jones*, 79 id. 64. The plaintiff's claim is not barred by the statute of limitations. The seventh section of the act of April 25, 1850—Pamph. Laws, 570—provides that: "The provisions of the act of 27th of March, 1713, entitled 'An act for the limitations of actions,' shall not hereafter extend to any suit against any corporation or body politic which may have suspended business, or made any transfer or assignment in trust for creditors, who may have, at the time or after the accruing of the cause of action, suspended the ordinary business for which said corporation was created." The liability accrued in 1859.

On January 29, 1861, the Tyrone and Lock Haven road was sold by decree of court. The corporation then became extinct, and ceased "from the ordinary business for which it was created." The statute then stopped running, and the legal bar is not in the plaintiff's way. *Shamokin Valley Railroad v. Malone*, 4 Norr. 34. The claim is not stale. We are suing to enforce a strictly legal cause of action, but are compelled to resort to an equitable form, because the act has not provided us with means to enforce it at law. We cannot obtain a judgment against the Tyrone and Lock Haven railroad, because it is an extinct corporation. *Shamokin Valley, etc., Railroad v. Malone*, 85 Penn. St. 36-37. The decisions upon suits of this kind hold that a claim of this description does not become stale. "It was intended that the property, into whosoever hands it might come, should remain, subject to a paramount claim of the contractor, so long as the debt due to him remained unpaid. That was giving him a lien of indefinite duration seems quite plain." *Id.* 35; *Fox v. Seal*, 22 Wall. 424. A presumption of payment may arise from lapse of time. That is not conclusive, but casts upon us the burden of refuting it. *Reed v. Reed*, 14 Penn. St. 239. A mortgage may be foreclosed in equity after twenty years. Equity, by analogy, follows the statute of limitations. In this case there is no limitation. Act of April 25, 1850.

David. W. Sellers, for appellee. Now it is submitted that this statute validates all of the proceedings resulting in the sale of the Tyrone and Lock Haven Railroad Company, and necessarily defeats the unrecorded and unasserted demand of the claimant, an act being the highest species of record conveyance. *Caverow v. Insurance*, 2 P. F. S. 287. If, however, the remedy given by the resolution of January 21, 1843 — P. Laws, 367 — survived against the Bald Eagle Valley Railroad Company then it is submitted that, as at law this claim would have been obliterated at the end of twenty-one years, it is also the same in equity. *Hamilton v. Hamilton*, 6 Harr. 20; *Wagner v. Baird*, 7 How. 234; *Cope v. Humphreys*, 14 S. & R. 15; *Foulke v. Brown*, 2 W. 214; *Dieman v. Sechrist*, 1 P. & W. 419; *Ankeny v. Penrose*, 6 H. 192; *Prior v. Wood*, 7 C. 145; *Bailey v. Vehmeyer*, 7 W. N. C. 195; *Porter v. Page's Est.*, 4 S. 465; *Reed v. Reed*, 46 Penn. St. 239; *Com. v. Snyder*, 12 S. 157; *Seibert's Appeal*, 2 W. N. C. 53; *Eckert's Appeal*, 6 id. 21; *Bentley's Appeal*, 11 id. 422; *Davis v. McHenry*, id. 305; *Ankeny v. Penrose*, 6 H. 193; *Slaymaker v. Wilson*, 1 P. & W. 219; *Biddle v. Girard Bank*, 16 W. N. C. 397.

TRUNKY, J. That the plaintiff had a lien of indefinite duration, prior to all other liens on the property, for the sum due him by the Tyrone and Lock Haven Railroad Company, as contractor for the construction of the road, is incontrovertible. And the lien remained, notwithstanding the judicial sale in the proceeding on the mortgage *Railroad Co. v. Jones*, 79 Penn. St. 60; *Railroad Co. v. Malone*, 85 id. 25. To that debt the statute of limitations does not apply. Although the debt is an indefinite lien, there is nothing in the statutes to save it from the presumption of payment arising from the lapse of time. This presumption arises upon every species of security for the payment of

money. The lien of a recognizance is indefinite, yet it lasts not forever ; it is subject to the legal presumption of payment, after twenty years from the time of payment. *Ankeny v. Penrose*, 18 Penn. St. 190. The rule is in the nature of the statute of limitations, furnishing, indeed, not a legal bar, but a presumption of fact, not subject to the discretion of the jury ; they are bound to adopt it as satisfactory proof until the contrary appears. *Cope v. Humphreys*, 14 S. & R. 15.

After the lapse of twenty years all evidences of debt excepted out of the statute of limitations are presumed to be paid. This is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. Transactions cannot be fairly investigated and justly determined after a long time has involved them in uncertainty and obscurity. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life. *Foulk v. Brown*, 2 Watts, 209.

The plaintiff's bill sets forth that the debt was due March 8, 1859, from which date he claims it bears interest ; that on January 29, 1861, pursuant to an order and decree of the supreme court, in a proceeding to foreclose a mortgage, the road-bed, franchises and property of the Tyrone and Lock Haven Railroad Company were sold to Philip M. Price for a grossly inadequate consideration ; that on March 25, 1861, said Price and others were created a corporation, under the name of the Bald Eagle Railroad Company, which company was vested with all the franchises and property of the Tyrone and Lock Haven Railroad Company, and that the sum due to the plaintiff is still unpaid.

This bill was filed on September 8, 1884, twenty-five years after the debt became due and payable, and twenty-three years after the judicial sale of the property of the debtor, and the organization of the Bald Eagle Railroad Company, one of the defendants. What has been the cause of delay in bringing suit nowhere appears in the bill. Not a circumstance is stated showing that the debt is unpaid. Hence, on the face of the bill, the presumption is that the debt has been paid ; and the action falls unless it is unnecessary to show facts repelling the presumption of payment.

Where a bill is so framed as to present the objection that from lapse of time there is a legal presumption of fact that the debt has been paid without any attendant circumstances to obviate it, courts of equity act on the analogy of the law as to the statute of limitation, and will not entertain a suit for relief, if it would be barred at law. And this objection may be taken advantage of by demurrer ; but if it does not appear on the face of the bill, it must be taken by way of plea or answer. *Story Eq. Pl.*, § 503. See §§ 751, 813.

In *Pratt v. Vattin*, 9 Pet. 405, a bill for conveyance of the legal title to real estate was dismissed aside from the statute of limitation, because lapse of time was a bar, there being no circumstances stated in the bill or shown in the evidence to overcome the adverse possession ; and courts of equity will not entertain stale demands. The remark of Lord CAMDEN was approvingly quoted. "A court of equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands, where the party has slept on his rights

or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court." See *Wagner v. Baird*, 7 How. 234; Story Eq. Jur., § 1520, and note.

Decree affirmed and appeal dismissed at the costs of the appellant.

ELKINS & Co. v. THE SUSQUEHANNA MUTUAL LIFE INS. CO.

October 4, 1886.

INSURANCE—PAYMENT OF PREMIUM.

The policies issued by a fire insurance company contained the following stipulation: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." A., an agent of the company, by an arrangement with it, had power on receipt of a policy to deliver it and collect the premiums, the company looking to him for the premium or the return of the policy; upon delivery of the policy he was obligated to pay the premium as his own debt; he kept an account with the company and charged himself with the premiums as the policies were delivered, and took credit with any remittance he might make. *Held*, the implication would arise, that the absolute requirement of the policy as to the actual prepayments of the premiums by assured receiving policies through A. had been dispensed with, and the obligation of A. to pay the premium was in effect the payment of it by the assured.

Error to the court of common pleas, No. 2, of Philadelphia county.

Elkins, through his broker, Lancaster, applied to Crane, an agent of the Susquehanna Mutual Insurance Company, for an insurance against fire amounting to \$1,575. A policy was made out by the company, and sent to Crane, who delivered it to Lancaster.

On March 8, 1881, Lancaster paid Crane \$100 in response to a bill rendered for \$200.82, for three premiums, one of which was the premium upon this policy. On March 9, 1881, a fire occurred, destroying the insured building. On March 15, 1881, Lancaster paid to Crane the balance due of \$100.82, who receipted for it. On March 7, 1882, Elkins instituted an action against the insurance company.

The case was tried December 1, 1882. On December 5, 1882, there was a verdict for plaintiff for \$771.01. Subsequently, December 29, 1882, judgment was entered for defendant on a reserved point. A writ of error was taken to the supreme court, where the court below was reversed, and a *venire facias de novo* was ordered.

The case was again tried, and a nonsuit entered. A writ of error was taken to the entering of nonsuit. This writ was quashed in the supreme court. Subsequently the court of common pleas granted leave to the plaintiffs' counsel to make a motion *nunc pro tunc* to take off the nonsuit, considered the reasons why it should be taken off, and refused to take it off. This refusal was assigned as error.

Charles B. McMichael and *Alexander P. Colesberry*, for plaintiff in error. The extent of the agent's authority is a question for the jury. *Sheldon v. Conn. Mut. Ins. Co.*, 25 Conn. 207; *Hough v. City Fire Ins. Co.*, 29 id. 10. *Farmers' Ins. Co. v. Taylor*, 73 Penn. St. 342; *Ins. Co. v. Norton*, 96 U. S. 234. An insurance company may waive

any condition of policy inserted therein for its benefit. As the company may at any time, at its option, give authority to its agents to make agreements, or to waive forfeitures, it is not bound to act upon the declaration in its policy, that they have no authority. *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 577; *Miller v. Ins. Co.*, 12 Wall. 303. It should have been left to the jury to say whether Crane received the premium as agent of the company. The rule laid down in *Marland v. Royal Ins. Co.*, 71 Penn. St. 396; *Shaffer v. Ins. Co.*, 89 id. 296; *Pottsville Mut. Ins. Co. v. Minnequa Spring Co.*, 11 W. N. C. 507; does not apply here, because in none of those cases was there payment of the premium to the company or its agent. *Miller v. Ins. Co.*, 12 Wall. 285; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Ins. Co. v. Ball*, 20 Wall. 560; *Trunkle v. Penn. Fire Ins. Co.*, 12 Ins. L. J. 616. In the late case of *Riley, Adm'r, v. Commonwealth Mut. Fire Ins. Co.*, decided October 5, 1885, and reported in 43 Leg. Int., March 12, the facts are almost identical with those of the present case. *Universal Fire Ins. Co. v. Block*, 43 Leg. Int. 46, January 29, 1886.

James C. Sellers, for defendants in error. The court below committed no error in refusing to take off the nonsuit, because no motion to do so was made until after the expiration of the term at which the judgment was entered. *Syracuse Pit Hole Oil Co. v. Carothers*, 13 S. 379; *Lance v. Bonnell*, 9 Out. 46. It is settled beyond dispute that where a policy of insurance requires the premium to be actually paid before the liability of the insurer shall attach, the insurer will not be liable for a loss occurring before the premium is so paid. *Marland v. Royal Ins. Co.*, 71 Penn. St. 393; *Schaffer v. Mutual Fire Ins. Co.*, 89 id. 296; *Greene v. Lycoming Ins. Co.*, 91 id. 387; *Pottsville Mutual Ins. Co. v. Minnequa Springs Improvement Co.*, 100 id. 137. The part payment of the premium would not render the company liable. A policy of insurance is an entire contract. Until the whole consideration passed to the insurers their liability would not attach. A person cannot recover for part performance of an entire contract where he has failed in the performance on his part. *Martin v. Shoenberger*, 8 Watts & Serg. 367; *Shaw v. Turnpike Co.*, 2 P. & W. 454. A waiver could take place only in the manner stipulated in the policy. *Waynesboro Ins. Co. v. Conover*, 98 Penn. St. 384; *Ins. Co. v. Improvement Co.*, *supra*; *Universal Ins. Co. v. Weiss*, 106 Penn. St. 20. A party who avails himself of the acts of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of the proof lies on him to establish the agency and the extent of it. *Hays v. Lynn*, 7 Watts, 524; *Moore v. Patterson*, 4 Casey, 505; *Underwriters' Ass'n v. George*, 27 Penn. St. 238. Were the provisions of the by-laws binding upon the assured? The company defendant was a mutual company. Persons insured in a mutual insurance company are bound to become informed of its by-laws. *Susquehanna Ins. Co. v. Perrins*, 7 Watts & Serg. 348; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St. 402; *Dreht v. Adams Co. Ins. Co.*, 58 id. 443. In addition to this, by the terms of the policy, the by-laws were "declared to be a part of this contract," etc. Where

an application, or other paper, is made by the policy a part of the contract, the policy is inadmissible without the paper referred to. *Lycoming Ins. Co. v. Sailer*, 67 Penn. St. 108; *Underwriters' Ass'n v. George*, *supra*; *Lycoming Ins. Co. v. Storrs*, 97 Penn. St. 354; *Crawford Co. Ins. Co. v. Cochran*, 88 id. 230. But while the nonsuit is alleged by the plaintiff to have been entered because of the non-payment of the premium, the bill of exceptions does not show such to have been the case. There was equal ground for a nonsuit in the fact that no evidence was offered to show that the plaintiff had forthwith given written notice of his loss to the secretary of the company, as was required by condition 10 of his policy. Without proof of such notice the plaintiff was not entitled to recover. *Trask v. State Ins. Co.*, 5 Casey, 198; *Edwards v. Lycoming Ins. Co.*, 75 Penn. St. 378. There was also no evidence that the plaintiff had complied with the provision of the condition requiring a particular account of the loss, containing certain proofs of loss therein specified, to be furnished to the secretary within thirty days after the loss. Compliance with this, unless waived by the company, was also a condition precedent to recovery. *Commonwealth Ins. Co. v. Sennett*, 5 Wright, 161; *Beatty v. Lycoming Ins. Co.*, 66 Penn. St. 9; *Mueller v. South Side Ins. Co.*, 87 id. 399; *Universal Ins. Co. v. Weiss*, *supra*. There was no testimony offered to show a waiver, or excuse for non-performance, of either of these conditions.

CLARK, J. The policy of fire insurance upon which this suit is brought contained the following express stipulation:

"This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid," etc.

It was competent, however, for the company to waive this provision; they were not bound to adhere to this clause of their contract, inserted solely for their protection, if they chose to dispense with it. Whether or not the company did dispense with it was, perhaps, the question in the cause; whether there was evidence from which that fact might fairly be inferred is the question for consideration here.

That Robert Crane, at the time the policy was applied for, was the defendant's agent for some purpose is plain; what power he possessed to bind his principal, with reference to the payment of the premium, must be ascertained from an examination of the testimony. The court below having entered a compulsory nonsuit, the plaintiff's evidence must be taken as true; not only from the facts directly established, but every reasonable inference therefrom.

Crane, having been called as a witness, testified on this branch of the case as follows:

"I was, in December, 1880, the agent of the Susquehanna Mutual Insurance Company for certain purposes; to receive applications, forward them to the company, and, if approved, they to write the policies, and send me the policies; I to make record of the policies, and to deliver to the assured or his agent; I collected the premiums and remitted the same to the company, less my commissions; I received this policy from the company direct by mail, and delivered it to Thomas J. Lancaster; I had a running account with Mr. Lancaster;

in March, the day before the fire at the Elkins' property, he paid me \$100 on account."

Upon cross-examination, he said :

"I commenced business with the Susquehanna Insurance Company April 20, 1880; my appointment was in writing; I did not have a certificate under seal; I got permission from them to send them business, and it resulted in an agency for certain purposes; I sent them business as agent, and signed my name as such in communications to them; there were a good many other details; I did not always sign my name as Robert Crane, manager. Ninety-nine times out of one hundred I signed as agent."

Being recalled and examined by trial judge, Crane testified:

"I charged myself in the day-book with the premium; I was responsible for the premium; they looked to me for the payment of the premium or the return of the policy; I often advanced the money to the companies; I was obligated to pay the company the premium after I had received and delivered the policy, as the agent of the company."

From this it appears that Crane had power, on receipt of a policy, to deliver it to the assured, or to his agent, and to collect the premiums. The company look to Crane either for the return of the policy or for the premium. Upon delivery of the policy he was obligated to pay the premium, as for his own debt. He, therefore, kept an account with the company, and charged himself with the premiums, as the policies were delivered, and took credit with any remittances he might make.

Now, if it be true that an arrangement to this effect existed between the company and Crane, and that may be fairly inferred from the evidence, the arrangement would seem to indicate that the company was content to accept the responsibility of their own agent for such sums as he might receive or otherwise provide for on delivery of the policies, and to substitute the personal liability of the agent in the place of the security which the suspension clause in their contract afforded.

This implication is greatly strengthened by the course of business which the agent pursued in the conduct of the company's business. He delivered such policies as he chose, and charged the premiums in an account which he kept. He had a running account with Lancaster, and the premiums for this insurance were charged up to Lancaster when the policy in suit was delivered to him. The effect of such a course of business as respects Crane certainly was to substitute the liability of Lancaster for that of the assured, and Lancaster says he usually rendered bills to Mr. Elkins once in three months.

In view of the course of business pursued by the company with Crane and by this agent in the consummation of their contracts, we think the implication might fairly arise that any absolute requirement of the policy, as to the actual prepayment of the premiums, had been dispensed with, and that the obligation of the agent to pay the premium was in effect the payment of it by the assured. If Crane had advanced the money to the company and delivered the policy, no one can doubt that it would have taken immediate effect, and in what respect can there be any difference, in principle, if Crane, with the company's consent,

assumed the payment, thus substituting his personal liability in the place of the money? Lancaster became debtor to Crane and Crane to the company, and this, in view of the course of business pursued by the company, would, as between the insurer and the insured, we think, be equivalent to the actual payment.

We think there was enough in this case to require its submission to the jury.

The judgment is, therefore, reversed and a *venire facias de novo* awarded.

Judgment reversed.

DECHERT v. COMMONWEALTH, EX REL. SMART.*

October 4, 1886.

PHILADELPHIA — COMPTROLLER — COUNTERSIGNING WARRANT — DISCRETIONARY POWERS — MANDAMUS — CONTRACT — BILLS OF ASSESSMENT — PAYMENT.

Where a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers according to his or its discretion, *mandamus* will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though in fact the decision may have been wrong.

The office of comptroller of Philadelphia was designed to operate as a check upon the councils in the appropriation of the public moneys, and it is the duty of the one holding that office to see that the money of the city is not applied to "any object not authorized by law," and if in his judgment a warrant, issued and presented to him, has been issued for the purpose of applying the money to an object not authorized by law, he may refuse to countersign it.

B. contracted with the city of Philadelphia to construct a sewer in Sixty-third street, agreeing to accept in full as payment bills of assessment against the abutting property without recourse to the city. The work was performed and the bill accepted later. B. filed two claims against property of C., against which he had received bills of assessment, and in proceedings to enforce them, defense was made that the property was rural; later the councils passed a relief ordinance directing the chief engineer and surveyor to draw a warrant for the construction of a sewer on Sixty-third street in front of property of C., fixing a sum but naming no person to whom the money was owing. The warrant was drawn, but the comptroller refused to countersign it, because the appropriation was not authorized by law. *Held*, the common pleas could not by *mandamus* compel the comptroller to countersign the warrant.

Error to the court of common pleas, No. 2, of Philadelphia county.

The council of Philadelphia, by a general ordinance approved May 12, 1866, provided *inter alia*, for the rates and manner of payment for sewers, viz., that the owners of ground in front of which the sewer was laid should pay for it at the rate of \$1.25 per foot; that bills assessing the expense in this way should be prepared by certain city officials, and further, "It shall be a condition of the contracts awarded under the provisions of this ordinance that the contractor shall accept assessment bills . . . as so much cash paid by the city on the said contract, and that he shall collect the same at his own cost without recourse to the city in any event."

By ordinance approved February 16, 1869, the rate was increased to \$1.50 per foot.

By ordinance approved June 24, 1881, it was directed, *inter alia*, that a sewer be constructed on Sixty-third street between Market and

* *City of Philadelphia v. Buckley*, 7 East. Rep'r, 10 — C. P., opinion of ARNOLD, J.

Arch streets — a distance of one square — and that it should be a condition of the contract entered into on behalf of the city therefor, that the contractor should “accept the sums assessed upon and charged to the properties lying on the lines of the said sewers in manner and form authorized by ordinance . . . approved May 12, 1866, and supplement thereto approved February 16, 1869.”

An agreement under seal dated August 19, 1881, was entered into between the city of Philadelphia, party of the first part, and T. P. Smart, party of the second part, for the construction of the sewer authorized in the ordinance approved June 24, 1881; the whole expense of the work was agreed to be paid for as follows:

“For sewer three feet in diameter and manholes, the sum of the assessment bills given by the survey department against the properties or premises fronting on the streets on which the sewer forming the subject of this contract is to be constructed, which said bills the said party of the second part agrees to accept in full for all work done under this contract. The said party of the second part further agrees to make no claim whatever upon the city of Philadelphia, excepting upon bills against city property, it being distinctly understood and agreed that the city of Philadelphia does not in any wise guarantee any of the said bills to be good and collectible. . . . Payments for the entire work shall be made by the chief commissioner of highways upon estimates signed by the chief engineer and surveyor, in assessment bills prepared as specified in section 2 of ordinance ‘regulating the assessment upon property for the construction of sewers,’ approved May 12, 1866, and warrants upon the city treasurer to an amount as authorized by ordinance approved April 3, 1868, in payment for the street intersections, manholes and legal deductions. All of which payments shall be received as so much cash, and be collected without recourse to the city of Philadelphia; but for the purpose of better enabling the contractor to collect the same, the name of the said city may be used, and all her legal remedies whether by bill [lien] or otherwise employed.”

Smart then constructed the sewer and received assessment bills for the work as agreed, including two against the property on the east side of Sixty-third street, extending along the whole length of the sewer. This property was then vacant ground, being owned by the Grandom Institution, a benevolent corporation. The bills not being paid, Smart filed on February 1, 1882, in the name of the city to his own use, claims against this property as liens in court of common pleas No. 4; defense was made by plea that the property was not liable, because it was rural; Smart replied that the property was not rural to such a degree as to relieve it from liability. Smart ordered the case on the trial list, and the suits at the time of arguing this case in the supreme court were still pending without further proceedings and as liens upon the property.

The councils passed the following ordinance, approved June 9, 1885:

“AN ORDINANCE

“To authorize the drawing and countersigning of a warrant for a sewer in front of the Grandom Institute.

"SECTION 1. The select and common councils of the city of Philadelphia do ordain, That the chief engineer and surveyor be, and he is hereby, directed to draw, and the city comptroller authorized to countersign, a warrant to the amount of \$600 for the construction of a sewer in Sixty-third street, in front of the Grandm Institute, on the east side of said street between Market and Arch streets, the same to be drawn against item 33 in the annual appropriation department of surveys for the year 1885, and all ordinances inconsistent herewith be and they are hereby repealed: Provided, that before any applicant shall have the use of the sewer, the full amount charged against the frontage shall be paid by the said applicant."

The chief engineer and surveyor then drew a warrant for \$600 in favor of Smart; this was presented to the city comptroller to be countersigned. The comptroller considered the subject of countersigning the warrant and refused to countersign it, but returned it to the chief engineer and surveyor.

The reasons for his refusal were: Because the ordinance of June 9, 1885, did not confer authority upon the chief engineer and surveyor to draw the warrant in favor of Smart; because Smart had done no work to entitle him to receive the money from the city treasury; he was estopped by his agreement and acts from asserting any claim; because the councils had no authority to appropriate money for the purpose alleged to be intended by the ordinance; because the question on which Smart based his claim, viz.: the non-liability of the property for the sewer claim, was pending and undetermined in another proceeding. Smart applied for a *mandamus* to which the comptroller filed a return. Smart demurred to the return.

The alternative writ commanded the respondent to countersign the warrant or show cause why he should not; the causes for not countersigning the warrant having been fully set out in the return, and having been deemed insufficient by the court, the relator's demurrer was sustained and a peremptory *mandamus* awarded.

Henry T. Dechert, Robert Alexander and Charles F. Warwick, for plaintiff in error. Under the act of February 2, 1854, section 12, the comptroller has succeeded to all the duties and powers of county auditors. *Taggart v. Commonwealth*, 12 W. N. C. 465; 6 Out. 354. The county auditors were given ample powers to "audit, settle and adjust" the accounts of all other county officers, to compel the appearance of witnesses, and production of papers, to administer oaths, and to commit persons refusing to testify. Bright. *Purd. Dig.*, "County Auditors," 376. The powers of county auditors are as full and complete within their jurisdiction as are the powers of courts. *Runkle v. Commonwealth*, 1 Out. 328; S. C., 10 W. N. C. 213. The powers conferred by the acts above referred to have been clearly recognized in the ordinances of councils: ". . . Whenever a warrant on the treasury shall be presented to him to be countersigned, the person presenting the same shall, if the comptroller require, produce evidence." Ordinance of Nov. 6, 1862, § 4; West. *Dig.* 66. When a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers according to his or its discretion,

mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though, in fact, the decision may have been wrong. *Respublica v. Clarkson*, 1 Yeates, 46; *Commonwealth v. Judges*, 3 Binn. 273; *Griffith v. Cochran*, 5 id. 87; *Commonwealth v. County Commissioners*, id. 536; *Commonwealth v. Judges*, 1 S. & R. 187; *Commonwealth v. District Court*, 5 W. & S. 272; *Drexel v. Man*, 6 id. 386; *Commonwealth v. Hultz*, 6 Barr. 469; *Commonwealth v. Perkins*, 7 id. 42; *School Directors v. Anderson*, 9 W. 388; *Commonwealth v. Henry*, 13 id. 530; *Schlaudecker v. Marshall*, 22 P. F. S. 200; *Commonwealth v. Mitchell*, 1 Norr. 343; *Commonwealth v. Douglass*, 42 Leg. Int. 337; *Runkle v. Commonwealth*, *supra*.

It is well settled that an injunction will lie at the instance of tax payers against a municipality, and its accounting and disbursing officers, to restrain the drawing, countersigning and paying of warrants under an appropriation illegally made. *Dill. Mun. Corp.*, § 914 (3d ed.). Such an injunction was granted at *nisi prius* by THOMPSON, Ch. J., against the comptroller and city treasurer to restrain the countersigning and paying of warrants under an ordinance making a void appropriation. *Sank v. Philadelphia*, 4 Brewst. 133. In *Commonwealth v. Mayor of Lancaster*, 5 Watts, 152, the councils had, by an ordinance passed in regular form, voted a certificate of loan to one of its members for services rendered by him; such an appropriation was prohibited by the act of incorporation; the mayor refused to issue the certificate, and a *mandamus* to compel him to do so was refused. In *Faas v. Warner*, 9 W. N. C. 412; 15 Norr. 215, an act of assembly had directed the comptroller of Allegheny county to examine and the county commissioners to pay the claim of a contractor who had furnished bread to a deceased sheriff for the use of prisoners in the county prison; the comptroller refused to examine the claim, and on proceedings in *mandamus* it was held by this court that the act was unconstitutional, and the comptroller had properly refused to act.

The comptroller cannot be elected by councils, and it has never been decided that councils may impose duties on him other than those conferred by statute. *Taggart v. Commonwealth*, 12 W. N. C. 465; 6 Out. 354. It is well settled that where the relator has a remedy at law covering the same questions as those raised in the proceeding for a *mandamus*, the *mandamus* will be refused even where the act sought to be compelled is ministerial. *Commonwealth v. Rosseter*, 2 Binn. 360. So *mandamus* is the appropriate remedy only where there is a clear legal right in the relator, a corresponding duty in the respondent, and the want of any other adequate and specific remedy. *Commonwealth v. Councils of Pittsburgh*, 10 Cas. 496. It is not contended by the relator that the city was in any way liable to pay Smart for the sewer. That point was definitely settled in two recent cases, in which it was held that the contractor, where he had released the city from any liability on the assessment bills, "cannot make the city liable to pay him," where the bills had been held to be invalid in suits properly brought upon them. *Horter v. City*, 13 W. N. C. 40; *Dickinson v. City*, 14 id. 367.

The foundation of Smart's claim in this case, by his own allegation, is the invalidity of the assessment bills, and the consequent appropriation. But he is equally unable to set up such matters in the present action as he would be in a suit at law against the city. Every objection that could be made in such a suit exists here, the limited power of the municipality to contract, the express agreements of the parties, and the relator's knowledge of the circumstances of law and fact. "With this full knowledge and means of knowledge, the plaintiffs voluntarily assumed the risk of collecting the assessment. Having failed in the attempt so to do, they cannot now repudiate their agreement and make the city liable to pay them." *Horter v. City, supra*; *Dickinson v. City, supra*. These circumstances, together with his abiding by the agreement, accepting the bills, and his own allegations in the pending suits on them, clearly estop Smart from asserting any claim against the city. Slighter circumstances of acquiescence on the part of property-owners have been held to estop them from raising the question of their non-liability for municipal improvements. *Bidwell v. Pittsburgh*, 4 Norr. 412; *McKnight v. Pittsburgh*, 10 id. 273. This was not a local assessment for a general benefit. The sewer ran for a single square with no connection at the upper end and emptied into a creek at the lower. Such an improvement does not come within the rule of *Hammett v. Philadelphia*, 15 S. 146, and like cases. The ordinance would be void because it is making a gratuity not only to Smart, but also to the Grandom Institution in relieving it from the claims now existing as liens against its property. By section 7 of article IX of the Constitution, viz.: "The general assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to any corporation, association, institution or individual." This section is intended to confine the municipal expenditures to public objects. The word "appropriate" is new and expanded the effect of the amendment of 1857, so as to embrace money in the treasury itself. *Speer v. Directors*, 14 Wright, 150; *Wilkesbarre Hospital v. Luzerne Co.*, 3 Norr. 55. Under this section no city can be authorized to appropriate money for any corporation, association or individual; *e. g.*, not to the support of a benevolent institution. *In re Northern Home for the Friendless Children*, 2 W. N. C. 349. Where a county had contracted with the sheriff to board prisoners, and the sheriff had died leaving a bill for bread unpaid, and an act of assembly directed the comptroller to ascertain the amount due and the commissioners to pay it, it was held that the act was unconstitutional. *Faas v. Warner*, 9 W. N. C. 412; 15 Norr. 215. It is equally prohibited on general principles of law governing municipal corporations. Whenever a municipality attempts to exercise powers not within the proper province of local self-government, whether the right to do so be claimed under express legislative grant or by implication from the charter, the act must be considered as altogether *ultra vires*, and, therefore, void. *Cooley Const. Lim.* 211. As a general principle "councils, who are mere trustees of public functions, ought not to vote away the people's money as matter of

grace and favor." LOWRIE, Ch. J., in *Smith v. Commonwealth*, 5 Wright, 341. See, further, *Phila. Association, etc., v. Wood*, 3 id. 73; *Washington Co. v. Berwick*, 6 S. 466; *Tyson v. School Directors*, 1 id. 9.

E. Rosenberger and *David W. Sellers*, for defendant in error. Though the contractor could not have adversely recovered from the city for this work because of his agreement—*Horner v. City*, 13 W. N. C. 40—yet the city did pass an ordinance the effect of which was to pay for the work done, and to reimburse the city treasury when the sewer should be used by the property; this being the system in common use relative to water-pipes, and which has met the approval of this court in *Philadelphia v. Cooke*, 6 Casey, 56. The provision that he "shall perform all the duties now enjoined by law on the county auditors" has no relation to this case. County auditors were related in their duties before 1854 only to county officers, such as sheriff, coroner and county commissioners. §§ 44 to 61, both inclusive, act of April 15, 1834, P. Laws, 546-7. Now, as the ordinance appropriated a specific sum to pay for public work done, the comptroller had no auditing or discretionary duties relative thereto. His public duty was only ministerial as to this, and because a check on the city treasurer was not good without his signature. *Appeal of City*, 5 Norr. 186. As the city could apply the same system in the construction of sewers which she always had adopted to water-pipe, that is, pay for the work in the first instance, and herself collect the charges, so she could modify any contract after it was made; *City v. Hays*, 12 Norr. 72. The court below followed precedent. *Com. ex rel. v. Comptroller*, 7 Phila. 29. The case of *Runkle v. Com.*, 1 Out. 328, is to the same effect. That claim was one of disputed title and claim. The warrant was not ordered to be drawn by the councils of the city of Reading. It was the act of a clerk without previous authority of the councils. As to such a claim, of course, there must be an appropriation, and the person entitled thereto must be considered.

CLARK, J. This writ of error is taken to the order and decree of the court of common pleas, No. 2, of Philadelphia, awarding a writ of peremptory *mandamus*. The relator, T. P. Smart, was a contractor of the said city, and the respondent, Robert P. Dechert, comptroller of the city and county of Philadelphia. The alternative writ recited that under authority of an ordinance passed June 24, 1881, the relator had constructed a sewer for the city; that certain property on the line was not subject to assessment, or municipal charge for the construction, and that by an ordinance, approved June 9, 1885, the chief engineer and surveyor was directed to draw, and the city comptroller authorized to countersign a warrant for \$600, to pay for the construction of said sewer, in front of the property referred to; that the chief engineer had drawn the warrant as directed, but the comptroller had refused to countersign it, and had returned it to the chief engineer, and that the relator had no specific remedy at law, for the grievance thus sustained. The comptroller was, therefore, commanded to countersign the warrant, or show cause why he should not.

The comptroller made a formal return to the alternative writ and to that return the relator filed a demurrer. All matters, therefore, sufficiently set forth in the return must be taken for true, and these with the material allegations of the writ, not traversed by the return, constitute the substantial facts upon which this case is to be determined.

The respondent in his return to the writ, as the comptroller of the city and county of Philadelphia, claims to exercise a discretionary power, under the law, in refusing to countersign the warrant referred to, and that in the exercise of that discretion he was not subject to the direction of the court; further, that under the provisions of the ordinance of city councils, and by the terms of the contract under which the work was done, the construction of the sewer had been fully paid for; that the city owed no debt, and was under no obligation whatever to the contractor therefor; that the appropriation was, therefore, not authorized by law, and that in the proper exercise of his duties as comptroller he was required to withhold his signature from the warrant.

It is well settled that *mandamus* will lie to compel the performance by public officers of duties purely ministerial in their character, but it is equally well settled that as to all acts and duties necessarily calling for the exercise of judgment and discretion on their part, *mandamus* will not lie. Whilst the writ may, perhaps, be awarded to set the latter class of officers in motion, and to compel action upon the particular matters over which they may have jurisdiction, it will in no manner interfere with the exercise of that discretion, nor control or dictate the judgment or decision which shall be reached. It is unnecessary to quote authorities in support of this plain and well-established principle of the law; such has been the uniform course of all the decisions, and in this case we do not understand the doctrine to be denied. The question for our consideration, therefore, is, whether or not the comptroller of the city and county of Philadelphia, in the exercise of his office, when called upon to countersign a warrant, is invested with a discretionary power in the performance of that duty, or whether his duty in this respect is merely ministerial.

On 12th May, 1866, a general ordinance of councils was approved providing for the construction of sewers in said city; that the owners of ground on the line thereof should pay at the rate of \$1.25 per foot front; and that bills of assessment at this rate in each case should be prepared by the city. The ordinance provides further as follows: "It shall be a condition of the contracts awarded under the provisions of this ordinance that the contractor shall accept assessment bills as so much cash paid by the city on the said contract, and that he shall collect the same at his own cost without recourse to the city in any event." By ordinance approved February 16, 1869, the rate was increased to \$1.50 per foot front.

On the 24th June, 1881, an ordinance was approved, authorizing and directing *inter alia* a sewer to be constructed on Sixty-third street, between Market and Arch, and providing "that it should be a condition of the contract, entered into on behalf of the city for the construction of the several sewers thereon authorized, that the contractor should accept the sums assessed upon and charged to the properties lying on

the line of said sewers, in manner and form authorized by ordinance, entitled, etc., approved May 12, 1886, and the supplement thereto approved February 16, 1869."

On the 19th August, 1881, T. P. Smart, the relator, under a written contract with the city, agreed to construct the sewer on Sixty-third street, as authorized by the ordinance of 24th of June, 1881; the price and mode of payment were agreed upon as follows: "For sewer three feet in diameter, per lineal foot and manholes, the sum of the assessment bills given by the survey department against the properties or premises fronting on the streets on which the sewer forming the subject of this contract is to be constructed, which said bills the said party of the second part agrees to accept in full for all work done under this contract. The said party of the second part further agrees to make no claim whatever upon the city of Philadelphia, excepting upon bills against city property, it being distinctly understood and agreed that the city of Philadelphia does not in any wise guarantee any of the said bills to be good and collectible. Payments for the entire work shall, be made by the chief commissioner of highways, upon estimates signed by the chief engineer and surveyor, in assessment bills prepared as specified in section 2 of ordinance regulating the assessment upon property for the construction of sewers," approved May 12, 1866, and warrants upon the city treasurer to an amount as authorized by ordinance approved April 3, 1868, in payment for the street intersections, manholes and legal deductions. All of which payments shall be received as so much cash, and be collected without recourse to the city of Philadelphia; but for the purpose of the better enabling the contractor to collect the same, the name of the said city may be used, and all her legal remedies, whether by bill or otherwise, employed."

Smart constructed the sewer and, it is admitted, received the assessment bills in full for the work, according to contract, including two against the Grandom Institute, the property on the east side of Sixty-third street extending along the whole length of the sewer. He, subsequently, on February 1, 1882, filed in the name of the city of Philadelphia, to his own use, two claims for the construction of the sewer against the Grandom Institute and the said property; which claims are entered in the court of common pleas, No. 4, of Philadelphia. Having issued writs of *scire facias*, the Grandom Institute pleaded *non assumpsit*, and that the property was rural; the relator replied that the property was not rural. The relator ordered the cases on the trial list, but no further proceedings appear of record, and the suits remain pending and unsatisfied. By the express terms of the general ordinance of May 12, 1866, as well as by the ordinance of June 24, 1881, under and subject to which the contract was made, as well as by the conditions of the contract itself, payment was to be made in assessment bills, which were accepted as cash, to be collected at the contractor's cost and without recourse to the city in any event; it was expressly provided also, that the city did not "in any wise guarantee any of the said bills to be good and collectible."

It is plain, therefore, that the city owed Smart nothing for the construction of the sewer; he had been paid in full four years before the

ordinance was passed authorizing the warrant, and paid precisely as the contract provided.

It is not pretended that there remained any obligation on part of the city, moral or otherwise, to pay to Smart in any other way. There was no mistake, no change of circumstances, or any other intervening matter which caused the contract to operate oppressively on the contractor; the parties stood on equal ground, no advantage was taken in the contract, and the law, as well as the facts, was presumably as well known to one party as to the other.

When this warrant was presented to the comptroller for his signature, what was his duty with reference to it? The duties of the comptroller, in this respect, are defined in various acts of assembly, as follows:

Act 2d February, 1854, section 12, P. L. 30: "He shall countersign all warrants on the city treasurer, and shall not suffer any appropriation made by the city councils to be overdrawn, and shall perform all the duties now enjoined by law on the county auditors. He shall superintend the fiscal concerns of the city in such manner and make reports thereon at such times as shall be prescribed by ordinance."

Act 21st April, 1855, section 21, P. L. 269: "It shall be a misdemeanor in office for the comptroller of the city to pass, or the treasurer of the city to pay, any bill or order for any object not authorized by law."

Act 13th May, 1856, section 24, P. L. 572: "It shall be lawful for the city comptroller, and his duty, whenever required by any citizen, to administer an oath or affirmation to any person presenting a bill against the city, as to its accuracy, the prices actually paid, or contracted to be paid therefor, whether others and who are interested therein, and as to whatsoever matter he may deem needful to protect the interests of said city."

Act 13th May, 1856, section 29, P. L. 573: "The city comptroller shall be and he is hereby required to keep separate accounts for each specific or separate item of appropriation made by city councils, to each and every department of the city, and shall require all warrants to state particularly against which of said items the said warrant is drawn; and he shall at no time permit any one of the items of appropriation to be overdrawn, or the appropriation for one item of expense to be drawn upon for any other purpose, by any one of the departments than that for which the appropriation was specifically made; he shall, upon receiving a bill or warrant from any one of the departments, proceed immediately to examine the same, and if the said bill or warrant contain an item for which no appropriation has been made, or the appropriation for which is exhausted, or to which, from any other cause, he cannot give his approval, it shall be his duty immediately to inform such department, and the warrant therefor shall not be issued unless by special authority from the city councils."

By the act of June 11, 1879, P. L. 130, the comptroller is directed not to countersign any warrant until councils have passed the appropriations necessary for each department, and the total of all appropriations, estimates and obligations is within the estimate of the income

of the city; he is also forbidden to countersign any warrant for the expenditure of money without a previous appropriation."

It will be observed that the warrant was from "one of the departments" of the city government—the department of surveys; it was drawn by the chief engineer and surveyor against a particular item in the annual appropriation. It was issued, it is true, pursuant to an ordinance of councils; but all warrants may be said to be so drawn. The power to raise money for city purposes, and also the power to disburse it, subject to certain restrictions, is vested in the city councils; and the warrants, which issue from the several departments, are drawn under such regulations of the councils as may best serve the public convenience and promote the dispatch of business.

It will also be observed that the ordinance of June 9, 1885, did not, in terms, authorize the issue of a warrant to Smart, the relator; it directed the chief engineer and surveyor to draw "a warrant to the amount of \$600, for the construction of a sewer on Sixty-third street," etc.; it did not name the contractor, or other person, to whom the money was owing; it simply authorized the application of a portion of item 33 of the annual appropriation to a particular purpose, but did not designate the party or parties entitled to receive it.

Upon receiving this warrant from the department of surveys, it was the comptroller's duty to "proceed immediately to examine the same," and, if it contained an item for which no appropriation had been made, or for which the appropriation was exhausted, "or to which from any other cause" he could not give his approval, it was his duty immediately to inform such department, and the warrant, therefore, could not again be issued from the department, and presented for his signature unless by special authority of councils.

It was his duty in any case, before countersigning the warrant, to know that the appropriation necessary for each department had been made, and that the total was within the estimate of the income, as required by the act of 1879; to be satisfied that the warrant covered items for which appropriations had been made, and that these appropriations had not been exhausted as required by the act of 1856; these inquiries, as they involved no particular exercise of discretion, are perhaps of a clerical, and, therefore, of a ministerial character only. But other duties devolved upon him as superintendent of the fiscal affairs of the city. Act 2d February, 1854. It was his duty to do what he might "deem needful to protect the interests of the said city." Act 13th May, 1856. To this end—act 2d February, 1854—he was invested with all the powers, and directed to perform all the duties, enjoined by law on county auditors; and, as a legal sanction to the just and full performance, on his part, of these duties in the interest of the city, it was declared—act 21st April, 1855—to be a misdemeanor in office, and to subject him to the pains and penalties of criminal law if he should "pass any bill or order for any object not authorized by law."

It is plainly then the duty of the comptroller, with due discrimination, to determine what "objects" are "authorized by law" for appropriation of the city moneys; he is guilty of a misdemeanor in office if he does not, and the discharge of this duty necessarily calls for the

exercise of judgment and discretion on his part. It is his duty, of course, to respect the contracts lawfully made on part of the city, and to discharge the legal obligations of the city, by countersigning warrants, regularly drawn in payment thereof, but it must be conceded that he was not bound to do what, in his judgment, was by the law positively forbidden.

Possessing all the powers of the county auditors, it was his duty to audit, settle and adjust the accounts of the city, and, in so doing, he could not, with propriety or consistency, reject a claim which he had previously approved. His jurisdiction as comptroller in the performance of the duties of the county auditors was as full and complete as that of the courts, and he was entitled to exercise these important functions free from all interference. The court might, when a proper case was presented, correct an error in judgment on part of the comptroller, but they would not by *mandamus* interfere in advance with that discretion, which it was his right and duty freely to exercise, or dictate the decision which, in a given case, he must reach.

In the event of the comptroller's refusal to countersign any warrant, the courts of the Commonwealth are open for vindication of the claimant's rights as against the city; and if these alleged rights are submitted to the decision of a court of competent jurisdiction, and are there finally adjudicated in his favor, either the neglect of councils to provide for payment, or the refusal of the comptroller to countersign a warrant in discharge of a legally ascertained liability of the city, would present a different question here.

In *Runkle v. Commonwealth*, 1 Out. 328, the specific question was as to the duties of comptrollers of cities of the third, fourth and fifth classes, under the act of 23d May, 1874, yet that case and the case in hand are precisely alike in this, that the city comptroller in both instances was expressly authorized to perform all the duties enjoined by law on county auditors. In delivering the opinion of the court in that case our brother GORDON says:

"Upon him also is imposed all the duties now enjoined on county auditors by the laws of the State, and he shall scrutinize, audit and settle all accounts whatever in which the city is concerned.

"But the powers of county auditors are as full and complete, within their jurisdiction, as are the powers of courts. They may issue subpoenas for parties and witnesses; they may compel the production of books and papers, administer oaths, compel the attendance of witnesses, and punish contempts by attachment. With this judicial and deliberative power, the comptroller of the city of Reading is clothed, and of necessity must be left free to exercise his own judgment. But how can he exercise these important functions if he is to be controlled in his judgment by the court of common pleas, or by any other court.

"In the present case, Comptroller Runkle, for reasons satisfactory to himself, refused to approve the warrants drawn in favor of Keepelman. This he had a right to do; this it was his duty to do, if he believed the interests of the city would be protected by the refusal of such approval, and we know of no power in the common pleas to substitute its judgment for that of this officer. Had the comptroller

refused to act in the matter at all, the court, by its *mandamus*, might have compelled him to act, but this was all it could do; but after he had acted, and had refused to sanction the warrants, it was a mere picee of usurpation on the part of the court to attempt to compel him to revise his decision, and adopt its judgment in preference to his own.

"The rule governing cases of this kind may be stated as follows: Where a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers according to his or its discretion, *mandamus* will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though, in fact, the decision may have been wrong. *Griffith v. Cochran*, 5 Binn. 87; *Commonwealth v. Perkins*, 7 Penn. St. 42; *Commonwealth v. Mitchell*, 82 id. 343."

The office of the city comptroller is certainly one of the gravest importance and responsibility; it is not to be supposed that the powers conferred will be prostituted to any purpose of injustice or oppression, but will be exercised in good faith for the protection of the people. We think the office was designed to operate in the manner indicated, as a check upon the city councils in the appropriation of the public moneys. The city corporation holds its moneys in trust to be used for legitimate corporate purposes only; there is no authority to apply them otherwise, or to bestow them upon those to whom the city was under no obligations whatever.

It is the comptroller's plain duty, as the representative of the people and of the city in its corporate capacity, to see to it that it is not applied to "any object not authorized by law," and if, in his judgment, the warrant in question was so issued, he was justified in refusing to countersign it.

The judgment is reversed, and judgment is now entered upon the demurrer in favor of the respondent.

THE PHENIX IRON COMPANY ET AL. v. THE COMMONWEALTH, EX REL.
GEORGE H. SELLERS.

October 4, 1886.

MANDAMUS—CORPORATION—STOCKHOLDER—BOOKS—INSPECTION—PRACTICE IN
MANDAMUS CASES.

B., who was a stockholder to a considerable amount in a corporation that was prosperous, but that had declared no dividend for nine years, was desirous of making a reasonable personal inspection of the books and papers of the establishment, in order that, with the aid of a disinterested expert, he might make extracts such as would be required in preparation of a bill in equity, he purposed filing for relief. The privilege was denied him. *Held*, that he could successfully invoke the aid of a *mandamus* to examine such books and papers of the company as were in existence, and contained the desired information.

Error to the court of common pleas, No. 2, of Philadelphia county. The facts are set forth in the opinion.

R. C. McMurtrie for plaintiffs in error. The real questions are: 1. Must a ground be stated for a right of inspection? 2. Are the averments of these grounds traversable? 3. If denied, does the same right exist as when they are admitted? We cite the following authorities:

Where there are firms with common partners they deal with each other as strangers, and it is *a fortiori* that corporation may deal with their members. *Bolton v. Puller*, 1 Bos. & Pul. 539; Lind. 939; *Gordon v. Preston*, 1 Watts. 388. The right to affirm or disaffirm contracts made with directors is in the body of stockholders who are not parties. *Foss v. Harbottle*, 2 Hare, 494, 497, 499; Lind. 939. *Atwood v. Merryweather*, 5 Eq. 464, in note, is a most complete proof of this proposition. "No one but the corporation can litigate the questions proposed to be litigated by the relator; and his right to compel them or to use their name to do this, depends on whether the stockholders who have not participated in the fraud, elect to litigate or acquiesce." *Craig v. Gregg*, 83 Penn. St. 19.

Samuel W. Pennypacker and *John G. Johnson*, for defendant in error. It is not at all necessary to our case that the facts should be either conceded or ascertained before the issue of the writ. This court, resting upon the decisions in *Rex v. The Merchant Tailors' Co.*, 2 Barn. & Ad. 115, and *Burton v. Sadlers Co.*, 31 Law Jour. 62, holds that we are entitled to inspect and see whether we can raise a case in our favor by examining the books.

CLARK, J. This proceeding originated in an application by George H. Sellers for a writ of alternative *mandamus* against the Phoenix Iron Company, a manufacturing corporation, to compel the company to produce for inspection, their books and papers, to enable him to prepare a stockholder's bill in equity, in respect of certain grievances which the relator alleges he has sustained by the fraudulent management of the affairs of the company.

On the hearing of the rule to show cause, the defendants resisted the application on two grounds: first, that there was no right to relief in this form; that the remedy was in equity; and second, if there was such right, the relator was not entitled under the facts. Affidavits were filed in the court below as to the facts on part of the defendants, and upon argument the writ was refused. The record having been removed to this court, and the refusal of the writ assigned for error, upon due consideration here the judgment was reversed, and the alternative writ allowed. *Com. ex rel. v. Phoenix Iron Co.*, 105 Penn. St. 111. The plaintiff's case was presented in his petition; the special facts upon which the writ was allowed were fully stated by our brother TRUNKY, who delivered the opinion of the court.

In some of the States, we believe, the practice is, when the application is by formal petition, setting forth the grounds in detail, to determine the case upon the traverse of the petition, instead of the traverse of the return to the alternative writ — 9 Ohio St. 599 — but the practice in Pennsylvania, especially since our statute of June 14, 1836 — *Purd. Dig.* 990 — is, to hear the case upon the matters alleged in the return. The nineteenth, twentieth and twenty-first sections provide as follows:

19. The jurisdiction aforesaid shall be exercised in the manner and according to the rules hitherto observed and practiced in the supreme court of this Commonwealth, except so far as the same shall be altered by this act.

20. Whenever any writ of *mandamus* shall issue out of the supreme court, or out of any court of common pleas, the person or persons who, by the laws of this Commonwealth, ought to make a return to such writ shall make his or their return to the first writ of *mandamus* so issued.

21. It shall be lawful for the person suing or prosecuting any such writ to demur, or to plead to or traverse, all or any of the material facts contained in such return; and the person or persons making such return shall reply, take issue or demur, and such other and further proceeding may be had thereon, except as hereinafter provided, as might be had if the person suing such writ had brought his action for a false return.

Upon the rule to show cause, the question was upon the sufficiency of the relator's suggestion of his right to the relief prayed for, upon the footing of the facts therein stated, and notwithstanding the latitude allowed in the argument, the opinion filed, and the judgment, awarding an alternative writ, clearly show that the case was so considered by this court.

"Has the relator shown such facts as entitle him to an alternative *mandamus*," is the inquiry of the learned judge delivering the opinion of the court, and then follows a statement of the facts relied upon, as set forth by the relator.

The proper practice in cases of *mandamus* is very succinctly stated in *Treasurer of Jefferson County v. Shannon*, 51 Penn. St. 221, as follows: "The act of assembly plainly points out the course to be pursued when a proper suggestion is filed, if it contain the substance of a case for a *mandamus*; the course is, to issue an alternative writ, commanding the defendant to perform the act required, or return his reason for not doing it. Upon this writ the act provides that the court shall allow the persons suing or defending, such convenient time to make return, plead, reply, rejoin, or demur, as shall be just and reasonable." If, after issue and trial, the return be adjudged insufficient, then a peremptory *mandamus* will issue to compel the performance of the duty required. The act contemplates regular issues of fact and law, as in other cases. 8 Casey, 218; 1 Wright, 237. See, also, *Childs v. Com.*, 3 Brewst. 194. Or, as stated in *Keasy v. Bricker*, 60 Penn. St. 9: "The ordinary practice is to direct an alternative *mandamus* to issue when the court is satisfied on affidavits that the writ should be issued as a matter of justice and right, to compel the performance of an act or duty, for which otherwise there would be no adequate remedy. This gives the party to whom it is directed an opportunity to do the act or to show good reason at the return of the writ why he should not do it. He does this by making a return to the writ. It is at this point the pleadings in the cause begin. The return may traverse the facts alleged in the writ, or, admitting them, may avoid performance by stating sufficient facts in excuse. The relator may then demur, plead to or traverse the facts set forth in the return. Such is the ordinary practice recognized by the act relating to *mandamus*." The alternative writ having been issued and served, the defendants entered of record their return, and the sufficiency of that return is, by the demurrer, made the

specific question for determination now. *Commonwealth, ex rel. Thomas, v. Commissioners of Allegheny County*, 8 Cas. 221.

In *mandamus* the relator must in all cases establish a specific legal right as well as the want of a specific legal remedy. *Commonwealth v. Rossiter*, 2 Binn. 362; S. C., 8 Am. Dec. 451. When this cause was here before, we held that in the absence of any restriction in the charter, the right of a stockholder in a trading corporation to an inspection of the books, papers and accounts was, in certain cases and under certain limitations, incident to the relation of a stockholder to the company. Of course a stockholder is bound by the corporate articles, where the right of inspection of the corporate books and papers is qualified by express stipulation, those who become members are subject to the qualification. But the doctrine of the law, as we then said, is that the books and papers of the corporation, though of necessity left in some one hand, are the common property of the stockholders," and "unless the charter provides otherwise, a shareholder has the right to inspect them and to take minutes from them for a definite and proper purpose at reasonable times." The facts set forth in the writ are, by the return, in part denied, in part qualified and in part admitted; but assuming the correctness of the return as far as it goes, and the facts set forth in the petition not traversed thereby, the following facts may, we think, for the purpose of this case, be deemed admitted.

The Phoenix Iron Company was incorporated April 27, 1855, for the purpose of engaging in mining and manufacturing iron, etc., with a capital stock of \$500,000, divided into five thousand shares of \$100 each. The relator, on November 29, 1866, became the owner of two hundred and thirty-eight shares of said stock, paying therefor \$38,500, and he still owns two hundred and thirty-five of the said shares. David Reeves and W. H. Reeves, at the time of the filing of the petition, either individually or jointly, and as trustees, were, and for several years had been, the holders of and controlled nearly all of the remaining shares. The number of shares held in trust was two thousand eight hundred and seventy-five; these shares were held for the children of Samuel J. Reeves, deceased, viz.: Elizabeth H. Carson, Clara R. Tyson, Jennie J. Reeves, the said David and William H. Reeves, each being entitled to one-fifth of two thousand eight hundred and seventy-five shares, or five hundred and seventy-five shares. Since these proceedings were instituted, these trust shares have been divided and transferred to the several persons entitled; David Reeves and Wm. H. Reeves, however, severally and jointly, are still owners of three thousand and thirty-three of said shares.

The board of directors consists of five persons, David Reeves, president; William H. Reeves, Carrol S. Tyson, John Griffin and George Gerry White; the last three named being each the owner of but a single share of stock. The works of the company are among the most extensive in the country, and the business, during the whole period of its existence, has been in a highly prosperous condition. The business of the company from 1870 to 1880 averaged \$2,000,000 per annum. In 1879 it amounted to \$2,705,036.11, and in 1880 to \$2,448,668, and the average profit upon this trade is estimated to be at least fifteen per

cent. The charter of the company provides for dividends of the actual net profits to be declared at the discretion of the directors, but no dividends have been declared for a period of nine years; the capital stock represents an investment of about six times its par value, but the real estate of the corporation is still subject to a mortgage of \$1,500,000, whilst a portion has been recently conveyed to secure an alleged indebtedness of \$322,000, in which the said David and William H. Reeves are themselves interested. The business of the Phoenix Iron Company, prior to 1868, had not been only the manufacturing of iron materials for bridges, viaducts, etc., but the erection of such structures.

The firm of Clarke, Reeves & Co., consisting of Thomas C. Clarke, David Reeves, Jr., John Griffen, and others, was engaged as engineers and contractors in designing and erecting structures made partially or wholly from iron materials, such as the Phoenix Iron Company made. In the year 1868, the Phoenix Iron Company ceased to act as iron builders, and, excepting in one or two instances, confined its operations to the manufacture of iron building materials. In October, 1870, the Phoenix Iron Company entered into an agreement with Clarke, Reeves & Co., by the terms of which the company agreed and became bound permanently to withdraw from the business of construction, and to confine their operations to the manufacture of materials alone; Clarke, Reeves & Co., on the other hand, agreed and became bound to pursue the business of construction, to purchase at certain rates their materials wholly from the Phoenix Iron Company, and at the completion of each contract to pay to the Phoenix Iron Company one-half of the net amount which they might receive by reason of the contract. This contract, originally in parol, took effect from October 22, 1870, but was not reduced to writing until May 21, 1871. At the time it was originally agreed upon, no member of the firm of Clarke, Reeves & Co. had any interest in the corporation. The shares were then held as follows: David Reeves, the elder, two thousand five hundred; Samuel J. Reeves, two thousand two hundred and sixty-two; George H. Sellers, two hundred and thirty-eight; nor did the relator, who was then consulted in the matter, make any objections to it; since that time, however, he has not been at any time consulted as to the renewal of the contracts from year to year.

David Reeves, the elder, died in March, 1871, however, and David Reeves, the younger, who was of the firm of Clarke, Reeves & Co., became entitled as legatee to fifty shares. Until December, 1878, none of the firm of Clarke, Reeves & Co. had any of the corporate shares of the Phoenix Iron Company, excepting David Reeves, who had the fifty shares mentioned, and John Griffen, who, at the request of David and Samuel J. Reeves, held one share each.

In December, 1878, Thomas J. Reeves died, and thereafter David Reeves and W. H. Reeves, his sons, held the controlling interest in the company, and it is charged, that through their votes and those of the other directors whom they elect, and who have but a merely nominal interest in the corporation, they have and exercise absolute control over all the affairs of the corporation, and that they unjustly and intentionally manage it in such a way as to advance their own personal

interests, to the injury of the relator; that the officers and directors of the corporation have abused the discretion conferred upon them, refusing to declare dividends of the profits, as contemplated in the charter; that the profits and estate of the corporation are illegally absorbed by the individuals who control it; in part, through the instrumentality of the contract with Clarke, Reeves & Co.; in part, by voting themselves large salaries; in part, by the conveyance to themselves, in trust, with power of sale, of a large portion of the real estate of said corporation, to secure indebtedness in which they are themselves immediately interested; and otherwise.

At a meeting of the stockholders, Sellers asked for information as to the affairs of the company, and the directors refused either to permit the minutes to be read or the papers to be examined. His request to the president, that a time and place might be named for such an examination of the books as would give him information proper as a stockholder, was refused, and a similar demand, made of the officers and directors, at the office of the corporation, during business hours, was in like manner refused. The relator states that his purpose is to file a bill in equity to obtain relief against the abuses complained of.

Under the circumstances mentioned, and for the purposes stated, we are of opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity, or for speculative purposes, but in good faith, and for a specific, honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as stockholder.

We cannot say that the matters involved have already been adjudicated in the decree of the circuit court of the United States. We cannot anticipate the bill which the relator may bring. What specific relief he may seek can now only be the subject of conjecture. It will be time enough to determine the question of *res adjudicata* when the case is presented. The question now is as to the relator's right to inspect the books. He avers that he purposes filing a bill of equity against the corporation and its officers, and that it is necessary that he see the books and papers in order that he may correctly state the facts now concealed from him. As we said, in the former opinion of this court, upon learning the facts he may abandon his purpose for want of matter of complaint. He desires "to inspect and see whether he can raise a particular case in his favor by examining the books." He is a stockholder to a very considerable amount, in what appears to be a prosperous and highly profitable trading corporation; for nine years, although large profits have admittedly accrued, no dividends have been declared; the profits are in no way accounted for; he is denied all access to the books and papers for information. At a regular stockholders' meeting, the minutes, because of his presence, were suppressed, the examination of papers prevented, and the meeting adjourned whilst the relator held the floor asking for information. A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers was not bound to accept the mere statement of the

board, whether under oath or otherwise, as to the contents of the books, etc.; he had a right to a reasonable personal inspection of them, and with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he purposed to bring.

The relator, we think, has a clear right under the writ and return to the relief he asks, and it is plain that he has no specific legal remedy for the enforcement of that right; and the existence of a supposed equitable remedy is not a ground for refusing the *mandamus*. *Com., ex rel. Thomas, v. Commissioners of Allegheny County*, 8 Casey, 223. The requirements of the writ, of course, can cover only such books and papers as are actually in existence, and only such of those as may contain information upon the subjects specified.

The judgment is affirmed.

COURT OF APPEALS OF NEW YORK.

CRANSTON, ADM'X, *Resp't*, v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO., *App't*.

December 17, 1886.

TRIAL—JURY—CHARGE THAT "MUST GET TOGETHER."

In an action to recover for personal injuries received at a railway crossing, after the jury had retired to consider their verdict they came into court and one of them stated that there was no probability of an agreement. To this the trial judge said: "I can't take any such statement as that. Gentlemen, you must get together in a matter of this kind. No juror ought to remain entirely firm in his own conviction, one way or another, until he has made up his mind, beyond all question, that he is necessarily right, and the others are necessarily wrong." Defendant excepted and plaintiff had a verdict. *Held*, that the instruction was not a correct statement of the law. If the evidence was so clear as to lead to a conclusion with the degree certainly required by the charge, there was nothing to submit to the jury, and it was the duty of the trial judge to either direct a verdict or to nonsuit the plaintiff.

This is an appeal from the judgment of the general term in the third department, affirming the judgment of the circuit court of Rensselaer county, awarding the plaintiff the sum of \$5,000, for the alleged negligent killing of David Cranston, at a railroad crossing in the city of Troy.

Action to recover for personal injuries. The opinion sufficiently states the point.

Edgar L. Fursman, for appellant. The instruction to the jury was erroneous. *Green v. Telfair*, 11 How. 260; *Slater v. Mead*, 53 id. 57.

R. A. Parmenter, for respondent. Defendant's exception to a remark by the trial judge to the jury, in answer to the suggestion by one juror that there was no probable chance of an agreement upon a verdict, was not well taken. It was but an earnest recommendation that the jurors should not be so obstinate as to prevent an agreement as to the facts of the case if the seeming contradictory testimony of the witnesses could be reconciled. *Erwin v. Hamilton*, 50 How. 32. But the defendant mistakes the remedy. The pretended error cannot be raised on exception to the charge, but only by special motion to set aside the verdict. Such motion has not been made. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282, 298-9; *Daly v. Byrne*, 77 id. 190-1; *Ginna v. Second Avenue R. Co.*, 67 id. 597.

RAPALLO, J. It is a serious question whether the uncontroverted evidence did not disclose a want of the care and caution which the law required of the plaintiff's intestate in approaching so dangerous a crossing as that at which he lost his life, and whether a nonsuit should not, therefore, have been ordered, but we need not discuss that question, as the case contains an exception which we are all agreed is well taken, and requires a reversal of the judgment and a new trial. After the jury had retired to consider their verdict they came into court and one of them stated that there was no possibility of their agreeing. To

this the court replied as follows: "I can't take any such statement as that. Gentlemen, you must get together upon a matter of this kind." He then added: "No juror ought to remain entirely firm in his own conviction, one way or another, until he has made up his mind beyond all question that he is necessarily right and the others are necessarily wrong." To this statement the defendant's counsel excepted. The jury thereupon brought in a verdict for the plaintiff.

We are of opinion that the instruction excepted to was not a correct statement of the law. It was incumbent upon the party holding the affirmative of the issue, who in this case was the plaintiff, to satisfy the jury, by a preponderance of evidence, of the facts upon which her right to recover depended. If she failed to do so the defendant was entitled to a verdict. The jurors who were not satisfied by the evidence of the truth of the plaintiff's allegations, were justified in refusing, for that reason, to find a verdict in her favor, although they might not have made up their minds beyond all question that they were necessarily right, and that those who were in favor of finding a verdict for the plaintiff were necessarily wrong. To sustain this instruction would be to cast upon the defendant, in a civil action, a burden quite as heavy as that which rests upon the prosecution in a criminal case, and perhaps still more onerous. If the evidence was so clear as to lead to a conclusion with the degree of certainty required by the charge, there was nothing to submit to the jury, and it was the duty of the court either to direct a verdict, or to nonsuit the plaintiff.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

NOTE.—In *Huntoon v. Russell*, 50 How. Pr. 155, the jury, after having been out some time, came into court and stated their inability to agree, whereupon the judge, among other things, remarked that the case was of too much importance to the parties to have a disagreement; that the verdict was the judgment of twelve men and each man formed one-twelfth part; that no man should be so obstinate as to say "I will have my own way or I will not have it at all," because he must remember that he formed only one-twelfth part; that it was better in cases of this sort that a judgment of doubtful propriety be rendered than none at all, because if the jury should render a judgment then the parties would know what their rights were and could act accordingly; whereas, if they did not render a verdict, no progress was made and the parties were punished by the disagreement; that it was a reproach to the administration of justice; that courts were organized that parties could come in and have their rights determined, etc.

The jury returned to their room and soon after came into court and brought in a verdict for the defendant. Exceptions were duly taken to the remarks of the judge, which were duly entered.

On denying of a motion to set the verdict aside on account of misdirection, the judge was of opinion that the portion of the remarks to the jury, to which objection could fairly be taken, raised a question of error rather than of irregularity, and must be reviewed on bill of exceptions and not decided on motion.

Where a jury has been out an hour or more and returns, announcing that they cannot agree, and the court orders them to be locked up until they should agree, without allowing them their dinner, *held*, that the jurors might very well understand from this order that they were required either to agree or to submit to indefinite confinement and starvation, and a verdict which may be the result of such a mandate of the court will not be affirmed. *Hancock v. Elam*, 59 Tenn. 35.

In *People, ex rel. Flaherty, v. Neilson*, 22 Hun, 1, during the trial of the plaintiff in error upon an indictment charging him with a conspiracy to defraud the city, the

judge called one of the jurors and the counsel for the prosecution and the defense into a room, and after showing to the juror an anonymous letter, which stated that the juror had been in the habit of playing cards with the sons of the plaintiff in error, asked him if he knew who wrote it, to which the juror replied that he did not. The judge then said that it was "very embarrassing and unpleasant, and, toward a juror, monstrously unjust, and a serious imputation." The plaintiff in error was not present, and the judge said when the counsel for the plaintiff in error attempted to speak, that "he did not expect counsel to make any observations." There was no proof that the facts stated in the letter were true, nor was the juror asked if they were true. *Held*, that the conviction should be reversed, as the tendency of this action, by the judge, was to dominate the juror's free will, and terrify him into a verdict for the people.

In *Clinton v. Howard*, 42 Conn. 204, the jury being for a long time unable to agree on a verdict, the court sent them back to a still further consideration of the case, stating among other things as reasons for their disposing of the case, that the trial had been a long one, and had made the State a large expense. *Held*, that it could not fairly be presumed that any juror was misled as to his duty by the remark, and that it was not a reason for granting a new trial after a verdict for the plaintiff.

In *Ervin v. Hamilton*, 50 How. Pr. 83, on a motion to set aside verdict for reasons which appear in the opinion, WESTBROOK, J., said: "The cause was tried at the Albany circuit on Friday, the 14th day of May, 1875, and was given to the jury about six and a half o'clock, P. M. In about an hour the jury came into the court-room and declared they were unable to agree. The judge refused to discharge them, and said he would go to supper and return about half-past eight to the court-room; that he would then wait a reasonable time for the verdict, and if they failed to agree before the court adjourned for the evening, they could bring in a sealed verdict on Monday at half-past three o'clock, P. M., to which time the court would adjourn. They were also distinctly informed that every provision would be made for their comfort during their confinement which was possible, and that, while no juror should yield his conscientious convictions, yet that the interests of justice required a longer deliberation. The judge attended at court again at half-past eight o'clock and waited until about half-past ten o'clock, P. M. At that time word was sent to the jury that the court was about to adjourn until Monday at half-past three o'clock, P. M., and asking them whether they had agreed upon a verdict. Word was sent from the jury that they would agree in five minutes, and before the expiration of that time they returned to court and rendered a verdict in favor of the defendant. The affidavits of the jurors in aid of this motion cannot be received. This is well-settled law. Neither are they necessary to present the question made. It is clear that the jury were kept out, after they had declared their inability to agree, and were also told that the consequence of a failure to agree by a reasonable hour that night would result in an adjournment to Monday. The case is thus identical with *Green v. Telfair*, 11 How 280, in which, for similar remarks made to a jury, the court, at special term, set aside their verdict. If that case was well decided this motion should prevail. I have very great respect for the learning and candor of Judge HARRIS who made that decision, but after a careful consideration I cannot yield to the soundness of his reasoning. Its value as an opinion is also very much impaired by the fact that the judge—A. J. PARKER—who made the remarks to the jury which were made the grounds of setting it aside, was equally eminent as a jurist, and his opinion, as expressed in the words addressed to the jury, is of equal value with that of his learned brother, who criticises them. The only difference is, that the one may be said to be the hasty utterances of the circuit, and the other those of the calm reflection of the study. Plausible as this may seem, however, it is only plausible. How far a judge should go in the detention of a jury, and what he should say, is necessarily a question upon which, for years, he has thought much. The sending word to a judge by a jury of inability to agree is so frequent and common that reflection upon what he ought to do is a necessity. When a case of that kind occurs, the words which he speaks are but the result of views reached long before, and which he has formed in the retirement of his chambers, as well as amid the bustle of the court-room. Authority, then, depending on the mere weight of judicial opinion, is equal, and as no case at general term or in the court of appeals has been cited, we are left to draw an original conclusion for ourselves. However beautiful, as a theory, it may be to say that a verdict is the unanimous judgment of twelve men, unbiassed, or uninfluenced from any source whatever—and such we concede a verdict ought to be—it is found in practice, that, owing to the infirmities of our nature, passion, prejudice, pride of opinion, etc., what would, at first view, seem to be coercion must be employed by the court in order that

the real judgments and opinions may be expressed in the form of a verdict. No court would, by mere physical exhaustion, force a verdict when satisfied that a failure to agree resulted from conscientious difference of judgment as to the weight of evidence; but any court will detain a jury until satisfied that the failure to agree springs from that cause, and that alone. No person can judge so accurately upon this question as he who presides at the trial. From intercourse with a jury he forms some knowledge of the men, and as the evidence is fully before him he must decide conscientiously when they should be discharged, and when his intentions in that respect should be communicated, and until there has been a clear abuse of the discretion committed to him, a verdict should not be disturbed.

"If the opinion of Judge HARRIS be carried to its logical conclusion, then no verdict obtained after a jury declares its inability to agree could stand. If detained beyond that instant it cannot be what he calls 'the free and independent judgment of twelve indifferent men acting without constraint,' for detention to compel them to deliberate after that pious is 'constraint.' So if the judge at the trial does what Judge HARRIS says is allowable to be done, urge motives for agreement, such as 'the importance both to the parties and the public of their agreeing upon a verdict, that thus the time and expense of a retrial may be saved,' is he not then presenting motives outside of the merits of the issues in the cause to induce some one or more of the jury to yield what he or they suppose to be their judgment upon the merits? And if a jury reports its inability to agree about the hour of adjournment for the night, and the court directs them again to retire, and bring in a sealed verdict in the morning, and a verdict is obtained when the court again assembles, what is this but a verdict obtained by 'constraint,' and, therefore, not to be upheld? Adopt this rule, and how many verdicts would stand? It is the experience of every lawyer and every judge that scarcely a verdict could be maintained if *Green v. Telfair* be pushed to its logical conclusion. If the jury are told they must consult for one hour longer, after they declare they cannot agree, or for a night, or for any time, it may be argued that the verdict, if one be obtained, is the result of coercion. For if a jury be told after a declaration that it is unable to agree, that it will be detained for consultation for an hour, the same kind of constraint is applied as if they were informed they would be kept out twenty-four. The two differ in the degree of constraint only, and that, if any thing, is what renders the verdict useless. It must, then, be left to the good sense and wise discretion of the judge who presides at the trial to determine how long the jury shall be detained, and what, if any thing, shall be said as to the probable length of the detention. He forms his judgment, as best he can, of the jury, and when they will be in a condition to lay aside all feeling, or pride of opinion, and look at the case upon the merits. So long as there is no abuse of this discretion the verdict should stand. In this particular cause a result was reached in four hours and a half. It is true the jury were told they would be, if they failed to agree, detained longer, but the readiness with which they yielded shows how slight were their convictions, and how little had their judgments been impressed in favor of the views they sought to maintain. Satisfied that no substantial injustice has been done, and no improper 'constraint' imposed upon the jury, the motion to set aside the verdict is denied."

In *State v. Lawrence*, 88 Iowa, 51, the jury, when being recalled into court, was admonished by the judge, "that if any juror went into that jury box with the pre-determination as to how he should find his verdict and to hang the jury, or to cause disagreement if the verdict could not be rendered as he wanted it, he would have 'a happy time of it,' to speak facetiously," but that he did not wish "to interfere with the opinion or action of any juror who acts conscientiously and in accordance with his best judgment." Held not to be such an undue interference with the prerogatives of the jury as to vitiate their verdict.

In *Slater v. Mead*, 53 How. Pr. 57, the jury retired to consider their verdict, and after being absent for a long time returned into court and reported that they were unable to agree. and thereupon they were further instructed by the court, and in closing the instructions the court stated to them as follows: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." The jury retired and very soon returned into court and rendered their verdict of "no cause of action." Held, that this verdict cannot be said to be the judgment of the jury acting without constraint, and in the discharge of their obligations to render a true verdict according to the evidence, and, therefore, ought not to stand.

In *State v. Bybee*, 17 Kan. 462, it was held, where, upon a charge of assault with intent to kill, the testimony runs in two lines, one tending strongly to prove the full crime charged, and the other to prove an *alibi*, and that the defendant was innocent of any offense, and where it appears that for a long time the jury were unable to agree, and that after having been unable to agree for many hours they are brought

into court, and the duty of agreement is strongly urged upon them by the court, who intimates that it would be a reflection on them not to agree — that there should be concession in matters of detail and of minor importance, that they should bring their minds together as an apothecary mixes different ingredients and ascertains the products, and that they need not hope to be discharged for a long time, and where the whole tendency of this instruction is to impress too strongly upon the jury the duty and necessity of coming to some agreement, and thereafter the jury return a verdict of guilty of an assault only, *held*, that such a verdict ought not to be permitted to stand; that it is too apparently a compromise between those believing defendant guilty of the crime of assault with intent to kill, and those believing him [guiltless of any offense induced wholly or in part by the urgent instructions of the court upon the duty of agreement.

The court said to the jury: "You should bring your minds together like the mixing of different ingredients by an apothecary, and ascertain what is the product. In a case of this importance I feel it to be my duty to afford you the most ample opportunity to agree. It is not my purpose to force you to a verdict not in accordance with your convictions. My experience with juries has taught me that they often agree after they have imagined it impossible to do so, and after the agreement they have been surprised that they ever disagreed. I hope this will be your experience. I, therefore, urge upon you to make another effort, in a spirit of reconciliation, and fairness to each other, to the accused, and to the public, and if possibly agree upon a verdict; and I warn you not to think of being discharged for some time to come."

In *Pierce v. Pierce*, 38 Mich. 412, a jury, after being out for one day, sent word to the judge that they could not agree. The judge sent back word that he did not believe it yet, and added the suggestion that they had better agree that night, as he was going away and should not be back until the second day after, and they might not get discharged until he returned. The verdict was returned within an hour afterward. *Held*, that it must be set aside as obtained by duress.

The court said: "Jury trials can never be safe unless the verdict is made as far as possible the unbiased and free conclusion of every juror. Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice. It may be discretionary with the trial judge to keep a jury out until he is satisfied an honest and free agreement is not to be expected. But there is no legal propriety in keeping a jury confined unreasonably after they have come to an agreement, and a verdict obtained by the suggestion of such an alternative is a verdict obtained by what it would be hard to distinguish from duress. It may be that the court is not bound to be present continually on the chances of an agreement; but any unusual and prolonged delay is not to be favored without giving an opportunity to find a sealed verdict. This error, however innocently committed, as we are bound to suppose it was, must nevertheless, in our opinion, be held fatal to the verdict."

CONSELYEA AND ANO., *Resp'ts*, v. SWIFT, *Appl't*.

December 7, 1886.

TRIAL — RIGHT TO OPEN AND CLOSE.

In an action on a promissory note the answer denied none of the allegations of the complaint but after setting up affirmatively, that defendant was an accommodation indorser and that the note had in fact been paid, continued: "And this defendant says, on information and belief as aforesaid, that the said plaintiffs are not the lawful owners and holders of said note, and that he is not indebted to them thereupon in any sum whatever." *Held*, that said clause was merely an affirmative statement of a conclusion drawn from the preceding new matter; no allegation of the complaint was thereby controverted, and that defendant had the right to open and close, and a ruling to the contrary was error. (*See note*, p. 615.)

This is an appeal by defendant from a judgment entered in Kings county, on an order of the general term of the second department, affirming a judgment after trial at the Kings county circuit.

The seventh cause of action — the only one material here — was thus stated in the complaint.

"And for a seventh and further separate cause of action against said defendant upon information and belief these plaintiffs respectfully allege :

"1. That at the city of Brooklyn, on or about the 1st day of May, 1882, one George Swift made his certain promissory note in writing whereby for value received he promised to pay to the order of himself, one month after the date thereof at the First National Bank, the sum of five thousand eight hundred and twenty-five dollars (\$5,825?)

"2. That thereafter the said George F. Swift duly indorsed and delivered the same so indorsed.

"3. That thereafter the said defendant above named duly indorsed the said note and delivered the same so indorsed.

"4. That thereafter and before maturity and for value said note lawfully came to the possession of one William Conselyea.

"5. That when said note became due and payable, the same was duly presented for payment at the place where the same was made payable, and payment thereof demanded, which was refused, whereupon the same was duly protested for non-payment, at an expense to said William Conselyea of one dollar and twelve cents (\$1.12), of all of which due notice was given to the defendant above named."

The answer to this cause of action was as follows :

"And further answering the said complaint the defendant says that the note mentioned and described in the seventh cause of action therein was made by George Swift for the purpose of raising money, and the same was indorsed by this defendant at the request of the said George Swift without any consideration and for the purpose of enabling the maker to raise money thereon, and the said William Conselyea thereafter, well knowing the premises, indorsed said note for the purpose aforesaid, and this defendant avers on information and belief that it was then and there agreed by and between the said George Swift and the said William Conselyea, that the said note was to be paid by the said George Swift out of the avails of a certain contract which the said George Swift then had with the city of Brooklyn, and that an order upon the proper office of the city to pay the amount of said note out of the moneys coming due to said Swift on said contract should be made by him in writing and should accompany and be delivered with the said note to the First National Bank, Brooklyn, to which said note was to be presented for discount, and that under no circumstances should this defendant be chargeable as indorser upon said note or otherwise with the payment thereof by the said William Conselyea or the said George Swift.

"And this defendant further says on information and belief, that said note was thereafter accompanied by the order aforesaid, duly discounted by the said bank and the proceeds thereof used for the purposes of said contract, and that before the said note became due, the said William Conselyea, who was theretofore and up to that time interested with the said George Swift in the contract aforesaid, took from the said George Swift an assignment thereof together with the moneys due and to grow due thereon, it being understood and agreed between them that such assignment was subject to the order which accompanied the note afore-

said for the payment thereof, and that the said note should be paid out of the moneys which should fall due under said contract, after said assignment, the same as if said assignment had not been made, and as if the moneys so falling due should become due to said Swift instead of the assignee thereof aforesaid.

"That said note was subsequently paid at maturity out of moneys, which fell due under said contract or was paid by the said Conselyea out of his own funds, he taking to himself the moneys applicable to and appropriated for the payment thereof, out of said contract as aforesaid.

"And this defendant says on information and belief as aforesaid, that said plaintiffs are not the lawful owners and holders of said note, and he is not indebted to them thereupon in any sum whatever."

James Troy, for appellant. The following cases establish the defendant's position: *Elwell et al. v. Chamberlain*, 31 N. Y. 611; *Miller v. Thorn*, 56 id. 402; *Linsey et al. v. European Petroleum Co.*, 3 Lans. 176; *Murray v. N. Y. Life Ins. Co.*, 85 N. Y. 236; *Conklin v. Conklin*, 20 Hun, 278; *Degraff v. Carmichael*, 13 id. 129; *Oppen v. Caillon*, 9 Daly, 157; *Huntington v. Conkey*, 33 Barb. 218; *Hoxie v. Green*, 37 How. Pr. 97; *Lindsley v. Petroleum Co.*, 10 Abb. (N. S.) 107.

J. Stewart Ross, for respondents. Defendant's answer failing to unqualifiedly admit every material allegation of plaintiffs' complaint, and specifically denying a material fact necessary to be proven to entitle plaintiffs to recover on the seventh cause of action alleged in the complaint, the right to open remained with the plaintiffs. See Abbott's Trial Brief, p. 34; Best's Right to Begin and Reply, p. 93, and cases cited; *Geach v. Ingall*, 14 Wells & Wells, 95; *Thurston v. Kennett*, 22 N. H. 157; *Belknap v. Wendell*, 21 N. H. 175; *Comstock v. Hadlyme*, 8 Conn. 254; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Bowen v. Spears*, 20 Ind. 146.

DANFORTH, J. The complaint contains seven causes of action. As to the first six no question arises. The seventh makes out a perfect case upon a promissory note against the defendant as indorser and the answer denies none of the plaintiffs' allegations, but sets up affirmatively that the defendant was an accommodation indorser and that the note was in fact paid out of moneys in the hands of the plaintiffs' testator, applicable thereto.

The defendant adds upon information and belief "that the said plaintiffs are not the lawful owners and holders of said note, and that he is not indebted to them thereupon in any sum whatever." This clause is relied upon by the respondents as an answer to the appeal. It is not sufficient. It is not a denial of any averment. Neither of the facts so controverted are alleged in the complaint. It is merely an affirmative statement of a conclusion drawn from the preceding new matter in the answer, and while it might have been omitted as wholly unnecessary, it put in issue no part of the plaintiffs' case. The whole burden of proof lay upon the defendant, and without evidence the plaintiff was entitled to a verdict. *Fleischman v. Stern*, 90 N. Y. 110.

The learned counsel for the respondent has placed upon his points

cases from the reports of other States. We do not refer to them, for our own Code is upon this subject very explicit and requires each material allegation in the complaint, not controverted by the answer, to be taken as true. § 522. In this case, as before suggested, no allegation is denied. It was, therefore, for the defendant to establish the defense set up, and as he thus held the affirmative, he had the right to open and close the evidence, and the learned trial judge erred in ruling to the contrary.

The judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except RUGER, Ch. J., and FINCH, J., not voting.

Judgment reversed.

NOTE.— See 22 Eng. Rep. 739. In *Claffin v. Baere*, 28 Hun, 204, the complaint alleged "that the complaint in this action alleges that the defendants were copartners; that, between September 3, 1878, and December 3, 1878, both days inclusive, plaintiffs sold and delivered to defendants, as such copartners, certain goods and merchandise at the prices agreed upon between the plaintiffs and defendants as such copartners, and which amounts, in the aggregate, to the stipulated sum of \$6,269; that no part thereof has been paid; and demanded judgment accordingly. The answer admits that the defendants were copartners, and the sale and delivery of the goods as referred to in the complaint." It then set up, as a separate defense, that the goods were sold on a credit of four months, which term had not expired when the action was commenced; and then denied each and every allegation in the complaint not therein specifically admitted. *Held*, that the plaintiffs were entitled to open and close the case. The answer did not set up a substantial defense, but in effect denied that the defendants had promised to pay for the goods at a time prior to the commencement of the action.

The court said: "The rule undoubtedly is that the party holding the affirmative upon an issue of fact has the right upon the trial to open and close the proof and to reply in summing up the case to the jury. This is regarded as a legal right not resting in the discretion of the court, and when denied the trial may be excepted to and the ruling reviewed upon appeal. *Millard v. Thorn*, 56 N. Y. 402. Yet, when the defendant in an action insists that he holds the affirmative and may open the trial and conclude the argument, he is called upon by the form of his pleadings to make it appear beyond all reasonable doubt that he had admitted the essential facts upon which the plaintiff bases his right of action, and he cannot call upon the court to make a critical examination of the pleadings to determine whether he is entitled to the privilege claimed or not."

The fact that a complaint alleges facts not essential for plaintiff to aver or prove, and that the same are denied by the answer, does not deprive the defendant of the affirmative if he is otherwise entitled to it. *Phillips v. Brown*, 20 N. Y. Week. Dig. 155.

MARTIN, *Resp't*, v. THE NEW YORK, NEW HAVEN AND HARTFORD R. R. Co., *App't*.

December 17, 1886.

EVIDENCE — DECLARATIONS — HOW ACCIDENT HAPPENED.

In an action to recover for personal injuries to an employee, resulting in death, the sole ground upon which plaintiff's claim to recover was founded was that the car which the employee was directed to detach from the train was not furnished with a horizontal grab-handle on its end, and that that alleged defect was the cause of the injury.

Under objection and exception plaintiff was allowed to prove that after deceased, who had been an employee of defendant, had been taken out from under the car by which he had been injured, and while he was being conveyed to the switch-house by his fellow employees, some one asked him how the accident had happened, and he said: "I pulled the pin and made a grab for the car, and there was nothing there for me to grab." Another version given by the wit-

ness was that the deceased said he cut off the car and made a grab for the handle of the car, and there was nothing there for him. *Held*, that the declarations of the injured party were incompetent, and the admission thereof was error. (*See note, p. 617.*)

Waldlee v. N. Y. Cent. R. R. Co., 95 N. Y. 274, followed.

A party excepting to the admission of testimony is not bound to concede its truth or to refrain from combatting it in order to retain his exception.

Appeal from a judgment of the general term, first department, affirming a judgment in favor of the plaintiff, and affirming an order denying a motion for a new trial.

The opinion sufficiently states the point.

Frank Loomis, for appellant. *Thomas P. Wickes*, for respondent.

RAPALLO, J. The decision of this appeal is controlled by the case of *Waldlee, Adm'x, v. The N. Y. Cent. & Hudson R. R. Co.*, 95 N. Y. 274; S. C., 47 Am. Rep. 41, in which it was held after much discussion, that the declarations of a person who had been fatally injured upon a railroad, made after he had sustained the injuries, explaining the manner in which the accident had happened, were not competent evidence in favor of his administratrix, in an action brought by her against the railroad company for causing his death by negligence.

The plaintiff was allowed to prove in the present case, under objection and exception, that after the deceased had been taken out from under the car by which he had been injured, and while he was being conveyed to the switch-house by his fellow employees, some one asked him how the accident had happened, and he said: "I pulled the pin and made a grab for the car, and there was nothing there for me to grab." Another version given by the witness was that deceased said he cut off the car and made a grab for the handle of the car, and there was nothing there for him.

The deceased was an employee of the defendant, and the sole ground upon which the plaintiff's claim to recover was founded was that the car which he was directed to detach from the train was not furnished with a horizontal grab-handle on its end, and that that alleged defect was the cause of the injury. The testimony thus erroneously admitted, therefore, tended to sustain the vital point of the plaintiff's case.

The learned counsel for the respondent seeks to avoid the effect of the erroneous admission of this testimony by claiming that it did no harm, but we think that position cannot be maintained. Whether the car on which the deceased attempted to climb, after he had cut it off, was or was not furnished with a grab-handle, and whether or not he met his death in the manner in which the witness testified that he said he did, were contested questions of fact which were submitted to the jury, and the evidence of his declaration very soon after the accident must have had weight with them in determining those questions.

It is further contended that the defendant is precluded from insisting upon this exception, by having itself inquired into the declarations of the deceased on the occasion referred to.

One witness testified that he attributed the blame to one of his fellow workmen; and another, that when asked how he came to fall,

he answered that he did not know. All this testimony was taken after the declaration of the deceased, while being taken to the switch-house, had been admitted, notwithstanding the defendant's objection and exception, and was introduced by way of contradiction of the witness Malone, who had given the objectionable testimony. The defendant did not waive his objection and exception by attempting to disprove the matter testified to, or to prove facts inconsistent with them. A party excepting to the admission of testimony is not bound to concede its truth, or to refrain from combating it, in order to retain his exception.

There are numerous other exceptions in the case worthy of attention, but as they may not arise on another trial, it is needless to pass upon them now.

For the error pointed out the judgment should be reversed, and a new trial ordered, costs to abide the event.

All concur, except DANFORTH, J, not voting.

Judgment reversed.

NOTE.—In *Merkle v. Township of Bennington*, 58 Mich. 156; S. C., 55 Am. Rep. 666, it was held that the declarations of an injured person to a physician as to the cause and circumstances of the injury are not admissible if not made until he has been removed and the physician has been called. COOLEY, Ch. J., said: "For the plaintiff it is claimed that these statements of the intestate were admissible as part of the *res gestæ*, and several cases are referred to as authority. One of these cases is *Insurance Co. v. Mosley*, 8 Wall. 397. In that case the question at issue was whether the decedent had died in consequence of an accidental falling down stairs in the night. His widow was permitted to testify that he got up in the night and went down stairs; and when he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling, and he complained of his head and appeared faint and vomited. She was up with him all night, and he appeared in great pain. These declarations were held to be properly thus proved on the ground that they were of the nature of *res gestæ*, and substantially contemporaneous with the main fact in issue. *Jordan v. Commonwealth*, 25 Gratt. 943, is another of the cases relied upon. There the question was one of identity of parties who had robbed a woman. The prosecution was allowed to prove that within a few minutes of the robbery the woman gave a description of the robbers to the witness, and that the latter pursued after the parties and caught the respondent, who corresponded to the description which had been given to him of one of the robbers. It was very properly held that what the woman thus promptly said was part of the *res gestæ*. Similar to this in the promptitude with which the declarations followed the criminal act in *People v. Vernon*, 35 Cal. 49, where they were also held admissible. *Burns v. State*, 61 Ga. 192, is to the same effect, but it appears to have been decided upon a section of the Code.

"In the case of *Waldele v. Railroad Co.*, 29 Hun, 35, the time which had elapsed after an alleged injury by a railroad train was twenty or twenty-five minutes, and a witness was permitted to testify that the party told him he got hit; that there was a long train, and he stood waiting for it to go, and an engine followed and struck him. This case may be considered authority for admitting the declarations of Merkle that his injury had come from an accident at the bridge, but it scarcely goes further.

"The cases of *Driscoll v. People*, 47 Mich. 413; *Stewart v. Brown*, 48 id. 383; *People v. Simpson*, id. 474; and *Brownell v. Railroad Co.*, 47 Mo. 289, are scarcely relevant to this. They were well decided, whether this case should be ruled one way or the other."

A child died, as alleged, from an injury by a bolt carelessly left projecting from the curb of a city sidewalk. Immediately after the injury he told his mother the cause of the injury, weeping from pain at the time, and the next day he told his father. In an action for damages against the city by the father, the father testified to the son's declaration to him, and that he and the son together went to see the bolt in consequence of the son's declaration, and found drops of blood on it. *Held*, that the declaration to the mother was competent, but to the father incompetent. *City of Galveston v. Barbour*, 62 Tex. 172; S. C., 50 Am. Rep. 519.

Mrs. Barbour, the mother, was permitted to state, over the objection of the defendant, that "the boy came in crying, and seemed to be suffering very much with his foot, and said he had hurt it on a screw bolt on the curbing of Hibbert's pavement." This conversation occurred on the same evening the boy received the hurt.

The testimony of the father necessarily had upon the jury all the effect which his statement that his son told him he was injured by the bolt which he examined could have had, if made. The evident intention and purpose, which by the course pursued was fully accomplished, was to get before the jury the declaration of the child as to the manner in which he was injured. If the father, under the circumstances, could not legally have been permitted to narrate before the jury what his son had told him, then his testimony which was intended to have, and must have had, with the jury the same effect, ought not to have been admitted. Parties cannot do by indirection what they could not do directly.

The father testified to matters which occurred the next day after the child was hurt, and the matters to which he testified could in no sense be termed *res gesta*.

This testimony was, in effect, a narration of what his son told him as to the cause of the injury which he had received the day before, and should have been so far excluded. 1 Greenl. Ev. 108; Whart. Ev. 261-263; Whart. Cr. Ev. 690, 691; Abb. Tr. Ev. 589; *People v. Davis*, 56 N. Y. 101; *O. & M. R. Co. v. Hammersley*, 28 Ind. 371.

Too great a time elapsed; the statement and acts of the son were not the natural utterances of a simple, truthful child prompted by the suffering endured at the time through the injury; there was too much calculation and method on the part of the father, who then had no reason to believe that the injury was more serious than boys often receive in the most innocent pastime, to make those things to which he testified *res gesta*. It was simply hearsay, with no feature to relieve it from the operation of the rule which excludes that class of declarations.

In *State v. Horan*, 82 Minn. 894; S. C., 50 Am. Rep. 583, it was held that where one was robbed, his declarations of the circumstances very soon thereafter are competent evidence.

The court said: "The evidence of the description of the men given by the witness to the policeman at his house was received against the objection of the defendants, and it is insisted that this ruling was error. It is claimed on behalf of the State that the statements of the witness were made in close connection with the events which had transpired, and under the pressure of the excitement occasioned thereby, and were properly received as a part of the *res gesta*. Upon this subject the authorities are not uniform. Some courts are inclined to hold the rule with much strictness as to the time and circumstances under which the statements proposed to be shown are made, while others allow a wider range for its application, leaving it to be applied largely in the sound discretion of the trial court. 15 Am. Law Rev. 85; *Com. v. Denmore*, 12 Allen, 535; *People v. Davis*, 56 N. Y. 95; *Com. v. McPike*, 3 Cush. 181; *Insurance Co. v. Mosely*, 8 Wall. 897; *O'Connor v. Chi., M. & St. P. Ry. Co.*, 27 Minn. 166. Our examination leads us to conclude that, especially in cases of tort involving personal injury, the weight of authority in this country is in favor of allowing evidence of the declarations or statements of the injured party, touching the cause or circumstances of the injury, made so soon after the event, and under such circumstances as to warrant the trial court in presuming that they grew out of and were dependent upon it, and could not have been devised or contrived by the declarant for his own purposes. *Insurance Co. v. Mosely*, 8 Wall. 897; *Harriman v. Stove*, 57 Mo. 93; *Driscoll v. People*, 47 Mich. 413; *Jordan v. Commonwealt.*, 25 Gratt. 943; *People v. Vernon*, 85 Cal. 49; *Burns v. State*, 61 Ga. 192; *Augusta Factory v. Barnes*, 72 id. 105; S. C., 53 Am. Rep. 838. In the last case the party was severely injured while employed in a factory. She was removed to her home, and about one-half hour after, while enduring severe bodily suffering, which had continued in the interval, she made a statement to her father of the particulars of the cause of the accident, which the court held proper to be received as part of the *res gesta*. In *O'Connor v. Chicago, etc., R. R. Co.*, 27 Minn. 173, this court, after reviewing the cases and in considering this subject generally, say 'that a considerable time may elapse, and yet the declaration be a part of the *res gesta*,' and 'that each case must depend on its own peculiar circumstances, and be determined by the exercise of sound judicial discretion.'"

In *Cleveland, etc., Railroad Co. v. Newell*, 104 Ind. 264; S. C., 54 Am. Rep. 312, it was held that in an action for damages for a personal injury, evidence of expressions by the injured person of pain and sickness and declarations as to its seat, at the time of or subsequent to the occurring of the injury, and without regard to whom made, is competent.

The court said: "Counsel for appellant insist that exclamations of pain, in order to be admissible in evidence, must be contemporaneous with the alleged injury and the then existing facts, and that they must have been made before sufficient time elapsed to enable the person making them to form plans for future lawsuits. They insist further that they must have been made *ante litem motam*, not only before suit brought, but before the controversy existed in any form. In a general sense, and as applicable to a different class of cases, the rule as stated by counsel is approximately correct. Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of inquiry as to its severity, effect and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received, or subsequent to it, are admissible in evidence. *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138; *Town of Elkhardt v. Ritter*, 66 id. 136; *Howe v. Plainfield*, 41 N. H. 185; *Toule v. Blake*, 48 id. 92; *Kennard v. Burton*, 25 Me. 39; *Hayatt v. Adams*, 16 Mich. 180; *Elliott v. VanBuren*, 83 id. 49; S. C., 20 Am. Rep. 668; *Brown v. N. Y. Cent. R. R. Co.*, 32 N. Y. 597; *Matteson v. N. Y. Cent. R. R. Co.*, 35 id. 487; *Johnson v. McKee*, 27 Mich. 471; *Earl v. Tupper*, 45 Vt. 275. Expressions of present existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made. They are especially competent and of more weight when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by the direction of a court, for the purpose of basing an opinion upon as to the physical situation of the person whose condition is the subject of inquiry. *Quaife v. Chicago, etc., R. R. Co.*, 48 Wis. 513; S. C., 33 Am. Rep. 831; *Atchinson, etc., R. R. Co. v. Frazier*, 27 Kans. 463. It is only when such declarations assume the form of a narrative of past experience or suffering, or a relation of the cause and manner of the injury, or where they are made *ante litem motam* to one not an attending physician or a medical expert under the condition above mentioned, that their admissibility becomes the subject of serious discussion. Statements of past sufferings and pains, when not made to a medical expert for the purpose of enabling him to form an opinion upon with a view to treatment or other legitimate purpose, are clearly inadmissible. *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Bacon v. Charlton*, 7 Cush. 581. And statements of the cause of the injury or of past occurrences, made to any one, unless made so nearly contemporaneous with the principal fact to which they relate, or unless they are made while the transaction is in progress, so as to constitute a part of the *res geste*, are also inadmissible. *Inhabitants, etc., v. Inhabitants, etc.*, 98 Mass. 47. When so related or connected as to become part of the *res geste*, they may be received as evidence bearing on the principal fact. *Insurance Co. v. Mosley*, 8 Wall. 397. The rule is not to be extended beyond the necessity upon which it is founded. Past events and the manner in which an injury was received are ordinarily susceptible of proof by direct evidence. For that reason such statements, not made contemporaneous with the occurrence, or so near it as to become part of the transaction, no matter to whom made, are inadmissible. *Chapin v. Marlborough*, 9 Gray, 244; S. C., 69 Am. Dec. 281; *Illinois Cent. R. R. Co. v. Sutton*, 43 Ill. 438. A physician may, however, testify to a statement or narrative given by a patient in relation to his condition, symptoms, sensations and feelings, both past and present, when such statements were received during and were necessary to an examination with a view to treatment, or when they are necessary to enable him to give his opinion as an expert witness. *Quaife v. Chicago, etc., Ry. Co.*, *supra*; *Barber v. Merriam*, 11 Allen, 322; *Looper v. Bell*, 1 Head, 373; *Yeatman v. Hart*, 6 Humph. 374; *Eckles v. Bates*, 26 Ala. 655."

MATTER OF JONES.*

December 17, 1886.

WILL — EXECUTORS CARRYING ON BUSINESS — WHEN EXPENSES CHARGEABLE TO INCOME.

Executors were authorized to continue the testator's business for such time as they should think most advantageous to his estate, and the profits were to be

* Affirming 37 Hun, 430.

received by the executors as part of the estate for division and investment as provided by the will. The testator devised all his estate to his executors in trust to take possession of and manage the same. The rent of the real estate, after payment of taxes, repairs, and insurance and dividends, interest and income of the personal estate, after payment of all necessary and legal charges and expenses, was to be paid over to his brother and sisters during their lives, and upon their death was devised to the children of said brother and sisters. There was no specific bequest of the profits of the business further than that contained in the direction to pay over to the brother and sisters the income of the personal estate.

Held, that the cost of replacing and restoring personal property worn out and used up in the ordinary course of the business, as also uncollectible credits incurred in carrying on the business were chargeable to the income of the life tenants and not to the principal.

The effect of charging any of the expenses which related to the business upon the principal of the estate would be a serious impairment of the capital employed therein, which might in the end absorb the same, and thus destroy all income arising therefrom.

Appeal from judgment of general term, second department, affirming a decree of the surrogate of Westchester county made upon settlement of an executor's accounts.

Luther K. Marsh, for appellant. *Martin J. Keogh*, for respondents.

MILLER, J. The questions in this case arose on the final accounting of the testator's executors before the surrogate of Westchester county, and affect the construction to be placed upon portions of his will.

The testator, before his death, was extensively engaged in the business of brewing ale and beer in the city of New York and vicinity, and by his will authorized and empowered his executors to continue his business for such time after his decease as they should think most advantageous to his estate, and he gave directions as to the management thereof and the distribution of the profits arising from the same. He then made provision for the division of the whole of his estate into five equal shares, and disposed of them substantially alike by separate provisions in regard thereto, one of which is as follows: "I give, devise and bequeath to Wilson G. Hunt, Martin Blydenburgh, Alexander Thayer and John J. Jones, executors and trustees under this my will, one equal fifth part of all my estate, real and personal, after payment of debts and funeral expenses as aforesaid, to have and hold the same, to them, the survivors and survivor of them, for and during the life of my sister, Margaret Jones; in trust, nevertheless, to take possession of the real estate, keep the same in proper and suitable repair, keep the buildings thereon well insured, and to let or lease the same from time to time and for such term of time within the life-time of my said sister Margaret, as to them may seem best, and for the best rent that can be obtained therefor; to keep the personal estate safely and securely invested, and to collect the rents and profits of the real estate, the interest, dividends and income of the personal estate, and after paying the taxes and assessments, expenses of repairs and insurance, and all other legal and necessary charges and expenses, pay over the residue or net proceeds of said one-fifth part of my estate, so given to them in trust as last aforesaid, to my said sister Margaret, semi-annually, during her life."

Under the provisions of the will the executors for a number of years

continued to carry on the business in accordance therewith. They sold the beer manufactured to purchasers on credit, as they had authority to do by the will, and a considerable amount of the credits created became uncollectible and were lost to the estate. In the account filed by the executors these losses were charged against the income of the life tenants, and deducted from the same. Various appliances and articles which had been worn out in the conduct of the business, as well as horses which had died, were replaced by the executors and the amount paid therefor charged against the life tenants. Certain items for repairs were also charged against the life tenants. All of the charges enumerated were allowed by the surrogate upon the accounting.

These allowances present the question whether under the will they were proper charges against the income and whether the executors have complied with the intention of the testator in reference thereto.

The testator after vesting authority in his executors to hold in trust his real estate for the purpose named, and for collecting the rents and profits of the real estate, the interest, dividends and income of the personal estate, and the payment of all legal charges and expenses, provides for the payment of the residue or net proceeds as directed in the clause cited. By the terms "residue or net proceeds" the testator evidently intended to dispose of such portion of the income as should remain after making proper and legitimate deductions for expenses and losses incurred in the management of the estate, and in the conduct of the business which was intrusted to their charge. Any money, therefore, which might be paid out in the course of the business which was essential to carry it on would be a necessary and proper charge against the income and profits in determining what amount of the residue or net proceeds remained for distribution among the legatees.

It would be very difficult to draw a dividing line by which it could be determined that a certain portion of the expenses incurred and disbursements made in the transaction of the business should be made a charge against the capital employed, and another portion against the profits or income. While a case might arise where a large expenditure, as for instance the erection of additional buildings might be such an improvement of the real estate as to become an addition to the capital employed, yet any ordinary expenditures for repairs or improvements would not be embraced within any such rule. So, also, in reference to the wearing out, loss of, or depreciation of personal property, it cannot well be claimed that moneys expended to replace the same should not be deducted from the income received or profits realized.

It was not necessary, we think, that the testator should have expressed in his will in more specific terms, what items should be deducted, and he evidently meant by the language employed to include all losses and all expenses which were necessarily incurred in the management of the estate and the conduct of the business.

It can hardly be supposed that the testator intended that a division should be made of profits realized from the business without deducting expenses and losses. Such a disposition of the income received would not constitute a division of the "residue" as the amount would be greater than what actually remained. There would in fact be no such

profits or balance on hand to be divided. The expenditure would have been made without any provision for its payment or reimbursement, and the value of the investment in the business very seriously impaired. The effect of charging any of the expenses which related to the business upon the principal of the estate would be a serious impairment of the capital employed in the business, which might in the end absorb the same and thus destroy all income arising therefrom.

It is no answer to this view of the subject to say that under the will the business is only to be conducted so long as in the opinion of the executors it shall be to the advantage of the estate to carry it on, as clearly it could never have been intended that the conduct of the business should deplete the estate by dividing its capital to make good the expenses and losses referred to. Nor can it well be said that the losses were to be apportioned between principal and income as it might be determined, and it is nowhere manifest that the testator's intention was that the devisees should not only receive the income, but a portion of the principal. It would require a close calculation to determine what apportionment should be made as to a portion of the losses incurred, and it is not fairly to be inferred that the testator intended that any such degree of exactitude should be required.

The provision under the will authorizing the executors to discontinue the business when it was no longer advantageous to continue it bears strong indication of the intention of the testator that when the body of the estate fails to yield a sufficient income, after making proper deductions, then the occasion arrived as mentioned in the will when it became the duty of the executors to discontinue the business.

The order of the general term affirming the decree of the surrogate should be affirmed, with costs.

All concur.

Judgment affirmed.

ROBERTS, *Resp't*, v. COBB, *App'l't*.*

December 7, 1886.

NEGOTIABLE INSTRUMENT — NOTE GIVEN FOR SUBSCRIPTION — CONSIDERATION.

A promissory note executed in pursuance of a promise to subscribe \$2,500 toward the payment of a church debt, on condition that the church would raise the balance by voluntary subscriptions, which condition is performed, is founded upon a sufficient consideration and binding upon the maker.

This case has been three times to the general term upon appeal. Upon the first trial of the cause a verdict was directed for the defendant, upon the ground that there was no consideration for the note. An appeal was taken by the plaintiff, and the judgment entered on the verdict was reversed.

Upon the second trial the case was submitted to the jury upon the question of undue influence, and the jury rendered a verdict in favor of the defendant. From the judgment entered on that verdict the plaintiff appealed. The general term reversed the judgment and ordered a new trial. Upon the new trial the court directed a verdict for the

* See 31 Hun, 150, 687.

plaintiff. From the judgment entered on that verdict the defendant appealed. The general term affirmed the judgment. From the order affirming the judgment the defendant appeals to this court. No opinion was delivered by the general term on the last appeal.

James M. Smith, for appellant. *Henry C. Griffin*, for respondent.

EARL, J. The persons interested in the First Baptist Church of Tarrytown had, prior to the 1st day of May, 1881, been engaged in building a church edifice, and at that time there was a mortgage upon the church property upon which there was then due about \$15,000. An effort was then being made by the church to raise the funds to discharge that mortgage, with a view to the dedication of the church in the near future. Rev. Mr. Horr, the pastor of the church, was active and efficient on its behalf in procuring subscriptions and pledges for that purpose. About the first of May he called upon Mrs. Barker, defendant's testatrix, an aged lady, who was a member of the church, and requested her to make a contribution, and she promised to contribute \$2,500 in cash toward the payment of the mortgage if he would secure pledges for the balance, \$12,500, and he promised her to make the effort. He at once set about raising the requisite sum and secured pledges for the amount during the month. After he had done so, on the 31st day of May, 1881, he called upon Mrs. Barker for the amount of her subscription, and she, finding it inconvenient to pay the cash in discharge thereof, executed the instrument set out in the complaint and delivered it to him. She subsequently paid thereon \$500, and this action was brought by the plaintiff, to whom the note was indorsed by the trustees of the church, to recover the balance.

It is entirely clear, we think, that Mr. Horr must be regarded as having acted for and on behalf of the church in procuring pledges to pay the mortgage. He was not acting in his own interest, and his relations to the church were such that it is a proper, if not an absolutely necessary inference, that he was its agent, acting for it with the sanction and co-operation of its trustees. This money and note which he obtained from Mrs. Barker were immediately delivered to the trustees and his action approved by them; and all the money and subscriptions which he obtained were turned over to the trustees, and used in the discharge of the mortgage.

Therefore, whatever he did and whatever he promised to do the church did and promised. We have, then, a case where Mrs. Barker agreed to give \$2,500 for the purpose of discharging the mortgage, on condition that the church would raise the balance by voluntary subscriptions, and the church promised her to make the effort. It did make the effort and performed the condition, and, therefore, her promise became obligatory, and the note which she gave in fulfillment thereof is based upon a sufficient consideration. *Trustees of Hamilton College v. Stewart*, 1 N. Y. 587; *Barns v. Perine*, 12 id. 18; *Marie v. Garrison*, 83 id. 14; Pars. Cont. (5th ed.) 452 and notes.

But if it could be held that Mr. Horr did not act as the agent of the church, then it would follow that he acted for himself in procuring the subscriptions, intending to present the money obtained to the church

for the discharge of its mortgage, and the same conclusion would still be reached. In that event Mrs. Barker promised to give him \$2,500 if he would procure subscriptions for the remaining \$12,500. He accepted the offer and performed the condition, and thus there was an adequate consideration to uphold her promise. He called upon her to perform her promise, and took her promissory note payable to the trustees of the church in discharge of her obligation to him. That note was founded upon a sufficient consideration, and was valid in the hands of the trustees, and they gave good title thereto by their indorsement to the plaintiff.

So in any view that can be taken of this case the judgment was right and should be affirmed.

All concur.

Judgment affirmed.

WYCKOFF v. SCHOFFIELD.

December 17, 1886.

An order denying an application for an order directing a receiver of rents and profits, pending the foreclosure of a mortgage, to pay therefrom the amount expended by an adjoining lot-owner in "shoring up" the wall of mortgaged building, is matter of discretion with the court below, and from its decision no appeal lies to this court.

Section 473 of the consolidation act — Laws of 1882, chap. 410—provides that "Whenever there shall be an excavation, either of earth or rock, upon any lot or piece of land in the city of New York, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary line of said lot, if the person or persons whose duty it shall be, under existing laws, to preserve and protect said wall from injury shall neglect or fail so to do, after . . . notice . . . from the fire department . . . the said department may . . . take such steps as in its judgment may be necessary to make the same safe and secure . . . at the expense of the person or persons owning said wall or building of which it may be a part, and any person or persons doing the said work or any part thereof, under and by direction of said department, may bring and maintain an action against the owner or owners, or any one of them, of the said wall or building of which it may be a part, for any work done or materials furnished in and about the said premises, in the same manner as if he had been employed to do the said work by the owner or owners of the said premises." *Held*, that said statute was not broad enough to cast the duty of protecting the wall upon the receiver.

Appeal from an order of the general term, first department, affirming an order of the special term denying an application for payment of the amount expended for benefit of mortgaged premises.

On the 8th of January, 1884, the defendant, Schofield, was the owner, and the plaintiff, Wyckoff, mortgagee of premises known as No. 367 West Twenty-third street, in the city of New York. Daniel J. Noyes was appointed receiver of the rents and profits accruing therefrom during the pendency of this action for the foreclosure of the plaintiff's mortgage. At the same time one Maddock owned the adjoining premises No. 365. In consequence of an execution upon this lot, the wall of No. 367 was made unsafe. The inspector of buildings gave notice to the owner and the receiver to make the same secure, and, they failing to do so, Maddock, under the authority of the inspector, furnished the materials and did the work, and then applied to the court

for an order directing the receiver to pay from the rents and profits \$395 expended for that purpose. The application was denied by the special term, and its order affirmed by the general term.

Lemuel Skidmore, for appellant. *Samuel A. Noyes*, for respondent.

DANFORTH, J. It does not appear upon what ground the receiver was appointed, but it may be assumed that the premises were inadequate security for the mortgage debt, or that the rents were expressly pledged for its payment, but, for whatever cause, it is plain the receiver had no power to lessen the fund to which the plaintiff had a right to resort. Such directions might have been given by the court if necessary for the preservation of the property. It was not applied to. The expenses were not incurred, nor the repairs made, with its permission, and whether, having been made, the court shall allow its receiver to reimburse the contractor, was a matter entirely within its discretion, and from its determination no appeal will lie to this court.

The appellant, however, asserts that his right to compensation is given by section 473 of the act of 1882, chapter 410, known as the New York consolidation act. It is there provided that "whenever there shall be an excavation upon any lot of land in the city of New York, and there should be any party or other wall, on adjoining land, standing upon or near the boundary line, if the person, whose duty it shall be to preserve and protect said walls from injury, shall neglect or fail so to do after . . . notice from the fire department, . . . the department may . . . take such steps as, in its judgment, may be necessary to make the same secure "at the expense of the person or persons owning said wall or building of which it may be a part, and any person or persons doing the said work, or any part thereof, under and by direction of said department, may bring and maintain an action against the owner or owners, or any one of them, of the said wall or building, of which it may be a part, for any work done or materials furnished in and about the said premises in the same manner as if he had been employed to do the said work by the owner or owners of the said premises."

It may be said that it was the duty of the owner of lot No. 367 to protect the wall against the effect of the excavation, but the statute is not broad enough to cast that duty upon others, certainly not upon the receiver, who can act only under the order of the court.

We think the petitioner failed to make out a case for the interposition of a court in equity, or a legal claim under the statute. The order appealed from should, therefore, be affirmed.

All concur.

Order affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

COFFIN v. LAWRENCE.

November 26, 1886.

COMMON AND UNDIVIDED LANDS — WARRANT FOR MEETING — TITLE.

Calls or warrants for meetings of the proprietors of common and undivided lands rest upon the same footing as warrants for town meetings. Such meetings may lawfully act upon any subject, the nature of which, the warrant gave substantial and intelligent notice.

When a meeting is called for the purpose of setting apart a portion of the common land, it is sufficient to authorize it to take action on the same if the call or warrant for the meeting states generally the object of the meeting without giving the boundaries of the land which it is proposed to convey.

Writ of entry to recover land in Nantucket. The case is stated in the opinion.

C. W. Clifford, for demandant. *T. M. Stetson* and *H. B. Worth*, for tenant.

MORTON, Ch. J. The demandant's title is derived from Henry Coffin. To show his title, they put in evidence a vote of the proprietors of the common and undivided lands of the island of Nantucket, passed January 25, 1886. It is not disputed that such proprietors might grant land by a vote instead of a deed. See *Mitchell v. Starbuck*, 10 Mass. 5; *Folger v. Mitchell*, 3 Pick. 396; *Springfield v. Miller*, 12 Mass. 415.

But the tenant contends that the vote on which the demandants rely was invalid, because it did not follow and conform to the call, or warrant for the meeting at which it was passed.

The petition of Henry Coffin asks the proprietors "to set off to him all the common land to the eastward of Siasconset village and Sunset heights, and in front of Sconset village." In the call for the meeting the proprietors are notified that the purposes of the meeting are, first, "to choose a moderator," and second, "to act upon the petition of Henry Coffin for land to be set off to him near Siasconset." At the meeting, as appears by the record "under the second article of the warrant, it was voted that the petition of Henry Coffin for land near Siasconset was granted." Thereupon, "the lot layers presented returns and map, pertaining to the land to be set off to Henry Coffin," the substantial part of which is as follows:

"Pursuant to a vote of the proprietors of the common and undivided lands of the Island of Nantucket, we have this day set off in severalty to Henry Coffin all the common and undivided land in and near the village of Siasconset, whether above or below the bank, contained and inclosed within the lines of the map or plan herewith presented." The plan bounds the lot set off to Coffin, easterly by the ocean, north-easterly and north-westerly by lots previously set off to other persons and north-westerly by a line defined by metes and bounds, as well as by courses and distances." The record then proceeds as follows: "And it was voted that the returns and map of the lot layers be accepted."

As we have said, this amounted to a grant of the land described in

the plan to Coffin, if the meeting was authorized to pass these votes under the warrant or call.

It was admitted at the trial that the base or northerly "line of the lay out passed through the eastern part of the village of Siasconset," and thereupon the court, at the request of the tenant, ruled that the "lay out to said Henry Coffin was invalid, because the lay out executed by its terms the land described in the petition and call."

We are of opinion that this ruling was erroneous.

Such proprietors of common and undivided lands are a *quasi* corporation or body politic. The calls for meetings are analogous to warrants for town meetings and are to be governed by the same rules. In regard to the meetings of such proprietors, as in regard to town meetings, our laws from the earliest period have provided that the warrant or notifications must state the purposes of the meeting and that no business can be transacted unless stated therein.

Thus the statute of 1713 provided that "no other affair shall be transacted at any meeting of the proprietors than what is expressed in the warrant or notification of such meeting." 1 Acts and Resolves of Province, p. 704.

The statute of 1783, chapter 39, section 1, contained the same provision. Substantially the same provision has been re-enacted in all the subsequent revisions of the statutes. Rev. Stats., chap. 43, § 5; Gen. Stats., chap. 67, § 11; Pub. Stats., chap. 111, § 11.

It has been repeatedly held that town warrants should be construed literally and that a meeting might legally act upon any subject of which the warrant gives substantial and intelligent notice to the voters. Warrants are held sufficient, if they indicate with substantial certainty the nature of the business to be acted upon. *Haven v. Lowell*, 5 Metc. 35; *Wood v. Jewell*, 130 Mass. 270; *Matthews v. Westborough*, 131 Mass. 521.

We think the same rule should be applied to notifications of the meetings of proprietors of common and undivided lands.

They must state the affair or business which is to come before the meeting. From the nature of the case they must be general and cannot state in detail the action which the proprietors may take upon the subject expressed in them.

In the case before us the proprietors were notified that the meeting was "to act upon the petition of Henry Coffin for land to be set off to him near Siasconset." The notification does not purport to give the boundaries of the land, which it is proposed to convey to Coffin. It is a general notice of the affair or business which is to come before the meeting, and the details of action and the boundaries of the land are necessarily left to be decided by the meeting. There is nothing in the case to show that Siasconset has any legally defined boundary. It is a part of Nantucket, and there is no certain ascertained line which separates it from the lands southerly of it and between it and the ocean. It seems to us that the ruling was based upon too narrow a construction of the call, and that the grant to Coffin which the meeting made was fairly within the scope of the business, of which the proprietors were notified by the warrant or call.

Exceptions sustained.

EASDALE v. REYNOLDS.

November 26, 1886.

LOST RECORDS — SECONDARY EVIDENCE.

When the original complaint and warrant, after being transmitted from the police court to the superior court, have been lost, secondary evidence of their contents may be given on the trial in the superior court.

BASTARDY — EVIDENCE AS TO INTERCOURSE WITH OTHERS.

It is the general rule that no act of sexual intercourse between the complainant in a bastardy proceeding and any other man than the defendant is admissible in evidence, unless it is so near in time as to afford some evidence that it resulted in begetting the child named in the complaint.*

Complaint under the bastardy act. Pub. Stat., chap. 85. At the trial in the superior court the jury found the defendant guilty, and the defendant alleged exceptions to the rulings and refusals to rule of the presiding judge. The facts appear in the opinion.

E. T. Burley, for complainant. *J. P. Sweeney*, for defendant.

MORTON, Ch. J. Bastardy proceedings must be commenced by complaint before a police, district, or municipal court or trial justice. The inferior tribunal, upon a default or a hearing, requires of the defendant a bond for his appearance in the superior court, and the proper course of proceeding is for it to transmit to the superior court, certified copies of the complaint and warrant, and of the record of the court or trial justice. Pub. Stat., chap. 85, § 7; *Bispan v. Ross*, 126 Mass. 233. But the superior court exercises an original and not an appellate jurisdiction, and the proceedings before the inferior tribunal are merely to compel the appearance of the defendant before the superior court. *Thompson v. Kenney*, 110 Mass. 317; *Kennedy v. Shea*, id. 152; *Duhamel v. Ducette*, 118 id. 569.

The case is tried in the superior court upon a supplemental complaint and warrant, which is in the nature of a declaration in a civil suit. It has been held that certified copies of the complaint and warrant, and of the record of the court in which the proceedings were commenced may be filed in the superior court at any time before the trial. *Harves v. Gustin*, 2 Allen, 402; *Packard v. Lawrence*, 15 Gray, 483.

In the case at bar, when it came up for trial in the superior court, it appeared that the clerk of the police court of Lawrence, in which court the complaint was made, had transmitted to the superior court the original complaint and warrant, and that they had been lost from the files of the superior court.

The only record in the police court concerning the case was the entries upon the docket showing that upon the complaint of the plaintiff the defendant pleads not guilty, waived examination, is ordered to give bonds in \$400 with sureties, and does give such bonds. In the absence of an extended record, this is the record of the case.

From the nature of the case the clerk could not furnish certified copies of the complaint and warrant, because they were lost. The superior court had to deal with a case where, owing to the loss of a part of the record, it had become impossible to comply strictly with the

* See 22 Eng. Rep. 239, note.

requirements that a certified copy of the record should be filed. It was a case of a lost record, and we think the superior court rightly ruled that secondary evidence of the contents of the complaint and warrant were competent. *Davidson v. Slocomb*, 18 Pick. 464; *Pruden v. Alden*, 23 id. 184; S. C., 34 Am. Dec. 51. The certified copy of the record of the police court, filed by the plaintiff, and the secondary evidence of the contents of the complaint and warrant were sufficient to show that the necessary preliminary steps were taken in the police court, and justified the superior court in proceeding with the trial upon the merits.

The defendant did not object to this secondary evidence, because it was in the form of an affidavit to the copies offered instead of being upon the oath and examination of the witness, but objected only because the copies "were not properly certified to."

We are of opinion that the court rightly overruled this objection, and ordered that the case proceed to trial upon the supplemental complaint.

At the trial the complainant was asked upon cross-examination "if she had not, in the autumn of 1884, been with child by one Menzies, and if she had not got rid of that child."

It is the general rule that no act of sexual intercourse between the complainant and any other man than the defendant is admissible in evidence, unless it is so near in time as to afford some evidence that it resulted in begetting the child named in the complaint. *Eddy v. Gray*, 4 Allen, 435; *Sabine v. Jones*, 119 Mass. 167; *Ronan v. Dugan*, 126 id. 176.

In this case the offer was to show an act of illicit intercourse with Menzies from three to six months before the child was begotten, and the evidence was rightly rejected. It is to be observed that there is in this case no evidence of any intimacy with Menzies, continuing up to the time of gestation.

If it had appeared that such intimacy continued and that the parties were together under circumstances of suspicion about the time the child was begotten, the offer would have presented a different question. *Oldwald v. Woodsum*, 142 Mass. 512.

Exceptions overruled.

COMMONWEALTH v. CORBIN.

November 26, 1886.

EVIDENCE — MISTAKE.

A paper which has been voluntarily produced and put in evidence by a defendant at the hearing in the police court, cannot afterward be withdrawn upon the claim that it was put in by mistake. It then becomes a part of the case, and the superior court has a right to use it on appeal.

Complaint to the police court of the city of Lynn, charging the defendant with the illegal keeping of intoxicating liquors in the city of Lynn, on June 12, 1886, with the intent unlawfully to sell the same without license.

In the superior court, on appeal, one James H. Carroll, a witness for the Commonwealth, testified substantially as follows: "That the

defendant—not being represented by counsel—in said police court, testified in his own behalf, and among other things that the beer seized was a present to him from one McCormick, of Boston, and as a part of his testimony, offered a certain bill or receipt, that the paper being read, the defendant said it was the wrong paper and had been passed in by mistake, and requested the justice of said police court to return said paper to him; but said justice refused to do so and ordered said paper to be impounded; the defendant further testified in the lower court that a certain barrel of ale, which was seized by the police officers of said Lynn, on July 12, 1886, was given him as a present. The witness here identified the paper or receipt above referred to. It appeared from said bill or receipt that said defendant paid for a barrel of ale, June 9, 1886.

The defendant then asked the court to order that said paper or receipt be returned to him, said paper or bill being then on file in the superior court. The court refused so to do and the defendant excepted. Said paper or receipt was then offered in evidence by the attorney for the Commonwealth, and the defendant objected to the introduction of the same as evidence. The court overruled the objection and the defendant excepted. The jury returned a verdict of guilty.

E. J. Sherman, attorney-general, for Commonwealth. *J. H. Sisk*, for defendant.

MORTON, Ch. J. It appeared in evidence that the officers in executing a search warrant, on June 12, 1886, found a barrel of ale in the defendant's premises. The defendant testified that this was given to him as a present by one McCormick. The receipted bill of McCormick, in which a barrel of ale is charged as delivered to the defendant on June 9, 1886, was competent to contradict the testimony of the defendant. The fact that this bill was received by the defendant and retained as a voucher is in the nature of an admission by him that the ale was bought and paid for and, though open to explanation, is some evidence of the fact that it was bought and paid for. The dates are so near as to raise a fair inference that the barrel sold by McCormick was the same barrel seized by the officers.

The defendant contends that the use of this bill in evidence was contrary to the bill of rights, as it compelled him to furnish evidence against himself.

But this paper was not obtained by the government by any unlawful means. We need not discuss the question whether, if it had been so obtained, the government could use it in evidence against the defendant.

The defendant voluntarily produced this receipted bill and put it in evidence in the police court. He could not afterward withdraw it upon the claim that he put it in by mistake. It had become a part of the case and the court had a right to use it upon the trial upon appeal in the superior court without any infringement of the constitutional rights of the defendant.

Exceptions overruled.

COMMONWEALTH v. GAUVIN.

November 26, 1886.

CRIMINAL LAW — ARSON — EVIDENCE OF OTHER FIRES.

On a trial for arson defendant offered to prove that there were other incendiary fires in the same neighborhood, and at about the same time as the one in question, claiming that they were all set by the same person, and by some one other than the defendant. *Held*, that the evidence was rightly rejected.

Indictment for burning a building in Marlborough. At the trial in the superior court the government called one Heman S. Fay as a witness, and on cross-examination he was asked by the counsel for the defendant whether or not, about the time of the fire, there were other incendiary fires in the same neighborhood. The defendant offered to prove that in the same neighborhood, in Marlborough, there was one fire about six weeks before and one other four days before the burning of the building alleged in the indictment, and that said fires appeared to be and were of incendiary origin. The defendant claimed that all said three fires were set by the same person, and by some other person than the defendant.

The court ruled that said evidence, offered by the defendant, was incompetent and immaterial, and excluded the question to said Fay. The jury returned a verdict of guilty and the defendant alleged exceptions.

H. N. Shepard, assistant attorney-general, for Commonwealth. *H. E. Fales*, for defendant.

By the Court. The indictment charges the defendant with burning a building in Marlborough. The fact that there were two other fires in Marlborough shortly before the burning alleged in the indictments, which the defendant claimed "were of incendiary origin," has no tendency to prove either that the defendant did or did not set fire to the building named in the indictment.

The court was not called upon to try, in this case, the questions whether the two previous fires occurred, whether they were incendiary, and if they were, whether they were set by the defendant or some other person. These questions are collateral and immaterial, and whichever way they might be settled, they do not aid in determining whether the defendant was guilty of the offense charged.

The court rightly rejected the evidence offered by the defendant to show such previous fires.

Exceptions overruled.

COMMONWEALTH v. LEE.

November 24, 1886.

CRIMINAL LAW — POLYGAMY — EVIDENCE.

On the trial of the husband for polygamy, evidence of lewd conduct of the alleged wife is not admissible to contradict her testimony as to the marriage.

Sometime after the alleged marriage, the wife, while on the street with a companion, was requested by the defendant's sister to come into the house, when she answered, "I will not; I have a right to do as I have a mind to," and the defendant offered to prove that her companion, at the time she made the remark, was a lewd woman, but the evidence was excluded. *Held* error; that the character of her companion was competent as aiding in the construction of the ambiguous answer.

Indictment for polygamy. At the trial in the superior court, to prove the fact of marriage in New York on November 8, 1881, as alleged, the government produced as a witness Clara B. Lee, the alleged wife, who testified that she and the defendant left Attleborough at 4:45 P. M. on November 7, 1881, and went by rail to Boston, and that late in the evening they took the shore line of cars from Boston, and, going through Providence, arrived at New York in the morning, and went to a clergyman and were lawfully married; that they remained there until about noon on the same day, when they took the cars by the same route and returned to Boston, arriving there on the evening of November eighth; that they took a room and boarded at 43 Pleasant street, Boston, until the following Saturday, when they returned to Attleborough, and, as all the evidence showed, they lived together as husband and wife, and were reported to be such until June 16, 1886, when she left him. The defendant, as a witness, denied that they ever went to New York, and denied that any marriage was ever solemnized between them anywhere, and testified that on Monday, November seventh, they went to Boston, as she stated; that they went to 43 Pleasant street, in that city, and cohabited until the following Saturday, when they returned to Attleborough, where they lived together as husband and wife until said June sixteenth, when she left him.

The principal issue to the jury was whether they were married in New York, as testified to by Clara. To rebut her testimony the defendant put in evidence several declarations made by her. Evidence was put in that after the alleged marriage, upon being remonstrated with for supposed immodest or improper conduct in going to ride and being out late at night with other men than her husband, she had said, "I have a right to do as I please." The brother of the defendant asked her if she thought her conduct was becoming a married woman; she answered, "I have a right to do as I please, you cannot prove our marriage." A sister of the defendant testified that the defendant and the said Clara lived together in the same house with her during the spring of 1883; that said Clara had been out without her husband late on Thursday night, April twenty-sixth and twenty-seventh, that she left the house early in the evening of Saturday, the twenty-ninth, leaving her husband; that at about one o'clock in the morning of Sunday, April thirtieth, she heard voices near the house; that she raised the window and saw her walking and talking with a man named Titus and another woman accompanying them; that she called to her and said, "Clara, come back into the house where you belong;" that she answered, "I will not. I have a right to do as I have a mind to." That she went away with this man and woman, and did not return during the night. The defendant's counsel then asked her, the sister, what was the character or reputation of the woman who was with her and Titus. The defendant's counsel stated that he offered the evidence in connection with the conversation, as tending to show that she did not consider herself under marital obligations, and in that view he proposed to show that her associate there was a lewd woman. The question was objected to and excluded, and the defendant alleged exceptions. The defendant's counsel also, in connection with what she had said, offered evidence to show that

she then and at other times during said cohabitation associated with lewd persons; and at other times sought privacy with other men than the defendant; but the court excluded all such evidence, and the defendant alleged exceptions.

E. J. Sherman, attorney-general, for Commonwealth. *J. Brown* and *G. A. Adams*, for defendant.

HOLMES, J. Evidence of lewd conduct of the alleged first wife was not admissible to contradict her testimony to a marriage in New York. But evidence should have been admitted that her companion was a lewd woman at the time she answered the defendant's sister's summons to "come back into the house, where you belong." The answer, "I will not. I have a right to do as I have a mind to," was ambiguous in itself. It might have had any one of various shades of meaning, some of which would not and some of which would be inconsistent with her being married to the defendant. For instance, it might have meant only a declaration of independence as against the defendant's sister. On the other hand it might have meant a denial of duty to any one in the house, including her alleged husband. If she had been in the company of a doctor and a sister of charity, bent on an errand of mercy, it might have been construed one way; if with a prostitute, it might very naturally be construed the other.

Exceptions sustained.

GIBBS v. CHILDS.

November 24, 1886.

CHATTEL MORTGAGE—TITLE.

The execution and delivery of a mortgage on personal property not in the possession of either mortgagor or mortgagee is no evidence of title as against a stranger in possession.

Action of replevin, to recover possession of the sloop *Clarice*. At the trial in the superior court the following facts appeared: The plaintiffs proved and read in evidence a mortgage of the replevied boat from William H. Chadwick, of Nantucket, to them. The plaintiffs proved that the boat was about five tons burden, and had always been employed as a pleasure boat at Nantucket, since she came to Nantucket about four years ago. The plaintiffs also showed by the United States deputy collector of Nantucket that, prior to the record of the mortgage, January 9, 1885, in the town clerk's office, the boat had never been registered, enrolled or licensed at the port of Nantucket. On cross-examination it appeared by the records of the said custom-house that a license had been issued to the defendant on May 16, 1885, and renewed to him in 1886. There was no other evidence of record at the custom-house. The mortgage was duly recorded January 9, 1885, in the office of the town clerk of Nantucket. On this evidence the plaintiffs rested their case. The defendant offered no evidence and asked the court to instruct the jury that upon this evidence the action could not be maintained, that they return a verdict for the defendant. This the court refused, and, it being conceded by the defendant that the evidence was true, instructed the jury that on this evidence the plain-

tiffs were entitled to a verdict. The jury returned a verdict for the plaintiffs, with nominal damages of \$1. The defendant alleged exceptions.

T. M. Stetson and *H. B. Worth*, for plaintiffs. *J. Brown*, for defendant.

FIELD, J. There was no evidence that the plaintiff ever had possession of the boat, or any title to it, except as mortgagees, under a mortgage given by William H. Chadwick, on January 8, 1885, and there was no evidence that William H. Chadwick ever had possession of, or any right or title to the boat. The plaintiffs can only recover upon their own title or right of possession. The execution and delivery of a mortgage of personal property are not evidence of title to the property included in the mortgage against a stranger. Such an act is not necessarily an act of domain over the property itself, and, if there is no possession of the property by either the mortgagor or mortgagee, it is with respect to the defendant, *res inter alios*. The mortgage in this case is not an ancient document. If the execution, delivery and recording of a mortgage were held to create a *prima facie* title to personal property against a person in possession, then a *prima facie* right to the property of another could be created by any one at will. *Chaffee v. Blaisdell*, Oct., 1886. See *Perry v. Weeks*, 137 Mass. 584.

Exceptions sustained.

SUPREME JUDICIAL COURT OF MAINE.

STATE v. BANKS.

December 9, 1886.

PRACTICE—COMMENTING ON THE FACT THAT ACCUSED DOES NOT TESTIFY.

The prosecuting attorney in a criminal action is not authorized by the statutes of the State to comment, in his argument to the jury, upon the fact that the defendant did not testify in his own behalf.*

An appeal from the municipal court of Bath on a complaint for the violation of certain fish laws.

F. J. Baker, county attorney, for State. *C. W. Larrabee*, for defendant.

VIRGIN, J. This is a complaint for "using in Winnegance creek a net of less than six inches mesh," in violation of chapter 463, Priv. and Spec. Laws of 1885.

A witness for the prosecution testified that he saw the net when it was taken out and was lying on the ice, and on measuring the mesh found it to be only three inches. Neither of the defendants offered to testify. The county attorney urged in argument to the jury, that the defendants sat in court, heard the testimony relating to the size of the mesh and did not take the stand to deny it.

* See 27 Am. Rep 142, note.

In his charge to the jury, the presiding justice, after calling their attention to the above facts and instructing them, in substance, that the defendants' silence was not evidence of their guilt; that the jury must act without the defendants' testimony; that in weighing the evidence as a whole it might make a difference whether they testified or not; that they might own the mesh to have been less than six inches when it was not; and on the other hand they might deny it, and then that would be a fact to act upon, but that the jury had not that fact before them — proceeded as follows: "So that the county attorney was perfectly justified in calling your attention to the absence of any evidence on their part as witnesses upon the stand that their net was not what Mr. Frisbee described it to be. Now that is as far as the law allows you to go."

Our opinion is that the learned judge erred in allowing the jury to go thus far.

In 1864, for the first time, a person charged with commission of a criminal offense was made, "at his own request and not otherwise, a competent witness." Stat. 1864, chap. 280. After this statute took effect, county attorneys, where the accused did not elect to testify, were allowed in argument to comment on the fact to the jury. *State v. Bartlett*, 55 Me. 220; *State v. Lawrence*, 57 id. 574; *State v. Cleaves*, 59 id. 298. This practice continued for fifteen years; and while it operated favorably for innocent persons, it resulted disastrously to the guilty, who would not add perjury to the crime charged. Thereupon the legislature, believing that the constitutional provision which declares that "the accused shall not be compelled to furnish or give evidence against himself" — Decl. of Rights, § 5 — like the rain descending upon the innocent and guilty alike; and looking to a more careful protection of this right, enacted that "the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt." Stat. 1879, chap. 92, § 1; Rev. Stat., chap. 134, § 19.

We think the intent of the statute is that the jury, in determining their verdict, shall entirely exclude from their consideration the fact that the defendant did not elect to testify — substantially as if the law did not allow him to be a witness. *Commonwealth v. Harlow*, 110 Mass. 411; *Commonwealth v. Scott*, 123 id. 241; S. C., 25 Am. Rep. 81. This the jury could not do under the instructions. The other questions raised are settled in *State v. Adams*.

Exceptions sustained.

PETERS, Ch. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

STATE v. ADAMS.

December 9, 1886.

CRIMINAL PRACTICE AND PLEADING — AFFIRMATION — COMPLAINT FOR VIOLATION OF FISH LAWS.

A certificate of the magistrate implies that the complainant had conscientious scruples against taking an oath, when it says that he affirmed to the truth of the complaint.

When the jurat recites that complainant made oath, or affirmed, the conclusive presumption is that it was done according to law.

The provisions of statute 1885, chapter 262, do not apply to those of Special Statute 1885, chapter 463, and hence to convict one of taking bass from Winnegance creek in violation of the latter statute it need not be shown that the notices provided by the former statute were posted.

A complaint under chapter 463 for using prohibited nets need not allege the owner's name; and it will not be bad for duplicity if, after setting out the offense of using nets prohibited by section 8, it also alleges the unlawful killing of bass under section 5, without laying any venue — the latter may be rejected as surplusage.

A complaint under section 8 is valid although it alleges the forfeiture in the future tense.

F. J. Buker, county attorney, for State. *A. N. Williams*, for defendant.

VIRGIN, J. The first objection is that it does not appear, either in the body of the complaint or in the jurat, that the complainant was "conscientiously scrupulous of taking an oath." Article 1, section 5 of the Constitution authorizes the issuing of warrants on complaints "supported by oath or affirmation." And "when a person required to be sworn is conscientiously scrupulous of taking an oath, he may affirm" — R. S., chap. 1, § 7 — "under the pains and penalties of perjury with the same force and effect as an oath." R. S., chap. 82, § 104.

The magistrate is to determine whether the complainant has such scruples; and on being affirmatively satisfied that he has, to permit him to affirm in the form prescribed. The magistrate's certificate that the complainant affirmed necessarily and conclusively implies that he did entertain such scruples and was, therefore, permitted to affirm. *Hall v. Howie*, 3 Metc. 251-54. And it seems an indictment is good which purports to be found by the grand jurors, "upon their oath or affirmation," some of whom affirmed. *Com. v. Fisher*, 7 Gray, 492. We are aware that the court in New Jersey has held otherwise; but the same court said that "were the question now to arise for the first time, we should hesitate before we gave it our sanction, but feel ourselves bound to adhere to the rule established by the court on previous occasions." *State v. Harris*, 7 N. J. L. 361.

Whether the complainant makes oath or affirms to the truth of the allegations in the complaint, the jurat need not certify the mode and manner in which the magistrate administered it. When it recites that the complainant either made oath or affirmation to the allegations, the conclusive presumption is that it was done according to law. *Lincoln v. Taunt. Cop. Manuf. Co.*, 11 Cush. 440; *Horne v. Haverhill*, 113 Mass. 344.

The provisions of Public Laws of 1885, chapter 262, do not apply to those of chapter 463, Private and Specific Laws of 1885. Although the latter statute applies to particular waters, it is a public statute in its character and prohibits all persons alike from taking bass therefrom during all seasons of the year except in the months of January and February; and in those all persons may take them with impunity, provided they observe the regulations and restrictions prescribed as to the nets used therefor, and provided also that they do not set their nets in the flood gates of the mill-dam; no person or association having any special benefit thereunder, and hence having no inducement to post and maintain the prescribed notices, without which no prosecution can be maintained.

The former statute is predicated of benefits of special rights secured to individuals or associations, who, therefore, have inducements to post and maintain notices thereof, to the end that they may enforce their rights against those of the public who may violate the provisions by which such rights are protected.

Section 3 is leveled against the owner by way of forfeiting his nets "which do not have his name in legible characters branded or carved on a wooden buoy," etc.; and section 5 adds a forfeiture of \$25. But section 3 also reaches one who is not the owner, but uses such a net as is therein prohibited. Hence ownership need not be alleged, the allegation of use being sufficient.

The complaint is not bad for duplicity. To the forfeiture of \$25 for a violation of any of the provisions of sections 1, 2 and 3, section 5 adds "a further sum of \$5 for every bass illegally caught and killed," by way of aggravation of those offenses, like a second conviction under Revised Statutes, chapter 27. But as no venue is laid in the allegations setting out the killing, it may be rejected as surplusage, the complaint for using the net without the prescribed attachments being sufficient for the forfeiture of \$25.

Following the language of the statute as to the forfeiture and adopting the future tense is not such pleading as the court would recommend as a precedent, but we do not think it is fatal.

Judgment for the State for \$25 and costs.

PETERS, Ch. J., DANFORTH, FOSTER and HASKELL, JJ., concurred.
Exceptions overruled.

PAROCHER v. SAO AND BIDDEFORD SAVINGS BANK.

December 10, 1886.

GIFT—CAUSA MORTIS.

To make a valid gift *causa mortis* it must be made during some illness or peril, and in expectation of death therefrom, which must take place.*

H. Fairfield, for plaintiff. E. P. Burnham, for defendant.

EMERY, J. The money sued for unquestionably belonged to the plaintiff's intestate in his life-time. He earned the money and it was deposited in the defendant bank, as his money, and for his benefit. It would pass upon his death to his administrator, if he did not effectually dispose of it in his life-time.

It is not claimed that he made any gift *inter vivos*, but it is claimed, that by causing to be made upon the bank ledger the entry, "payable also to Mrs. Leavitt in case of death of H. Peters," he made an effectual gift *causa mortis*. Such gifts are not to be favored, as they conflict with the general policy of the law relating to the disposition of the estates of deceased persons. To be valid and take the property out of the general law of administration of estates, the gift must be made during some illness or peril of the donor, and in contemplation and expectation of death from the illness or peril, and death must also ensue therefrom. *Weston v. Hight*, 17 Me. 287; S. C., 35 Am. Dec. 250; *Grymes v. Hone*, 49 N. Y. 17; S. C., 10 Am. Rep. 313.

*See 6 East. Rep'r, 160; 5 id. 747.

This case does not disclose such circumstances, and this attempted gift was, therefore, ineffectual. The money belongs to the administrator. Defendant defaulted.

Damages to be assessed by the court at *nisi prius*.

PETERS, Ch. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

GRAY v. BUOK.

December 10, 1886.

SHIP AND SHIPPING — MARINE INSURANCE — ACTION FOR MONEY COLLECTED BY ONE OWNER FOR HIMSELF AND OTHERS.

The ship's husband by agreement insured the interests of two other owners with his own and collected the whole insurance for a loss. *Held*, that each of the others whose interest was thus insured could maintain an action against the ship's husband for his proportional part of the insurance money thus collected.

On exceptions to the ruling of the court in ordering a nonsuit. The opinion states the case and material facts.

Charles P. Stetson, for plaintiff. *Wiswell & King*, for defendant.

EMERY, J. In this case there was evidence from which a jury might find the following as facts:

The brig "*Isaac Carver*" was practically owned in the following proportions: Mark Gray, plaintiff, one-eighth; Wm. L. Swasey, one-eighth; Joseph L. Buck, defendant, one-fourth; and O. M. Gray, the master, one-half. The master's part was held by the plaintiff, awaiting payment therefor, but that half is not involved in this case. O. M. Gray procured insurance on his half independently of the other owners. Mark Gray, the plaintiff, applied to the defendant, who was agent for the vessel, to procure some insurance on his eighth. Swasey also made a similar application to the defendant as to his one-eighth. It was agreed that the defendant should procure an insurance of \$1,500, for himself, Swasey and the plaintiff, on their half of the vessel, to be divided among them in proportion to their interests in that half. The defendant thereupon procured the insurance, and upon the subsequent loss of the vessel collected the entire insurance. The plaintiff after demanding one-fourth of the sum collected, brought this suit to recover it.

The only objection urged to the maintenance of the action upon the foregoing facts is the non-joinder of Swasey as a co-plaintiff.

We do not think the interests of the plaintiff and of Swasey were joint. They were not partners. Each owned his share individually. Each could insure his share separately, or leave it uninsured without affecting the other. The plaintiff and Swasey did not jointly request the defendant to procure insurance upon any joint interest. Each applied for himself and for insurance upon his own separate share. The defendant made similar arrangements with each about the insurance. He could have made different arrangements. The similarity of the contracts does not weld them into one joint contract. We think each promisee can maintain his separate action for his share of the insurance. *Owings v. Owings*, 1 Harr. & Gill (Md.) 484; *Dunham v.*

Gillis, 8 Mass. 462; *Bunn v. Wisner*, 3 Caines, 54; *Hall v. Leigh*, 8 Cranch, 50.

The case of *White v. Curtis*, 35 Me. 534, relied upon by the defendant, is different from this case. In that case the insurance was upon the freight in which all the owners had a common interest. They had a common interest in the profit or loss of the venture. The defendant was not an owner and had no share in the venture. He procured the insurance for the joint account of the owners, and there was no evidence, as there was in this case, of any separate contract with either owner.

Exceptions sustained.

Actions to stand for trial.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

LOWNEY v. NEW BRUNSWICK RAILWAY COMPANY.

December 10, 1886.

RAILROADS — FIRES — NEGLIGENCE.

The owner of personal property cannot recover for damages thereto by fire, communicated by a locomotive, from the railroad company, except upon proof of negligence on the part of the company, and that the fire was caused by such negligence.*

On motion by the defendant to set aside the verdict.

Madigan & Donworth, for plaintiff. *Wilson & Woodard*, for defendant.

EMERY, J. If this case were within section 64 of chapter 51 of the Revised Statutes the burden would still be upon the plaintiff to prove that the fire which consumed his sleepers was communicated by the defendant's locomotive engine. The only evidence we find of such a communication is the fact that the fire was discovered in Shaw's barn — from which it spread to the sleepers — within a few minutes after the passage of the engine. It may be doubted if that alone is sufficient proof.

But the case is not within the statute above cited, and the judge so instructed the jury. The instruction was correct. The statute does not include movable articles, that are only temporarily left near the railroad track, and are liable to be changed at any time. *Chapman v. A. & St. L. R. Co.*, 37 Me. 92; *Pratt v. Same*, 42 id. 579.

The burden upon the plaintiff, therefore, was to prove, not only that the fire was communicated by the engine, but also that the defendants were guilty of negligence, and their negligence was the cause of the communication of the fire. The communication of the fire alone does import negligence. Nor does the proof of negligence alone import that it was the cause of the fire. The negligence must be proved. Its relation as the efficient cause of the fire also must be proved. *Pierce*

*See 6 East. Rep'r, 4, 6; 10 Eng. Rep. 25; 5 id. 277; 2 id. 493; *Peppers v. Missouri, etc., R. R. Co.*, 67 Mo. 715; S. C., 29 Am. Rep. 578; *Hong v. Lake Shore, etc., R. R. Co.*, 85 Penn. St. 298; S. C., 27 Am. Rep. 653; *Lehigh Valley R. R. Co. v. McKeen*, 90 Penn. St. 122; S. C., 35 Am. Rep. 644.

Railroads, 437; *Sheldon v. Hudson R. R.*, 14 N. Y. 218; S. C., 57 Am. Dec. 155; *Bachelder v. Heagan*, 18 Me. 32; *Sturgis v. Robbins*, 62 id. 289; *Lesan v. Maine Cent. R. R.*, 77 id. 85; S. C., 2 East. Rep'r, 100; *State v. Same*, 77 Me. 538; S. C., East. Rep'r.

In this case we find no evidence of such negligence, nor of its causal relation. It is urged in the argument for the plaintiff that the dampers were probably open or warped, or that ignited coals may have been blown out of the ash-pan, or that the smoke-stack might not have had proper appliances to arrest sparks. We do not find the evidence of them, however. Indeed, what evidence there was upon these points seem to negative the plaintiff's suggestion.

The verdict seems to us clearly against the law and evidence, and it should be set aside.

If it be suggested that it is difficult to prove negligence in such a case, and that the rules of law above stated are a hardship upon the plaintiff, and those situated as he is, it should be remembered that the defendants were pursuing in a lawful manner a lawful business, and one useful to the entire community. It is the general rule of law that one engaged in a lawful business, and acting in a lawful manner, is liable for such injuries only as are caused by his negligence. In some actions against individuals it may be difficult to prove that the defendant was negligent, and that his negligence caused the injury, but that difficulty would be no good reason for changing the rule. *Bachelder v. Heagan* and *Sturgis v. Robbins*, *supra*.

Verdict set aside. New trial granted.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

LIBBEY v. BROWN

December 10, 1886.

STATUTE OF LIMITATIONS — PAYMENT — ACCOUNT-BOOKS.

The entry of a payment by a debtor on account, in the handwriting of a deceased creditor upon his account-books, is not competent evidence of a payment to remove the bar of the statute of limitations.*

Davis & Bailey, for plaintiff. *Barker, Vose & Barker*, for defendant.

EMERY, J. This is an action by a surviving partner on an account stated. Assuming the account stated to be sufficiently proved, the action thereon is admittedly barred by the statutes of limitation, unless the bar is removed by what are claimed to be partial payments.

The burden of proving such payments is on the plaintiff, and the only evidence of them he offers are the entries of them as credits on the partnership books of the plaintiff's firm in the handwriting of the deceased partner. Are such entries of credits admissible to prove a partial payment by defendant for the purpose of removing the statute bar, and if admissible are they sufficient evidence for that purpose?

Where a person enters upon books, in regular course of business,

*See 7 Wait's Act and Def. 302; Abb. Trial Ev. 825.

what he himself does from day to day, such entries in certain cases are received as some evidence that the things were actually done. This, however, is an exception to the general rules of evidence, and is confined in narrow limits. It is said by BIGELOW, Ch. J., in *Townsend Bank v. Whitney*, 3 Allen, 455, that "a party is never permitted to introduce entries made by himself in support of his own case, except where they are offered to prove charges in shop-books." We have found no case admitting entries of things purporting to be done by other persons who were antagonistic to him making the entry.

On the other hand, such entries as are offered in this case were offered and excluded in *Hancock v. Cook*, 18 Pick. 30. The opinion of Chief Justice SHAW, in that case, we think states the law correctly, and gives sound and satisfactory reasons.

It is true that it was formerly held, prior to any statute upon the subject, that an indorsement made by the holder on a note of a payment thereon, such indorsement being made before the debt was barred, was some evidence of such payment at the date of the indorsement. *Coffin v. Bucknam*, 12 Me. 471. The doctrine of that case was soon after overthrown by statute — R. S. 1841, chap. 146, § 23, now R. S. 1893, chap. 81, § 100 — which declared that such indorsement shall not be sufficient evidence. We do not find that the rule of that case was ever extended beyond indorsements on the written evidence of debt. We do not think it should be. An indorsement upon the note, or other written evidence of the debt, necessarily operates as a payment, and to reduce the debt *pro tanto*. It becomes a part of the note. Mere credits upon a book have no such effect. The distinction between the two cases is fully recognized, and stated in *Hancock v. Cook*, *supra*.

Plaintiff nonsuit.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

PEAKS v. McAVEY.

December 10, 1886.

EQUITY PRACTICE.

When the answer to a bill in equity alleges a fact in avoidance of the bill, the burden is on the respondent to establish it by evidence.

Where the answer is not required by the bill to be upon oath, it can have no effect as evidence.

Bill to redeem.

Joseph B. Peaks, for plaintiff. *Ira W. Davis*, for defendant.

PER CURIAM. The evidence for the complainant establishes his right to a decree for the redemption of the mortgage, if the right to redeem has not been foreclosed. This is not questioned by the respondent. She alleges, however, in her answer a foreclosure by entry in the presence of two witnesses. Rev. Stat., chap. 90, § 3, p. 4.

The case, as made up and sent to the law court, does not contain any evidence of any such foreclosure, nor of any possession under it. The answer is not required by the bill to be upon oath, and, therefore, can

have no effect as evidence. Rev. Stat., chap. 77, § 15; *Clay v. Towle*, 78 Me. 86, 88; S. C., 4 East. Rep'r, 202.

The allegation being in avoidance of the bill, the burden is on the respondent to establish it by evidence. *Bradley v. Webb*, 53 Me. 462.

The respondent's counsel has sent us with his brief a register's copy of the certificate of entry. If this could now be received as evidence, there is still lacking any evidence that the possession was continued for three years, as required by section 4 of chapter 90, Revised Statutes.

It is adjudged that the "complainant is entitled to redeem with costs, and that the case be sent to a master to determine the amount due."

PATTEN v. PAUL.

December 10, 1886.

NEW TRIAL.

A new trial will not be granted when there was evidence which, if believed, warranted the jury in rendering the verdict they did.

On the plaintiff's motion to set aside the verdict.

W. Knowlton, for plaintiff. *Thompson & Dunton*, for defendants.

PER CURIAM. The plaintiff's team was stationary. The defendant's team was in motion. The rear end of defendant's axle caught in the off hind wheel of plaintiff's wagon. The defendant put in some evidence that plaintiff's team was standing crosswise or quartering the road, with the off hind wheel in the middle of the horse path, and that defendant had to pass around the wheel out to the right nearly into the ditch. It was also testified for defendant that the collision was caused by the plaintiff's horse suddenly backing the plaintiff's wagon against the defendant's wagon at the moment of passing. This testimony, if believed, would warrant a verdict for defendant.

Motion overruled. Judgment on the verdict.

HILBORN v. BUCKNAM.

December 9, 1886.

DURESS — THREATS OF PROSECUTION.

It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the rule includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution.*

On motion of defendants to set aside the verdict.

Dana & Esty and *Savage & Oakes*, for plaintiff. *J. N. Libby* and *J. P. Swasey*, for defendants.

WALTON, J. The plaintiff claims that the defendants obtained \$1,075 from him by duress; and he has recovered a verdict for that amount with interest.

The only question we find it necessary to consider is whether this verdict is not so clearly against the weight of evidence as to make it the duty of the court to set it aside and grant a new trial.

* See 6 East. Rep'r, 163.

We think it is. In the opinion of the court the evidence falls very far short of establishing duress.

The case shows that the defendants had lost large quantities of meal from their mill, and that, with the aid of a detective, they had obtained such proof as satisfied them that the plaintiff, in collusion with the miller, had taken much, if not the whole of it. The plaintiff did not deny that he had taken a portion of the missing meal, but denied that he had taken so large a quantity as the defendants claimed to have lost. The defendants claimed that by a comparison of the amount of corn delivered at the mill, with the amount of meal returned to them, after making a proper allowance for shrinkage in grinding, it appeared that in three years and a half they had lost not less than twenty-three hundred bushels; and they estimated their pecuniary loss, including the expenses of the investigation, at \$2,000. After a negotiation which lasted the greater part of two days, the defendants finally consented to make a discount of \$500, and to take security from the miller for \$425, leaving \$1,075 for the plaintiff to pay. To this the plaintiff assented, and the matter was so compromised and settled.

The plaintiff now claims that this settlement was obtained by duress, and that he is entitled to recover back the money paid by him on that ground. In the opinion of the court, as already stated, the evidence falls very far short of establishing duress. The plaintiff was at no time arrested. He was not in express terms threatened with arrest. It may be true, as contended by his counsel, that he was made to believe that he would be arrested if he did not settle; but no direct threats of arrest were made. But suppose such threats had been made; suppose that, instead of leaving it to inference, he had been told in so many words that, if he did not settle, he would be prosecuted both civilly and criminally — still such threats, under the circumstances disclosed in this case, would not constitute duress. It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. It is not to be supposed that a man smarting under the sense of wrong and injury, such as the defendants in this case had suffered, will not use some such threats. It is not in human nature to exercise such restraint. It is unreasonable to expect it, and the law does not require it. The law regards it as the duty of every one who knows of the commission of a crime, to take measures to have the offender brought to justice; and it does not involve itself in the absurdity of making it unlawful for one to express to the offender an intention of doing what the law makes it his duty to do. There can be no doubt that the defendants believed, and had reason to believe, that they were sufferers by the plaintiff's wrong. By collusion with their miller, he had taken their corn or meal without their knowledge or consent, and had not accounted to them for it. He knew better than they how much he had taken. He consented to pay them \$1,075; and, in the opinion of the court, the evidence fails to disclose any legal or equitable ground for his recovering it back. In support of this conclusion it is only necessary to refer to two recent decisions of this court. *Harmon v. Harmon*, 61 Me.

227; S. C., 14 Am. Rep. 556; *Higgins v. Brown*, 78 Me.; S. C., 6 East. Rep'r, 163.

Motion sustained. Verdict set aside. New trial granted.

PETERS, Ch. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE v. FENLASON.

December 13, 1886.

CRIMINAL LAW — EVIDENCE OF THREATS TO BURN BUILDING — PRACTICE — ALIBI — VERDICT — NEW TRIAL.

In the trial of an indictment for arson, evidence of threats by the accused to burn the same building he is charged with burning is admissible.

When the presiding justice in his charge misstates a fact, or that it was not controverted when in truth it was, his attention should be called to the mistake before the jury retire.

An *alibi* is completely established only when it is shown that the defendant was so far from the scene of action as to render it impossible that he could have participated.

Sending blank forms of a verdict to the jury after twelve o'clock Saturday night, with instructions to seal up their verdict when agreed, is not a sufficient cause for a new trial.

Nor is any irregularity in receiving, recording and affirming the verdict a cause for setting it aside, when the parties were present and made no objections at the time.

This was an indictment in which it is set forth in the first and third counts that the respondent, a "dwelling-house," in the night-time, feloniously, willfully and maliciously did set fire to, "and the said dwelling-house," "by the setting of such fire in the night-time, did feloniously, willfully and maliciously burn and consume," and in the second and fourth counts it is set forth that the respondent "a certain building called a barn," "in the night-time, feloniously, willfully and maliciously did set fire to with intent" "a dwelling-house" "to burn and consume, and that by the kindling of said fire and burning of said barn, the said dwelling-house was," "in the night-time, feloniously, willfully and maliciously burnt and consumed;" and it is further set out, in the first and second counts, that the dwelling-house and barn were the property of Mary L. Munson, and in the third and fourth counts that said house and barn were the property of Frederick Munson.

John H. Gray, called by the State, testified on direct examination that he had a conversation with Devereaux Fenlason in the spring of 1885. He was talking over the matter of the trouble between his uncle Stillman and aunt Sophronia; he said if his aunt Sophronia got that property away from Stillman that the buildings would be burned. I told him to be careful how he talked; that the town had a mortgage on that property and the mortgage and notes were in my hands, and he said he did not care if they had, nevertheless there would be a brand put in inside of two months. That was in reference to the same premises upon which Munson afterward lived, which were burned.

The respondent objected to the conversation, but the objection was overruled, and exception duly taken. In the charge to the jury the court used the language following, to-wit:

"I do not understand that there is any controversy here in regard to

this fact; that the dwelling-house of Mrs. Munson was burned in the night-time of the seventeenth of July last I do not understand to be controverted; nor do I understand that it is materially controverted that it was done by some person with the criminal intent, willfully and maliciously."

The respondent takes exception to this expression of opinion, but no objection was made nor exception taken before the jury retired, and no such contention was made. In the charge to the jury the court made use of the following expression, namely:

"I had supposed that an *alibi* consisted in proving the prisoner so far away from the commission of the crime that it would be impossible for him to participate in it."

To this instruction the respondent alleged exception.

The case was committed to the jury at about six o'clock Saturday evening. After being out some time the jury were brought into court and, after further instruction from the court, were required to retire and consider the case further. This was about eleven o'clock Saturday evening. After twelve o'clock Saturday night, at about half-past twelve o'clock, on the Lord's day, the court still being in open session, the court directed the officer to give to the jury blank forms, with directions that when they agreed upon a verdict they should make it in writing, and seal it up. The respondent and his attorney were present when this direction and instruction was given, and they neither objected or assented to it. Early on the morning of the Lord's day the jury agreed upon a verdict in writing, in the words following, namely:

"The jury find the respondent is guilty in manner and form as charged against him in the second count of the indictment, and not guilty as charged in the first, third and fourth counts.

"LADWICK HOLWAY, *Foreman*."

This verdict was sealed up, and the jury was then allowed to separate. On Monday morning the jury came into court, more than twenty-four hours after they had separated, and the sealed verdict was opened and read. By direction of the court the clerk made this inquiry of the foreman, namely:

Was any person lawfully within the house at the time it was burned? To this inquiry there was no direct response, and it does not appear that the jury had considered or formed any opinion on this point, farther than that expressed in these words of the foreman, namely:

Court — Mr. Clerk, you may inquire of the foreman whether they found that no person was lawfully in the house.

Clerk — What say you, Mr. Foreman, was any person lawfully within the house at the time it was burned?

Foreman — The house that was burned?

Court — It means whether any person was actually lawfully in it when it was burned. You remember I instructed you that the evidence was such that you could not find that any person was lawfully in the house at the time.

Foreman — The house was burned by taking fire from the other buildings.

Court — The inquiry is whether the jury were satisfied that no person was in fact lawfully in the house at the time it was burned?

Foreman — I should say not.

Court — The jury were of that opinion?

Foreman — The indictment was read over and voted on it individually as our understanding of it.

Court — Under the instruction I gave you I think you should further find as follows: "And the jury further find that no person was lawfully in the house at the time it was burned, and this should be signed by you and affirmed by the jury."

Under the instructions of the court the following finding was reduced to writing. "And the jury further find that no person was lawfully in the dwelling-house at the time it was burnt," and signed by the foreman.

The verdict and this finding were separately affirmed, and by request of the respondent's attorney the jury was polled, and the verdict and said finding were affirmed by each individual jurymen, personally.

All the proceedings in receiving and affirming the verdict and directing and taking the special finding were in the presence of the prisoner and his counsel and no objection was made or exception taken thereto.

The court was not adjourned Saturday, but took a recess till Monday.

In his charge to the jury the judge instructed them, if they found the prisoner guilty, to find also that there was no person lawfully in the house, as the evidence would not authorize any other finding.

To this the respondent takes exception.

E. E. Livermore, county attorney, for State. *George M. Hanson*, for defendant.

EMERY, J. I. As to the admission of the testimony of Gray about threats made by the respondent to burn the building. Evidence of prior threats by a respondent to do the particular act he is charged with doing is clearly admissible. No citation of authorities is needed to establish the proposition. The threats testified to by Gray were threats to burn the same building the respondent was charged with burning. It is urged in the argument that the ownership of the building had changed between the time of the threats and the time of the burning. The bill of exceptions does not state any such change of ownership. If there had been such a change, it would weaken the force of the evidence, but we doubt if it would entirely exclude it. The evidence would still have some tendency to prove some elements of the crime charged, the act, the intent, the malice, or at least the disposition of mind of the respondent.

II. As to the presiding justice's statement in his charge of what was uncontroverted. It is the duty of the presiding justice to present the case to the jury as plainly as possible. He should eliminate all uncontroverted matters and distinctly point out the precise issues. If he errs in assuming a matter to be uncontroverted, which a party intended to controvert, his attention should be called to the error, before the jury retire, that he may make proper corrections. Rule 11; *Marchie v. Gates*, 78 Me. 300; S. C., 5 East. Rep'r, 816. In this case the objection was made to the judge's statement of the controversy, and indeed

the bill of exceptions states that no such contention was made, as the counsel now suggests. We, therefore, assume that the controversy was correctly stated.

III. As to the expression in the charge upon the matter of the respondent's attempted *alibi*. It is true the respondent need not prove his *alibi* beyond a reasonable doubt. He may show where he was at the time the act was committed, and perhaps the farther off he was from the scene of action, the more doubt he raises as to his guilt. Still he may have participated though at a distance, and hence distance is not a conclusive answer to the indictment, unless it be so great as to render it impossible for him to have participated in the crime. It appears from the charge — the whole charge being made a part of the bill of exceptions — that the respondent's counsel claimed in his argument to the jury, there was "the most perfect proof of an alibi," while the testimony of the respondent's own witnesses showed that he was within twenty-five rods, or thereabouts. The judge suggested to the jury to ascertain if the respondent was near enough to assist by giving warning or otherwise, and then in alluding to the counsel's claim that an alibi was proved, used the expression complained of. Counsel seemed to contend that proof of any distance was proof of alibi, and hence a conclusive answer to the indictment. The judge simply stated in effect, that to make mere distance a conclusive answer as an alibi it must be shown to be so great as to render it impossible for the respondent to have participated. This was correct.

IV. As to the Sunday proceedings. It is settled in this State that a jury may deliberate on Sunday, and may write out and seal up their verdict on Sunday. *True v. Plumley*, 36 Me. 466. The weight of authority is in favor of the proposition, that the court may receive a verdict on Sunday, the case having gone to the jury before Sunday. *Houghtaling v. Osborn*, 15 Johns. 115; *Huidenopen v. Collins*, 3 Watts, 56; *Paster v. People*, 3 Gil. 368, cited with approval in *True v. Plumley*. See, also, *Van Riper v. Van Riper*, 1 South. 156; S. C., 7 Am. Dec. 576; *Webber v. Merrill*, 34 N. H. 202; *State v. Ricketts*, 74 N. C. 187; *Reid v. State*, 53 Ala. 502; S. C., 25 Am. Rep. 627. See, also, notes to 12 Am. Dec. 291. If the jury may deliberate on Sunday, and write out and seal up their verdict on Sunday, the court may receive the verdict on Sunday, it would seem the presiding justice might on Sunday send blank forms to the jury, with instructions to write out and seal up the verdict when agreed upon without thereby invalidating the entire proceedings.

V. As to the sealing the verdict and the separation of the jury before returning the verdict into court and there affirming it. It was resolved by this court as reported in 63 Me. 590, that in any criminal case, where the punishment was not death or imprisonment for life, the jury might lawfully seal up their verdict when agreed upon, and might then separate during a temporary adjournment of court. In this case the judge in his charge had expressly instructed the jury, that the evidence showed no person lawfully in the house at the time of the firing, and that they must so find. This lowered the grade of the offense from one necessarily punishable by life imprisonment to one only discretionally so

punishable. No verdict could be recorded for the greater offense. It is contended by the State that the case, at the time of the giving the directions to seal up the verdict, etc., was thus one within the resolution of the court above cited.

But however all this may be, and whatever might be our duty if the respondent had seasonably objected to what he now calls irregularities, it appears from his bill of exceptions that he and his counsel were present in court, and saw all these things done and made no objection. No intimation was given to the presiding justice that the respondent or his counsel had any objection to any of these proceedings or regarded them as possibly detrimental, or even irregular. An objection from the respondent would probably have prevented them. He probably saw no harm in them. They were not matters of substance. They were matters of purely formal procedure, which, perhaps, he might have insisted should be carried on after strict ancient forms, but he did not so insist or even suggest. Having thus tacitly waived the irregularity if any, and having permitted, without remonstrance, the court to order things for the admitted convenience of all persons concerned, he should not now have these proceedings quashed and another trial ordered, unless it appears he was at least probably prejudiced by the alleged irregularities. After conscientious study and reflection upon the case, we are satisfied that no harm was likely to come to him, and none did in fact come to him from the proceedings now complained of.

VI. As to the direction of the presiding justice to the jury to sign and return the special finding. This direction and the consequent special finding, that no person was lawfully in the house at the time of the firing was clearly for the benefit of the respondent. He did not object to it, and was not prejudiced by it.

Exceptions overruled, judgment on the verdict.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

STATE v. MURCH.

December 11, 1886.

CRIMINAL PLEADINGS—INTOXICATING LIQUORS.

A complaint which charges a person with transporting intoxicating liquors from place to place in this State, but does not allege an intent that the same are to be sold in this State, is bad.

On exceptions by the defendant to the ruling of the court in overruling a motion in arrest of judgment.

This originated before the municipal court of Waterville, and comes to this court on appeal. The complaint is made under section 31, chapter 27, Revised Statutes, and alleges "That Charles A. Murch, of Waterville, in the county of Kennebec, on the 4th day of March, A. D. 1886, at said Waterville, did then and there knowingly transport from place to place in the State, intoxicating liquors, with the intent that the same shall be sold in violation of law, by some person to said complainant unknown, and with intent then and there to aid said person, to said complainant unknown, in such sale."

W. T. Haines, county attorney, for State. *Brown & Carver*, for defendant.

PER CURIAM. Revised Statutes, chapter 27, section 31, makes it an offense to knowingly transport intoxicating liquors from "place to place in the State," "with intent to sell the same within the State in violation of law, or with intent that the same shall be so sold by any person, or to aid any person in such sale."

The complaint alleges the transportation in the State, but does not allege any intent that the liquors are to be sold "in the State." The statute requires that the transportation shall be incident to an intended sale in the State in violation of law. The statute makes it no offense to transport intoxicating liquors in the State intended for unlawful sale in another State or country, and that may be the offense charged.

Exceptions sustained. Judgment arrested.

WHITEHOUSE v. SPRAGUE.

December 11, 1886.

JOINT-STOCK COMPANIES--ACTIONS BETWEEN MEMBERS.

Assumpsit cannot be maintained by one member of a joint-stock company against another member of the same company who is in possession of the company property for the use of his proportional part of such property.

On exceptions by the plaintiff to the ruling of the court in ordering a nonsuit.

Assumpsit on account annexed for "the use of five undivided nineteenth parts of the subscription list, working capital, good-will and business of the *Kennebec Journal* newspaper establishment, together with that proportion of the printing materials, consisting of types, presses and furniture," from January 5, 1879, to July 15, 1883, with interest, \$256.50.

Plaintiff's interest was obtained March 19, 1857, in a joint-stock company, comprising ninety shares, of which he took and paid for five, which he had never conveyed. The whole or greater portion of the balance of the original stock was owned and held by the defendants, during the time covered by the account annexed, and the defendants were during that time in the use and possession of what there remained of the company property, which formed a small part of their printing establishment at Augusta.

E. L. Whitehouse, for plaintiff. *L. & L. Titcomb*, for defendant.

PER CURIAM. The plaintiff has proved no express contract with the defendants touching the matter in suit; nor has he proved facts to exist from which the law will imply a promise to himself from the defendants, upon which an action at law can be maintained. The plaintiff and defendants were members of a joint-stock company "in the subscription list, good-will and business of the *Kennebec Journal* newspaper establishment, together with that proportion of the printing materials, consisting of types, hand-presses and furniture, of the value of \$3,362," and the plaintiff has no remedy at law. *Myrick v. Dame*, 9 Cush. 253. The evidence excluded was inadmissible.

Exceptions overruled.

MERRITT v. BUCKNAM.

December 20, 1886.

WILL — DEVISE — ANNUITY.

An annuity given by a will, to be paid by a devisee under the same will, is a charge upon the real estate devised upon such conditions, and equity will enforce the charge by a sale of such real estate.

In case of a sale of real estate for such a purpose the costs and expenses of sale, the amount of all annuities due and unpaid with interest, and a sum sufficient to produce the annuity in the future will be taken from the proceeds of sale, and the residue will be paid to the devisee or his grantee.

The plaintiffs are trustees under the will of Louis J. Bucknam, and bring the bill praying that the land devised to Hiram Coffin under the fifth clause of her will be sold, and out of the proceeds the unpaid installments due the church be paid, and a sum be placed at interest sufficient to produce \$50 a year.

"Fifth. I give and bequeath to Hiram Coffin, his heirs, etc., the remainder of my homestead farm, all my right, title and interest in the same, upon condition as follows, viz.: that he pay annually the sum of \$50 to the Methodist Church in Columbia village, for the support of preaching the gospel, or if the said Hiram choose to pay the principal, of which the above sum is the interest, all at one time or in payments within . . . then my executors hereinafter named shall give a good and sufficient deed to the said Hiram Coffin, his heirs, etc., which shall be as good and binding as if given by me, and the principal if paid by the said Hiram shall be placed in the hands of trustees hereinafter named, who shall put the same at interest as a fund forever, and the interest accruing from the same shall be expended for the support of the preaching of the gospel in the village of Columbia, as before requested. But if the said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the Methodist Episcopal Church in Columbia village, to go into the hands of the trustees hereinafter named, and their successors, who are to dispose of the same, and put the proceeds at interest as a fund forever, and the interest of said fund shall only be expended for the support of the gospel, as before named."

Coffin paid the annuity from the death of the testatrix, until the year 1880, when he conveyed the premises to the defendant by a quit-claim deed for the nominal consideration of \$141. The defendant has not paid the annuity since.

William Freeman, for plaintiffs. *E. B. Harvey* and *Charles Peabody*, for defendant.

EMERY, J. I. The first question is whether the annual payments to the Methodist Episcopal Church, provided for in the fifth clause of the will, are a charge upon the land devised in the same clause to Coffin. We think they are. Similar language and even language less clear, in other wills, has been held to impose a charge upon the lands. *Bugbee v. Sargent*, 23 Me. 269; *Merrill v. Bickford*, 65 id. 118; *Birdsall v. Hewlett*, 1 Paige Ch. 32; S. C., 19 Am. Dec. 392; Pom. Eq., § 1246, note 2. "It is well settled that where a legacy is given, and is directed to

be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy." EARL, J., in *Brown v. Knapp*, 79 N. Y. 143. "When an estate is on condition of, or subject to, the payment of a sum of money, or where the intention of the testator to make an estate specifically devised, the fund for the payment of a legacy is clearly exhibited, such legacy is a charge upon the estate." SHEPLEY, J., in *Bugbee v. Sargent, supra*.

It is evident the testatrix intended to make the church secure of her bounty, and to bind the land at such security. She declared the devisee should have a deed *after* securing to the church its legacy. She also declared that in case the devisee failed to pay the legacy, the land itself should be held by the trustees for the church. This last proviso was ineffectual, as was held in *Merritt v. Bucknam*, 77 Me. 253; S. C., 1 East. Rep'r, 386, but it is proper evidence of her intention to bind the land to the payment of the legacy.

II. The next question is how this charge or lien upon the land shall be enforced

It is not a mortgage according to the Maine doctrine of mortgages, which is that the mortgagee has the legal estate. The beneficiaries have no remedy at law against the land. 77 Me. 253. They cannot make use of any of the statute modes for foreclosing a mortgage. Their claim upon the land is simply a lien, recognized by the law but not amounting to any legal estate. It is analogous to a mortgage according to that doctrine of mortgages which obtains in some States, and which is that the legal estate is in the mortgagor, and that the mortgagee has "a potentiality to follow the land by proper proceedings, and condemn it for the payment." Pom. Eq., § 1188. The rights of these beneficiaries would seem to be "to follow the land by proper process and condemn it for the payment" of their legacy. This can only be done by some process and decree in equity, for process and judgment at law are clearly unsuitable and ineffectual.

In those jurisdictions where mortgages are held to be liens only, the usual procedure to enforce them is by process in equity, and decree for the sale of the land, and the payment of the debt out of the proceeds and the payment of the residue to the mortgagor. Pom. Eq. 1228; Jones Mort. 1143. Such a procedure and decree seem applicable to this case, the tenant, the holder of the legal estate, having neglected and refused to pay the annuity to the church. Such a decree is what is prayed for in this bill. In the cases cited upon the question whether the legacy is a charge upon the land, it was assumed and not questioned, that process in equity was the proper process.

III. The next question is the amount to be raised out of the land. The respondent has expressly refused to pay the annuity, and denies the right of the complainant thereto. To effect the evident intention of the testatrix, to make the church secure of her bounty, and to fully effectuate her charitable purpose, it seems necessary that a fund should be raised out of the land sufficient at least to produce \$50 per year, if invested at six per cent interest. A sufficient sum at that rate is all that is asked for in the bill as a principal. The arrearages stated in the bill, and that have since occurred, should also be provided for with

interest on each installment from November first of each year to the day of sale.

As this is not an action against the respondent to enforce any agreement of his, the statute of frauds, as urged in the argument, does not apply.

As the legacy to the church was for a charitable purpose, and no claim is now made to any estate in the land, there is no violation of the rule against perpetuities in giving this effect to the will of the testatrix.

The judgment and decree of the court should be, that the complainants have a lien on the land described in the bill, for the payment of the legacies therein described; that a master be appointed to sell said land, and make conveyance thereof, and from the proceeds to pay the costs and expenses of sale, and then pay to the complainants \$833.33 as principal, and also the amount of the annual payments in arrears at the time of the sale, with interest on each from November first of the year when due, and to pay the residue to the respondent, that the time, place, notice and manner of sale, and other details be fixed in the decree appointing the master, that the complainants recover costs of suit, and have execution therefor.

Demurrer overruled. Decree for complainants as above stated in the opinion.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

PATTERSON v. NUTTER.

December 20, 1886.

SCHOOLMASTER — PUNISHMENT OF PUPIL.

In an action for assault and battery by a pupil against his teacher, based upon corporal punishment inflicted in school, the court instructed the jury that the defendant would not be liable unless the punishment was so clearly excessive "that all hands at once say it was excessive," or that "all hands would instinctively rise up and say 'that is excessive, that is beyond judgment.'" *Held error.*

Crosby & Crosby, for plaintiff. *Morill Sprague* and *John Varney*, for defendant.

EMERY, J. Free political institutions are possible only where the great body of the people are moral, intelligent and habituated to self-control and to obedience to lawful authority. The permanency of such institutions depends largely upon the efficient instruction and training of children in these virtues. It is to secure this permanency that the State provides schools and teachers. School teachers, therefore, have important duties and functions. Much depends upon their ability, skill and faithfulness. They must *train* as well as instruct their pupils. Rev. Stat., chap. 11, § 97. The acquiring of learning is not the only object of our public schools. To become good citizens, children must be taught self-restraint, obedience and other civic virtues.

To accomplish these desirable ends, the master of a school is necessarily invested with much discretionary power. He is placed in charge sometimes of large numbers of children, perhaps of both sexes, of

various ages, temperaments, dispositions, and of various degrees of docility and intelligence. He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands and what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board. In *State v. Pendergrass*, 2 D. & B. (N. C.) 365; S. C., 31 Am. Dec. 416, it was said: "One of the most sacred duties of parents is to train up and to qualify their children for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway he is armed with the power to administer moderate correction when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties is invested with his power. The law has not undertaken to prescribe stated punishments for particular offenses, by a pupil, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments within the limits of this grant to the discretion of the teacher."

This power of moderate correction unquestionably includes corporal punishment. Authorities are not needed for this proposition. The subject was incidentally considered in *Stevens v. Fassett*, 27 Me. 296, and it was declared by this court, through Judge SHELLEY, that personal chastisement was lawful in our schools, and was properly resorted to where milder means of restraint were unavailing. Indeed the plaintiff's counsel does not question that personal chastisement has been the practice, and has often been declared to be lawful. He eloquently urges, however, that corporal punishment is a "relic of barbarism;" that it has been abolished in the army and navy, and has been forbidden in many schools by school boards. He urges that the greater humanity and tenderness of this age should not tolerate it in any schools, and that the courts of this day should not recognize it as a proper mode of school punishment. Whatever force this argument might have with legislatures or school boards, it should not move the court from the well-established doctrine.

The extent of the school-master's discretion, in the exercise of this power of personal chastisement, is the only question here, and upon the question we think the law is well and correctly stated in *Lander v. Seaver*, 32 Vt. 114, as follows: "A school-master has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining what is a reasonable punishment various considerations must be regarded; the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. Among reasonable persons, much difference prevails as to the circumstances which will justify the infliction of pun-

ishment and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has, by being on the spot, to know all the circumstances, the manner, look, tone, gestures and language of the offender — which are not always easily described — and thus to perform a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by the way of protecting him in the exercise of his discretion. Especially should he have this indulgence when he appears to have acted from good motives, and not from anger and malice. Hence, the teacher is not to be held liable on the ground of the excess of punishment, unless the punishment is clearly excessive and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master would be liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive. But if there be any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt." The foregoing statement of the law is well supported by the authorities cited in the notes to that case, in 76 Am. Dec. 163.

Now comparing the judge's rulings in this case with the above clear exposition of the law, it will be seen that, in one respect at least, there was error. It is true the master should not be held to have exceeded his discretion and thus become liable as a trespasser, unless the punishment is clearly excessive, but the judge ruled that the punishment must be so clearly excessive "that all hands at once say it was excessive," and again in another phrase, that the punishment must be so great that "all hands would instinctively rise up and say 'that is excessive, that is beyond judgment.'" The true criterion, as expressed in *Lander v. Seaver*, *supra*, is "the general judgment of reasonable men." Reasonable men are those who think and reason intelligently. Their general judgment is the common result of their reflection and reasoning. The correct rule holds the teacher liable if he inflicts a punishment which the general judgment of such men after thought and reflection would call clearly excessive. The rule given at the trial of this case, however, would permit a teacher to proceed in severity of punishment until it became so great as to excite the instant condemnation of all men, the stupid and ignorant as well as the rational and intelligent. Such a ruling is clearly wrong, and there should be a new trial.

It is not necessary to consider the other exceptions in detail. They are mostly covered by the general propositions above laid down. We have stated their propositions at some length in view of their importance to school officers, teachers and pupils.

Exceptions sustained. New trial granted.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

BRIGGS v. HODGDON.

December 24, 1886.

ATTACHMENT — MONEY HAD AND RECEIVED — DEFECTIVE LEVY — AMENDMENT — ATTORNEY AT LAW.

An attachment of real estate creates no lien when made on a writ containing a count for money had and received without any specification of the claim.

An officer may be permitted to amend his return of levy upon real estate by signing the same, when it states only facts, and the rights of innocent third parties have not intervened.

When an attorney at law is employed to bring suit, attach real estate, procure a judgment and levy the same on the land attached, he can never afterward contest the validity of any of these proceedings. If he take a deed from the judgment debtor of the land levied upon, any title thus acquired will inure to the benefit of his client, the judgment creditor.

The record that discloses the relation of attorney and client touching a levy upon real estate is a sufficient notice to a subsequent purchaser from the attorney.

Ephraim Flint, for plaintiff. *Peregrine White*, for defendants.

HASKELL, J. Trespass *q. c.* for cutting timber upon lot 56, in Williamsburgh, Piscataquis county, and carrying the same away. Some cutting and asportation are admitted. The case comes up on report, with an agreement that the title to the locus shall be determined.

The evidence fails to prove that the plaintiff has acquired title to the locus by seizin, and his supposed title must be upheld, if at all, by virtue of an attachment and levy upon the locus as the property of one Soule, who, at the date of the attachment, in 1855, was the owner of two-thirds thereof, and at the date of the levy, had conveyed that interest to the defendant's predecessor in title.

The record produced shows that the judgment, supposed to have been satisfied by the levy, was rendered upon a declaration containing three counts, two upon promissory notes and the third for \$200, before the date of the writ, "had and received by the defendant, to the plaintiff's use," without more particular allegation or specification; the judgment was on default, for the amount due upon the two notes declared upon.

No attachment of real estate creates any lien thereon unless the nature and amount of the plaintiff's demand are set forth in proper counts, or a specification thereof is annexed to the writ. Rev. Stat., chap. 81, § 59. This statute, enacted in 1838, chapter 344, was in force when the supposed attachment was made.

The first two counts, shown by the record, are without fault, but the third count, for "money had and received," does not allege when the money was received, other than prior to the date of the plaintiff's writ; nor does it state from whom the money was received, nor on what account. A count for money "had and received" may be drawn with sufficient precision so as to be a specification in itself; but when drawn without any particularity of circumstance, and not accompanied by a specification of claim, it is not sufficient to support an attachment of real estate. *Drew v. Alfred Bank*, 54 Me. 451; *Phillips v. Pearson*, id. 570; *Shaw v. Nickerson*, 60 id. 249; *Bank v. Lumber Co.*, 73 id. 404; *Bartlett v. Ware*, 74 id. 292.

The levy upon the *locus* was made after the judgment debtor had conveyed his two-third interest therein to a stranger, through whom the defendants claim title. By mistake, the officer making the extent did not sign the return, and asked the court below for leave to amend his return by signing it. It is agreed that the court may determine whether the amendment shall be made, and if allowed, it is to be considered as made. The truth of the return is not questioned, and no good reason is shown why the amendment should not be allowed. The authorities permit it. *Fairfield v. Paine*, 23 Me. 498; S. C., 41 Am. Dec. 357; *Wilton M'f'g Co. v. Butler*, 34 Me. 431; *Glidden v. Philbrick*, 56 id. 222; *Howard v. Turner*, 6 id. 106; *Gilman v. Stetson*, 16 id. 124; *Wilson v. Bucknam*, 71 id. 545; *Childs v. Barrows*, 9 Metc. 413; *Pratt v. Wheeler*, 6 Gray, 520; *Peaks v. Gifford*, 78 Me. 362; S. C., 7 East. Rep'r, 243.

Such amendment ought not to be allowed to the prejudice of innocent purchasers, and ordinarily should only be allowed, by saving the rights of such persons. *Glidden v. Philbrick*, *supra*. But in this case such reservation is not called for, inasmuch as all interests in the *locus* adverse to the plaintiff have been conveyed to Mr. C. A. Everett, a counselor and attorney of this court, who was the attorney for the judgment creditor, in making the writ, directing the attachment, procuring the judgment, making the extent, and in receiving seizin and possession of the *locus* for the judgment creditor, and in his name and stead.

The office of attorney and counselor is full of responsibility and honor. The law holds out these officers to be competent, honest and faithful to those seeking their counsel and assistance. The communications of the client must remain with the faithful attorney a secret forever; he can neither voluntarily disclose them nor can he be compelled to do so by process of law. The law requires from these officers the most implicit fidelity and complete good faith in all their professional "walk and conversation." From them judges of the court of last resort are to be selected, "persons learned in the law and of sobriety of manners." Their oath requires the strictest professional demeanor, absolute honesty, fidelity and good faith, both to the courts and to their client.

Mr. Everett is a counselor of this court, of many years' standing. More than thirty years ago he was employed by the judgment creditor to complete a statute conveyance of the *locus* to him, as an attorney at law. This the attorney attempted to do, and must be cut off from denying, for his own pecuniary advantage, the validity of his own work. He extended the execution upon the whole of lot 56, the *locus*. After the lapse of more than twenty years, by the outlay of less than \$12,000, he procured releases to himself, from sundry persons holding the record title to the *locus*. These conveyances, in contemplation of law, he took for the benefit of his client, the judgment creditor; and the title so procured inures to the latter, and this the attorney is estopped to deny. It may be, that in equity the title so procured stands charged with the expense of gaining it; but it could never be invoked by the attorney to destroy the title of his client, the judgment

creditor. That he is bound to ratify and uphold; he cannot gainsay or dispute it. The levy was intended to operate as a satisfaction of the judgment, and for that purpose the attorney caused it to be made. In that capacity he became invested, for his client, of seizin and possession of the *locus*. That seizin is sufficient to give the judgment creditor an action for trespass against one who is estopped to deny it. *Reid v. Stanley*, 6 Watts & S. 376; *Galbraith v. Elder*, 8 Watts, 81; *Henry v. Raiman*, 25 Penn. St. 254; S. C., 64 Am. Dec. 703; *Smith v. Brotherline*, 62 Penn. St. 469.

Nor can the grantees of Mr. Everett invoke a purged title. The registry of deeds disclosed the levy, showing the receipt for seizin and possession of the *locus* by Mr. Everett as attorney for the judgment creditor; and the record of the judgment recites that he appeared as attorney for the judgment creditor. These facts, shown by record, were notice to the defendants of the estoppel that attached to their grantor, in the absence even of the other facts shown in evidence, tending to prove it. The purchase by Everett inured to the judgment creditor, precisely as though Everett had previously given him a deed of warranty of the premises, and the fiduciary resolution shown by the record had the same force and effect as the record of such deed of warranty would have, that is, notice that works an estoppel upon the subsequent grantees of such grantor. *Pike v. Galvin*, 29 Me. 183; *Crocker v. Pierce*, 31 id. 177.

Amendment of levy allowed. Defendant defaulted. Damages to be assessed below.

PETERS, Ch. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

HIGGINS v. BUTLER.

December 27, 1886.

EVIDENCE — WITNESS — SPECIFIC PERFORMANCE — UNREASONABLE CONTRACT.

The defendant in a suit in equity was made a party as heir to the plaintiff's wife. *Held*, that the plaintiff was incompetent as a witness.

Where the evidence in support of a contract is conflicting and unsatisfactory and the contract itself unreasonable equity will not decree specific performance.

Thompson & Duntun, for plaintiff. *J. H. Montgomery*, for defendant.

HASKELL, J. The orator seeks a decree, that the respondent shall convey certain real estate to him, upon two grounds:

1. That he may secure the benefit of a resulting trust, that arose in his favor, in the hands of his wife, in her life-time, and at her death, descended to the respondent.

2. That he may have specific performance of the respondent's agreement with him to make the conveyance.

The respondent, by answer, denies both the trust and the agreement, thereby casting the burden upon the orator to prove both.

Without the testimony of the orator the evidence does not sustain the averment of the bill, that the estate was held in trust; and to prove that issue, the orator is not a competent witness. The respondent.

ent is summoned to answer the charge, that as heir of her mother, the estate cast upon her is a trust estate, that was acquired and held by her mother in trust for the orator's use. She is thus "made a party as heir of a deceased party." Rev. Stat., chap. 82, § 98; *Simmons v. Moulton*, 27 Me. 496; *Burlough v. White*, 64 id. 23; *Wentworth v. Wentworth*, 71 id. 72.

To prove the alleged agreement of the respondent to convey the orator is a competent witness; because touching that agreement the respondent is summoned to answer in her own right and on her own account. It seems that the bill must be multifarious, as two distinct causes for relief are set out, but as no objection is urged on that account, the court is constrained to decide the latter issue.

The property said to have been conveyed to the mother, and inherited by the respondent, and by her agreed to be conveyed to the orator, is valued by some witnesses at \$1,200. The consideration for the respondent's agreement to convey, that is, said to have been paid by the orator, was the delivery of a horse, valued by some witnesses at \$100. Whatever agreement the respondent made was doubtless under the impression that she could not hold the land, but had only a claim against it for money that she had expended in the support of her father's family, amounting to a considerable sum.

The evidence touching the agreement is so conflicting and unsatisfactory, and the agreement standing by itself, as it must stand in this cause, is so unreasonable, that the court hesitates relief; and refers the parties to a court of law, where such damages may be recovered as the law may give. *Woodbury v. Gardiner*, 77 Me. 71; S. C., 1 East. Rep'r, 103.

Bill dismissed.

PETERS, Ch. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

BIRD v. CLEVELAND.

December 28, 1886.

INSOLVENT LAW — EQUITY COURT.

The supreme judicial court has full equity jurisdiction in all insolvent matters, to revise the proceedings, orders and decrees of the insolvent court where no other remedy is given by the statute.

SAME.

Its jurisdiction, however, is supervisory rather than concurrent with the insolvent court.

SAME — ASSIGNEE — DIVIDEND.

For the neglect of an assignee to declare a dividend where it is his duty so to do, application should be made in the first instance to the court having original jurisdiction of the insolvent proceedings.

C. E. Littlefield, for plaintiff. *J. H. Montgomery*, for defendant.

FOSTER, J. The plaintiffs are creditors of John H. Parker, who, on the 15th day of June, 1883, was duly adjudged an insolvent debtor, and upon whose estate the defendant was appointed assignee. This bill is filed under Revised Statutes, chapter 70, section 11, by which it is enacted that "the supreme judicial court has full equity jurisdiction in

all insolvent matters," and alleges that the plaintiffs, as creditors of said Parker, have duly proved their claim of \$398.08; that the defendant has settled his account in the insolvent court, and there remains in his hands, after paying all expenses, charges and preferred claims, the sum of \$333.51 for distribution among the creditors of said estate who had proved or might prove their claims before dividend made. It also avers that "a large number of creditors have proved their claims against said estate"; that no dividend has ever been declared or paid to said creditors by the defendant, or notice given by the register to any of the creditors, and that the defendant refuses to declare or pay any such dividend or to procure the register to give the notice required by law, or to disburse the sum in his hands to the creditors of the estate. The prayer is that the defendant be ordered to require the register to notify the creditors of an intended dividend, and thereafter that the defendant pay a dividend to all the creditors who shall then have proved their claims.

To this bill the defendant demurs, and the case is before the court on the bill and demurrer. Taking the allegations in the bill to be true, as we are bound to do upon demurrer, it sets forth no case falling within the equity jurisdiction of this court relating to insolvency proceedings. While the language of the statute is broad and comprehensive in regard to the equity powers of this court in such proceedings, yet it is not without limitation in its application. Its jurisdiction is supervisory rather than concurrent. In our own State the statute in question has been before the court and received an interpretation which is in harmony with that expressed by the decisions of the court in Massachusetts, where a somewhat similar provision has existed for many years and frequently been the subject of judicial decision. And it appears to be settled that it was the evident intention of the legislature to confer upon this court, sitting as a court of equity, full supervisory jurisdiction to revise the proceedings, orders and decrees of the insolvent court in cases where no other remedy is given by statute. *Harris v. Peabody*, 73 Me. 266; *Lancaster v. Choate*, 5 Allen, 538; *Barhard v. Eaton*, 2 Cush. 301; *Harlow v. Tufts*, 4 id. 452; *Winchester v. Thayer*, 129 Mass. 133.

In the case of *Harlow v. Tufts*, *supra*, the court say: "It may be proper, however, to remark that although the power thus conferred on the court is general, they will consider, in the exercise of it, the purpose for which it was given, namely, to reach cases not otherwise provided for; and they will probably, therefore, be slow to exercise it until other remedies, to be obtained in the ordinary course of proceeding, have been exhausted."

By section 39 of the insolvent law it is made the duty of the assignee whenever he receives from the estate assets available to pay a dividend equal to twenty-five per cent of the debts proved, exclusive of expenses, to declare and pay such dividend and render an account thereof to the judge; and for each twenty-five per cent of assets received to make a like dividend, and a final dividend at such time as the judge directs. But no dividend is to be paid or declared without the approval of the court, entered of record.

The allegations of the plaintiff's bill may all be true, and the defend-

ant not in fault. The assignee is not by law obliged to declare a dividend unless it be a final one, or such as the court may order until the amount collected by him amounts to twenty-five per cent of the debts proved exclusive of expenses. While the bill specifically states the amount of the plaintiff's debt proved, it also sets forth that "a large number of creditors have proved their claims against said estate." What the amount of the debts proved is does not appear; nor is it alleged that the amount in the hands of the assignee exceeds twenty-five per cent of the debts proved against the estate.

Furthermore, the declaring or paying a dividend is not at the motion of the assignee only. He is not authorized to declare or pay any dividend without the approval of the insolvent court obtained and entered of record — nor a final one till such time as the judge of the court of insolvency directs. The main question raised is when a dividend shall be made — not what it shall be, or to whom — a question over which the insolvent court would seem to possess primary jurisdiction. If the assignee has delayed to declare a dividend beyond what parties interested deem a reasonable time, application to the judge of the insolvent court, to whom the assignee has given bond for the faithful discharge of his duties, and who may remove him at any time for good cause shown — § 31 — might afford ample remedy, and would appear to be the appropriate course to pursue in the first instance. Such was the view of the court in *Lincoln v. Bassett*, 9 Gray, 357, which was a bill in equity against an assignee of an insolvent estate who had received in cash from the estate a sum exceeding \$5,000, but had never rendered any account, nor declared or paid any dividend, notwithstanding the requirement of the statute that within eighteen months from the time of the assignee's appointment his account should be produced and settled and a dividend made. In that case, BIGELOW, J., said: "So far as the bill goes on the ground of neglect by the assignee to render his accounts in due season, and to make a dividend according to law among the creditors of the insolvent, it is open to the objection that the proper remedy in such case is to apply in the first instance to the court having original jurisdiction of the insolvent proceedings." *Glenny v. Langdon*, 98 U. S. 28, 29, 30.

In the case at bar it does not appear that any application has ever been made to the judge of the insolvent court, or that the remedy to be obtained in the ordinary course of proceeding has been exhausted, or even invoked. There is no reason shown by the allegations in the bill that the assignee might not properly refuse to declare a dividend on the individual application to him of the plaintiff. Nor is there any claim that the judge has been derelict in his duty — or refuses to exercise that discretion with which he is invested by the provisions of the statute as to the time in which he may direct the defendant to declare a final dividend.

While this court, in the exercise of its supervisory jurisdiction in equity over the proceedings, orders and decrees of the insolvent court, will, in proper cases, make such orders and give such directions as the law and the rights of the parties may require, yet, as was said by the court in *Lancaster v. Choate*, *supra*, "it is a power to be exercised with

great caution; not in cases where there has been *laches*, in the court of insolvency, but only where the party complaining can show that he has been aggrieved and has pursued his remedy diligently.'"

Bill dismissed, with costs.

PETERS, Ch. J., DANFORTH, VIRGIN, LIBBY and HASKELL, JJ., concurred.

CARTER v. HARDEN.

December 31, 1886.

FALSE REPRESENTATIONS—HUSBAND AND WIFE.

The plaintiff while riding with her husband was injured by the horse running away and throwing her from the carriage. The horse had eighteen days before been purchased by the husband of the defendant as a gentle and kind animal and good family horse. It appeared that the defendant understood that the horse was to be used by the husband in his business, and did not know that it was being purchased for the plaintiff, or for the use of the plaintiff. *Held*, that the defendant was not liable for the injuries to the plaintiff because of his false representations to her husband. (*See note, page .*)

On report.

B. P. Soule, for plaintiff. *George P. Dutton*, for defendant.

EMERY, J. The female plaintiff was riding with her husband in his wagon, drawn by his horse, which he was driving. The horse became unmanageable, and ran away, throwing the female plaintiff from the wagon to her injury. In the absence of any contractual rights or obligations she would have a right of action against that person only whose tort was the direct proximate cause of the injury. In seeking for this cause, she goes back to the purchase of the horse by her husband from the defendant. This purchase was made eighteen days before the injury, and at a place over twenty-five miles distant. She claims that the defendant, knowing the horse to be an unmanageable runaway, and knowing that her husband had a wife and family, yet, to induce her husband to buy the horse, falsely represented it to be a safe and kind horse, and good family horse.

She does not claim that there was any privity between her and the defendant in this contract. She does not claim that she thereby acquired any contractual rights against the defendant. All such rights belong to the husband. She does claim, however, that a wrong was done by the defendant—that his deceit of her husband was a tort against her, and was the direct proximate cause of her injury.

In support of this proposition her counsel cites, and mainly relies upon, *Langridge v. Levy*, 2 M. & W. 519, where a son, injured by the explosion of a gun sold to the father by the defendant, recovered for his injuries against the defendant. In that case, however, it was alleged and appeared that the father purchased the gun to be used by himself and son; that the defendant knew the gun was being so purchased, and it was to be used by the plaintiff, the son, and that he made the false representations, expecting the son, as well as the father, to rely upon them. The action was sustained solely upon that ground, on the ground that the defendant expected the son to act upon his statements, and, therefore, contemplated any harm that might come to

him therefrom. In the case at bar we do not find from the evidence that the defendant understood that the horse was being purchased for the wife, or for her use, or that he expected the wife to rely upon any representations of his. The husband was in the business of peddling sewing machines, and the defendant understood the horse was wanted for use in that business.

Baron PARKE, who pronounced the judgment in *Langridge v. Levy*, afterward in *Langmaid v. Holliday*, 6 Exch. 766, said: "That the principle of the former case was that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in loss, he is liable to that person in an action of deceit. To bring this case at bar within that principle, it should appear that the defendant made the false representations, with intent to induce the wife to act upon them. The evidence fails to show any representations made with that intent."

This case is more similar to *Winterbottom v. Wright*, 10 M. & W. 109, than to *Langridge v. Levy*. In *Winterbottom v. Wright*, the defendant had contracted with the postmaster-general to provide for a certain post route, mail coaches of suitable strength, etc. A third party contracted to horse the coaches along the same route, and employed the plaintiff as one of his drivers. The plaintiff was injured by some defect in the coach, the fault of the defendant. It was held that plaintiff could not recover against the defendant. The case of *Langridge v. Levy* was expressly distinguished. ALDERSON, B., said: "The principle of the case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it." Lord ABINGER, C. B., in the same case said: "We ought not to attempt to extend the principle of that decision which, although it has been cited in support of this action, wholly fails as an authority in its favor, for there the gun was bought for the use of the son, who could not make the bargain himself, but was really and substantially the party contracting."

In *Blakemore v. Bristol & Exeter Ry. Co.*, 8 El. & Bl. 1035, COLERIDGE, J., said: "It has always been considered that *Langridge v. Levy* was a case not to be extended in its application."

In the case of *Thomas v. Winchester*, 6 N. Y. 396; S. C., 57 Am. Dec. 455, cited by plaintiff, the act of the defendant was shown to be the direct proximate cause of the injury to the plaintiff. The act of the defendant was the carelessly labeling a deadly poison as a harmless medicine, and putting it on the market as such. Such an act was a tort directly against any person who should, on the strength of the label, purchase and use the compound as a medicine. The plaintiff did rely upon the label, and used the compound to his injury. It was like the case of the squib thrown into the market place. The thrower was liable, to whatever person was finally struck and hurt by it. Chief Justice RUGGLES, in the opinion, expressly distinguishes the case from *Winterbottom v. Wright*, which he cites with approval.

In the case at bar the alleged cause is evidently too remote, in time, place and sequence, to be the direct, proximate cause of the plaintiff's

injury, and she has not shown that the defendant told any falsehood with the intent that she should act upon it.

Plaintiffs nonsuit.

PETERS, Ch. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

In the principal case the court seems to hold defendant was not liable because he had no knowledge the horse was intended for use by the plaintiff's wife, and, therefore, could not have contemplated an injury to her as one of the results of a sale of the horse to plaintiff. The rule would seem to be otherwise had he known of such intended sale. In *Langridge v. Levy*, 2 Mees. & Welsb. 519, cited in the principal case, plaintiff's father purchased of defendant a gun, stating to defendant the gun was for the use of himself and sons. Defendant falsely represented it to have been manufactured by N., a maker of high reputation, and to be good, safe and secure; whereas it was made by an inferior maker and was not good, safe or secure. Plaintiff while using the gun was injured. *Held*, defendant was liable to him on the ground that plaintiff having used the gun, as defendant had notice he would, relying on such representations, it was a question of fact for the jury whether he was not induced to do so by defendant's false representations.

The court—pp. 580-1—PARKE, Baron, said: "In this case a motion was made to arrest the judgment after a verdict for the plaintiff." His lordship stated the declaration and proceeded: "It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it. The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported. We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer; we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded in order to make it so, had been simply delivered by the defendant without any contract or representation on his part to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an (581) action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman*, 3 T. R. 51; which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.

"If this view of the law be correct, there is no doubt but that the facts upon this record must be taken to have been found by the jury bringing this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true — for this is [532] the meaning of the term 'confiding' — used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not, indeed, averred, but it is stated that, by the act of the defendant, the property was transferred to the father, in order that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's, for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear. We, therefore, think that, as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured. We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

This case was taken to the exchequer chamber where it was affirmed. *Hastings* Torts, 181; 4 Mees. & Welsb. 387.

In the case of *George and Wife v. Skivington*, L. R., 5 Exch. 1, defendant sold plaintiff, the husband, a hair wash for his wife, as a safe and useful remedy, which on application injured her. He was held liable, the court holding the liability was not based upon contract, but upon a wrong to the wife in furnishing for her use an article which in use caused her injury.

CLEASBY, Baron, said, p. 5: "No person can sue on a contract but the person with whom the contract was made," and this undoubted proposition was attempted to be taken advantage of in *Langridge v. Levy*, 2 Mees. & Welsb. 519, in Exchequer chamber, 4 id. 337. The answer was that, admitting the proposition to be true, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided, at least, that his use of the article was contemplated. So when a dealer sold an unsafe lamp to one to be used in his family, fraudulently representing it, his wife while using it was injured." *Longmeid v. Holliday*, 6 Exch. 766; approving *Langridge v. Levy*, 2 Mees. & Welsb. 519.

But holding that, in the case under consideration, fraud was negatived. 2 Addison Torts (Banks' ed.), § 1208.

Or manufactures or sells burning fluid below the legal standard. *Wellington v. Downer*, etc., 104 Mass. 64.

Or sells gunpowder to a child. *Carter v. Towne*, 98 Mass. 537. See 21 Am. Law Reg. (N. S.) 533.

To the same effect is the case of *Deolin v. Smith*, 89 N. Y. 479; where one who furnished a scaffold for use by a contractor, for use by his workman, was held liable to a workman injured though the employer was not liable to him.

To the same effect is *Conlon v. Eastern*, etc., 135 Mass. 195.

Thomas v. Winchester, 6 N. Y. 398; S. C., 57 Am. Dec. 455, where one putting up for sale a poison as a harmless medicine, was held liable to any person who purchased it, and was injured in consequence of the false representation by the label. 1 Thomp. Neg. 94, 233-5. Also, *Heaven v. Pender*, 11 Q. B. Div. 503.

"If A. makes a contract with B. for the protection of C., and C. is injured in consequence of B. breaking the contract, C. may recover damages of B." 2 Thomp. Neg. 906, § 23.

"Defendant having leased the premises to Vanderzee incurred the same liability to his sub-tenants for the safety and sufficiency of the premises for use for the purposes for which they were intended as they were under to him." *Jeffrey v. Haerlem*, 56 N. Y. 400; *Coughtry v. Globe Woolen Mill*, 56 N. Y. 124, 126-7; *Minor v. Sharon*, 112 Mass. 477; S. C., 18 Am. Rep. 122.

Defendant, being about to sell a public house, falsely represented to B., who had

agreed to purchase it, that the receipts were £180 a month; B. having, to the knowledge of defendant, communicated this representation to plaintiff, who became the purchaser instead of B. *Held*, that an action lay against defendant at the suit of plaintiff. *Pilmore v. Hood*, 5 Bing. N. C. 97; 35 Eng. C. L. 62. See elaborate opinions, pp. 104-109. TINDAL, Ch. J., pp. 106-7, expressly approves of and applies *Landridge v. Levy*, 2 Mees. & Welsb. 519.

"Every man must be held responsible for the consequences of false representation made by him to another, upon which a third person acts, and so acting is injured or damnified; provided that it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." *Watson v. Crandell*, 7 Mo. App. 235; affirmed, 78 Mo. 583.

"An action may be maintained for a false representation not addressed directly to the plaintiff, if it was intended to influence everybody who might hear of it and if plaintiff acted on it to his injury." *Carrill v. Jacks*, 43 Ark. 454.

"The general rule appears to be, that if any man makes a fraudulent representation for another to act upon, either directly or indirectly, and such representation is calculated to induce that other person to act on it, and he does act on it, the person who makes the representation is responsible in damages." 2 Addison Torts (Banks' ed.), §§ 1175, 1208.

So fraudulent statements as to his pecuniary condition made by a merchant to a mercantile agency in consequence of which a subscriber trusts such merchant. *Eaton v. Avery*, 88 N. Y. 81; S. C., 38 Am. Rep. 389; *Morrison v. Lewis*, 49 Super. Ct. 178; *Schultz v. Harris*, 25 Daily Reg. 909; *Victor v. Henlein*, 7 Civ. Proc. R. 67; *Genesee, etc., v. Mich., etc.*, 52 Mich. 164, 169; *Goodwin v. Goldsmith*, 49 N. Y. Super. Ct. 105.

"Where a party, with intent to cheat and defraud another, induces him, by fraudulent means, to purchase stock for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase is made of him or another. The elements of fraud and damage are united; and that this gives an action to the injured party is a maxim as old as the law." *Hubbel v. Meigs*, 60 N. Y. 491; citing *Upton v. Vail*, 6 Johns. 181; S. C., 5 Am. Dec. 210; *Medbury v. Watson*, 6 Metc. 259; S. C., 89 Am. Dec. 726.

Nor is it necessary that the intention should exist to defraud the plaintiff in particular; if a person intending to defraud somebody gives a general recommendation of credit to an insolvent person, any one who sustains damage by reason of such recommendation is entitled to an action for such damages grounded upon the fraud. *Allen v. Addington*, 7 Wend. 9; *Williams v. Wood*, 14 id. 126; *Carrill v. Jacks*, 43 Ark. 54.

Directors and trustees are liable to one who purchases the stock of their corporation in consequence of fraudulent prospectuses or other fraudulent representation as to the value of the stock. 31 Eng. Rep. 61, note; Moak's Underhill Torts, 532-6.

A. being in negotiation with B. for the sale of land containing ore, C., knowing the land, falsely represented to B. that an experienced manufacturer was of the opinion that the ore would suddenly run out, and B. refused to purchase in consequence. *Held*, that C. was liable to A. in damages. *Paul v. Halferty*, 63 Penn. St. 46; S. C., 8 Am. Rep. 518.

* When a void contract would have been performed but for the false and fraudulent representation of a third person, an action will lie against such person, although the contract could not have been enforced by such person. *Benton v. Pratt*, 2 Wend. 885; S. C., 20 Am. Dec. 623; *Snow v. Judson*, 38 Barb. 210; *Rice v. Manly*, 66 N. Y. 82; S. C., 23 Am. Rep. 30.

It is not necessary that plaintiff should have benefited by the fraud, or be in collusion with a party who is benefited.

It is sufficient that plaintiff was moved by the false representations of defendant, so that without them he would not have acted in the premises, whereby he was damaged, although representations made by others had some influence upon his mind. *Hubbard v. Briggs*, 81 N. Y. 518, 529-530; *Allen v. Addington*, 7 Wend. 9.

COLE v. COUNTY COMMISSIONERS.

December 31, 1886.

WAYS — CONSTITUTIONAL LAW — APPEAL — PEOPLE'S FERRY, PORTLAND.

A special statute authorized the county commissioners to locate a highway "into tide waters of sufficient depth, with a good ferry way . . . in like manner and effect as in locating other highways." *Held*, (1) that the authority conferred upon the commissioners was not exhausted by their adverse action on one petition; (2) that the statute was constitutional; (3) that an appeal could be taken from the decision of the commissioners in refusing to locate such a way on petition therefor; (4) that the committee of the appellate court did not transcend their authority when they decided that the doings of the commissioners should be reversed, and that common convenience and necessity required the location of the way "as prayed for in said petition," though the petition asked for a way "down said Portland pier to the end of said pier and into tide waters a sufficient distance to give a sufficient depth of water."

Nathan & Henry B. Cleaves, Drummond & Drummond and F. H. Harford, for petitioners. *C. W. Goddard*, for remonstrants from ten towns. *Joseph W. Symonds*, for the city of Portland. *George E. Bird*, for proprietors of Portland pier. *A. A. Strout*, for Portland and Cape Elizabeth Steam Ferry Company.

LIBBEY, J. The proceedings in this case were had by virtue of the act of 1873, chapter 375, as modified by act of 1885, chapter 495.

The act of 1873 reads as follows: "SECTION 1. That the county commissioners of the county of Cumberland, on petition of one hundred or more citizens of said county, be and hereby are authorized and empowered to locate a public highway in the city of Portland, extending into tide waters of sufficient depth, with a good and substantial ferry way and landing therein, suitable for the passage and accommodation of teams and foot passengers, with right to take private property therefor, in like manner and effect as in locating other highways in said county."

"§ 2. Said highway and landing shall be governed and controlled by the city of Portland, and so much of said highway and landing as is not required for said ferry purposes may be used or leased by said city for any other purpose."

The act of 1885, section 8, provides, "that the county commissioners of the county of Cumberland shall not be called upon to locate a public highway in tide waters of the city of Portland, under the act of 1873 . . . until a double-end steam ferry-boat suitable for the carriage of teams and passengers is put upon said ferry route, and its continuous operations secured to the satisfaction of said county commissioners."

At the June term of the court of county commissioners of the county of Cumberland, a petition in all respects in compliance with the acts aforesaid was presented to said court, and upon due proceedings had by said commissioners, they heard the parties interested, and at the January term of said court reported that all the requirements of the acts aforesaid had been complied with, but they adjudged and determined that public convenience and necessity did not require the location of the highway prayed for.

An appeal was duly taken to the January term of the supreme

judicial court in said county, when a motion was filed by the remonstrants to dismiss the appeal on the ground that court had no jurisdiction. This motion was overruled and a committee was appointed. To this ruling exception was taken. At the April term of said court the committee made their report, in which they "adjudge and determine that common convenience and necessity do require the location of the aforesaid highway and ferry landing on Portland pier in the city of Portland, as prayed for in said petition, and we do wholly reverse the judgment of said commissioners."

Several objections were filed by the remonstrants to the exceptance and confirmation of the report, but four only are relied upon and need be considered:

I. It is claimed, inasmuch as the act of 1873 was not a general statute, but special and local in its character, enacted for a special purpose, it conferred upon the county commissioners power to act but once under it; and that their power was exhausted by their adverse action, on the petition of David Keaser *et als.*, in 1873.

We think this objection cannot prevail. The petition of Keaser *et als.* did not describe the way to be located in any manner, and, therefore, gave the county commissioners no jurisdiction to act under the statute. Rev. Stat., chap. 18, § 1. Their action upon that petition was void. But we are of opinion that the act of 1873 should receive a broader construction than that claimed for by the learned counsel for the respondents. Before its passage the county commissioners had no power to locate a public highway in the city of Portland; nor could they locate one into tide waters. The act of 1873 removed both of these limitations upon their jurisdiction, and in these respects enlarged it to be exercised "in like manner and effect as in locating other highways in said county." Under the general statute giving them the power to locate other highways in said county, the only limitation upon their jurisdiction is, that if their decision is against the prayer of the petition, no new petition shall be entertained for one year thereafter. Rev. Stat., chap. 18, § 45. The doctrine of *res adjudicata* does not apply to the action of county commissioners in the location of highways. The facts and situation may be such as to require them to refuse to locate, on one petition, when such change may take place in the wants and necessities of the public as to require the location a year or two thereafter.

II. It is contended that there is no appeal given by the law from the judgment of the county commissioners under the act of 1873. This contention cannot be sustained. The case of *City of Belfast, Appellants*, 53 Me. 431, is conclusive against the respondents. The proceedings for the location of the highway under said act are in all respects the same as in the location of other highways.

III. The third ground of objection is, that the act of 1873 is unconstitutional, inasmuch as it authorizes the taking of private property for private uses. This objection is based on the second section of the act which provides that "so much of said highway and landing as is not required for said ferry purposes may be used or leased by said city for any other purpose."

The fallacy of this position is, that it assumes that this act authorizes the taking of private property for private uses. The power conferred upon the commissioners by the act is, to locate a "public highway" in Portland and into tide waters, and to take private property *therefor* in like manner and effect as in locating other highways in said county. The highway is to be located only when it is adjudged to be of public convenience and necessity. They can take private property only for the "public highway," as in the location of other highways. They cannot take it for the use of the city.

The right given to the city by the second section is *contingent*, and may never be brought into life, and that section is entirely independent of the first section. Assuming that the legislature exceeded its constitutional power in enacting the second section it may be rejected without, in any way, impairing or affecting the powers granted in the first.

It is a well-settled rule of law that the same statute may be in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional may be rejected. *Allen v. Louisiana*, 103 U. S. 80; *Packet Co. v. Keokuk*, 95 id. 80; *Packard v. Lewiston*, 55 Me. 456; *Schwartz v. Drinkwater*, 70 id. 409; *Fisher v. McGirt*, 2 Gray, 84.

In what we have said we do not mean to hold the second section is in conflict with the Constitution. If the contingency stated in the act occurs, and the city undertakes to exercise the license given by it, it will be in season to decide this question, if raised, and properly brought before the court. *Packet Co. v. Keokuk*, 95 U. S. 89.

IV. The last objection is that the committee have excluded the power conferred on them by the law. We can see no ground for the objection. By Revised Statutes, chapter 18, section 49, the committee is required, after viewing the route and hearing the parties, to report "whether the judgment of the commissioners should be in whole or in part affirmed or reversed." They reported that the judgment of the commissioners should be wholly reversed, and "that common convenience and necessity do require the location of said highway and ferry landing on Portland pier in the city of Portland, as prayed for in said petition." The substance of this adjudication is that the whole highway should be located as prayed for. This is strictly within the legal authority. When the report is accepted and judgment entered thereon, and is certified to the court of commissioners the case will stand precisely the same as if the commissioners had themselves made the same adjudication, and it will become their duty to carry the judgment of the appellate court into full effect as if made by themselves. The water terminus of the highway is described in the petition, "the end of said pier and into tide waters to give a sufficient depth of water." It will be the duty of the commissioners, in making the location, to fix the precise termini of the highway. In doing so they are not required by the judgment of the appellate court to adhere strictly to the bonds named in the petition, but they must conform substantially to them so as to effectuate the purpose sought. Rev. Stat., chap. 18, § 1.

Exceptions overruled.

PETERS, Ch. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

COLE v. HAYES.

December 31, 1886.

AD DAMNUM — DEBT OR DAMAGES DEMANDED.

A statute giving trial justices exclusive jurisdiction in civil actions "when the debt or damages demanded do not exceed \$20" does not preclude the supreme judicial court from taking jurisdiction of an action on a promissory note for \$12, the *ad damnum* being stated at \$25.

George D. Bisbee and *Oscar H. Hersey*, for plaintiff. *James S. Wright* and *J. B. Peaks*, for defendant.

LIBBEY, J. By Revised Statutes, chapter 83, section 3, trial justices "have original and exclusive jurisdiction of all civil actions . . . when the debt or damages demanded do not exceed \$20" except certain cases therein specified.

In this case the note declared on is for \$12 and interest. The *ad damnum* is for more than \$20. It is claimed by the defendant that the "debt or damages demanded" is to be determined by computing the amount due on the note when the action was commenced, and not by the *ad damnum*.

We think this is not the law. It appears to be well settled that in all actions sounding in damages, as *assumpsit* and tort, the jurisdiction depends upon the *ad damnum*, which is the amount of damages demanded. *Estes v. White*, 61 Me. 22; *Hapgood v. Doherty*, 8 Gray, 273; *Bank v. Pearson*, 14 id. 521.

In such case it cannot be judicially determined that the debt or damages which the plaintiff is entitled to recover are less than the *ad damnum* until judgment is rendered; and then if it is for a sum less than \$20 it does not affect the jurisdiction. *Ladd v. Kimball*, 12 Gray, 139.

Exceptions overruled.

PETERS, Ch. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

SWETT v. CITIZENS' MUTUAL RELIEF SOCIETY.

December 31, 1886.

RELIEF SOCIETIES — VOLUNTARY ASSOCIATIONS — MUTUAL LIFE INSURANCE — MISREPRESENTATION OF AGE — ASSESSMENTS — ASSIGNMENT.

The age of an applicant for life insurance is a material fact, and a misrepresentation of that fact in an application for membership in a voluntary association for life insurance renders void the contract issued thereon.

The incorporation of such voluntary association and a vote of the corporation making all of the voluntary associates members of it will not make such a void contract valid.

The treasurer of such a corporation cannot ratify and validate such a contract.

The assessment, and payment thereof by the members into the corporation treasury, for a death-claim upon such void contract, will not give the claimant an action against the corporation for the amount of the assessment.

An assessment so paid into the treasury becomes the money of the corporation; and the members making it cannot, by an assignment to the claimant of the several sums paid in by them, give such claimant a right of action against the corporation.

M. P. Frank, for plaintiff. *Byron D. Verrill*, for defendant.

LIBBEY, J. The defendant corporation is similar to the one involved

in *Bolton v. Bolton*, 73 Me. 299, in which this court, after a careful consideration of the question, held that such corporations are mutual life insurance companies.

In 1875, certain men formed a voluntary association under the name of the Citizens' Mutual Relief Society of Portland, having for its object the payment of a stipulated sum on the death of a member as relief to any person designated by him in writing, or to his widow, children or relatives, in the order specified in the articles of association.

The requisite qualifications for membership were as follows: "Any male resident of the city of Portland, and any business man resident in Cape Elizabeth, Deering, Westbrook, Scarborough, Gorham, or Windham, having a regular and established place of business in Portland, if twenty-one and not over sixty years of age, may become a member upon a two-thirds vote of those members of the society present when the election is held and payment of the admission fee as follows:

"An applicant for admission was required to make application in writing stating, among other things, his age."

On the 15th of June, 1876, the plaintiff's husband, W. H. Swett, made his application to be admitted as a member, stating therein that he was born in 1817, and his age was fifty-nine years.

On this application, by the requisite vote of the members of the society, he was admitted a member, and acted as such, paying his dues till May, 1877, when the associates were incorporated by the same name and organized the defendant corporation. By a by-law of the corporation the qualification of membership as to age was "twenty-one and not over fifty-five years of age." By a vote of the corporation, passed when it was organized, all members of the voluntary association were made associate members of the corporation without a new application. Swett continued to pay his dues as a member of the society till his death, May 29, 1883. By the terms of the insurance, the plaintiff, as his widow, if she can maintain her action, is entitled to \$1,030.

It is proved that the plaintiff's husband, when he made his application for admission to the voluntary association in 1876, was sixty-four years of age, and not fifty-nine as he stated in the application, and upon proof of his death the directors for that cause rejected the plaintiff's claim, and in August following the corporation affirmed the action of its directors.

The age of the applicant was a material fact. If more than sixty he could not become a member. His representation of the fact was a warranty of its truth, and if not true the contract was invalid. This rule is so uniformly held by the courts that no authorities need be cited.

But it is claimed by the learned counsel for the plaintiff that the vote of the corporation making the voluntary associates members of it created a valid contract between it and Swett, notwithstanding that, by reason of the false warranty of his age, he was not legally a member of the voluntary association. We do not think so. It made those only members of the corporation who were legal members of the voluntary association. It was merely a continuation by the defendant of the contract existing between Swett and his associates, and the defendant took the

place of the first society; or in other terms, it was a reinsurance of Swett's life on his application. And any fact which rendered the contract invalid when so adopted furnished a good defense by the defendant to the plaintiff's action on it.

It is further claimed that the defendant, by its treasurer, received of the plaintiff, after her husband's death, two assessments against him made just before he died, and at the time the treasurer and some of the other officers had information of Swett's true age. And upon these facts it is contended that the defendant ratified the contract or is estopped from setting up this defense.

We think this ground untenable. There is no evidence that the directors had knowledge of Swett's true age prior to their action rejecting the plaintiff's claim in July, 1883. Nor is there any evidence that the treasurer or any other officer of the corporation acquired any knowledge or information of the facts while in the discharge of any official duty. *Fairfield Savings Bk. v. Chase*, 72 Me. 226; S. C., 39 Am. Rep. 319. But assuming that the treasurer acquired notice of the fact when he received the assessments, he made no power to ratify the invalid contract. He could not admit a member and thereby make such a contract of insurance, and if he had no powers to make such a contract for the corporation, he had no power to validate a void contract by any act of ratification.

The fact that after Swett's death assessments were made by the treasurer on the members, in accordance with their by-laws, and paid into the treasury of the corporation, gives the plaintiff no right to maintain her action on an invalid contract to recover the sums so paid. Nor does the assignment to the plaintiff, by seventy-nine members of the assessments so paid in by them, give her a right of action. After paying their assessments into the treasury of the corporation, the members could not maintain an action to recover it back. The money so paid in became the money of the corporation, and it had a right to retain and control it. If the assignors could not maintain an action for it, they could give the plaintiff no power to do so by their assignment.

Judgment for the defendant.

PETERS, Ch. J., WALTON, VIRGIN and EMERY, JJ., concurred; HASKELL, J., did not sit.

STATE v. LIBBY.

December 31, 1886.

INDICTMENT — PLACE — GAME LAW.

An indictment for killing deer in violation of the game law alleged the place of killing to be "at a gore north of numbers two and three in range six in said county of Franklin." *Held sufficient.*

On exceptions.

The defendants Reed A. Smith and Eugene H. Smith were tried jointly and found guilty of the following counts in the indictment.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said David S. Libby, Reed A. Smith and Eugene H. Smith, at a gore north of numbers two and three in range six, in said county of Franklin, on the twenty-fifth day of February, in the year of

our Lord one thousand eight hundred and seventy-five, with force and arms did kill five deer by then and there shooting said deer with a rifle, said rifle being then and there loaded with powder and one leaden bullet, against the peace of said State, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said David S. Libby, Reed A. Smith and Eugene H. Smith, at a gore north of townships numbered two and three in range six, in said county of Franklin, on the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms did hunt and kill seven deer against the peace of said State and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said David S. Libby, Reed A. Smith and Eugene H. Smith, at a gore north of townships numbered two and three in range six, in said county of Franklin, on the twentieth day of March, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms did hunt and kill five deer against the peace of said State, and contrary to the form of the statute in such case made and provided."

They moved in arrest of judgment for the following reasons:

"1st. The indictment does not allege that any offense was committed by these defendants in Franklin county or State of Maine.

"2nd. No offense is alleged against the defendants in the indictment.

"3rd. No valid judgment can be rendered on the verdict.

"4th. It does not appear that said prosecution was commenced by the warden or his deputy, of any county where the deer were alleged to be killed, nor by any other person, in any county in which the offense is alleged to have been committed, or the accused then resided or now resides.

"5th. No part of the forfeiture under said chapter goes to the State, or county, although the county is subjected to the expense of this prosecution.

"6th. The indictment does not show who is entitled to the forfeiture, if the defendants are convicted."

The motion was overruled and the defendants alleged exceptions.

Joseph C. Holman, county attorney, for State. *H. L. Whitcomb*, for defendants.

EMERY, J. If these respondents should receive a deed of conveyance to them of real estate, with this description, "a gore north of townships numbered two and three in range six in the county of Franklin," they would undoubtedly look for their land within Franklin county, and expect to find it in that county, and next north of said townships. They would not look for it in any other county or country.

The same language in an indictment sufficiently alleges a place in Franklin county.

The other alleged causes for arrest of judgment are not relied upon, and are clearly not valid. *State v. Willis*, 78 Me. 70.

Exceptions overruled.

PETERS, Ch. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

AUGUSTA SAVINGS BANK v. CROSSMAN.

December 31, 1886.

EQUITY — JUDGMENT CREDITOR — CONCEALED PROPERTY — TITLE OF REAL ESTATE IN DAUGHTER'S NAME.

A judgment creditor may maintain a suit in equity against the debtor, and any person holding the title to the debtor's real estate in order to reach such property for the satisfaction of the judgment debt.

Where, as here, the person holding the title is the daughter of the debtor, she may be allowed a lien for the money advanced by her to her father, but not for her wages when laboring for her father from fourteen to twenty-one years of age.

This is a bill in equity inserted in a writ of attachment.

Wherein said bank complains that the said John R. Crossman on the 11th day of August, 1873, for a valuable consideration, to-wit: \$700 paid by said bank to said Crossman, gave said bank his promissory note of that date, promising to pay said bank the sum of \$700 in one year from that date with interest at the rate of eight per cent per annum, payable semi-annually.

That by reason of failure to pay said note by said Crossman, according to the tenor thereof, said note was placed in suit, the action thereon being entered at the December term, 1879, of the superior court for the county of Kennebec, and on the 24th day of February, 1880, said bank recovered judgment against said Crossman for the amount then due on said note, said amount being — \$557.58 — five hundred fifty-seven and fifty-eight one-hundredths dollars damages, and also — \$12.10 — twelve and ten one-hundredths dollars costs of suit, as by the record now remaining in said court more fully appears, and that execution for said amount was issued on February 25, 1880, a last execution for same amount in same action being issued January 14, 1884, which execution was placed in the hands of an officer duly qualified to serve the same, and that said officer has made due return thereon that he could find no goods or property of the said John R. Crossman to satisfy said execution and therefore duly returned the same in no part satisfied, and since said 24th day of February, 1880, the date of said judgment, said John R. Crossman has had no property which could be come at to satisfy said judgment, and said last execution is now wholly unsatisfied and due to said bank.

And complainant further says that said John R. Crossman is the father of the said Sadie E. Briggs, and that the said John R. Crossman and his said daughter Sadie E. Briggs, combining and confederating together and contriving to injure and defraud said bank, and fraudulently to secure the property of said Crossman from attachment and execution and to prevent said bank from collecting said account and satisfying the same, and any judgment and execution or any part thereof from the property of the said John R. Crossman, on the day of _____, 1876, purchased a certain lot of land situate in said China, and paid therefor the sum of \$375, with money belonging solely to him, the said Crossman, and took a conveyance thereof by and to and in the name of said Sadie E. Briggs, then bearing the name of Sadie E. Crossman.

And said complainant further says upon information and belief that the said John R. Crossman thereafter with the knowledge and fraudulent consent of the said Sadie E., erected a stable and shed upon said premises, and the lumber, labor and materials therefor were furnished and provided by said John R. Crossman, or by means furnished by him to the amount of about \$200.

And said complainant further says upon information and belief that said John R. Crossman since said 11th day of August, 1873, when said note was so given said bank, by said John R. Crossman, intending to defraud said bank, and with the fraudulent consent and agreement of the said Sadie E., paid to said Sadie E. other money to which she had no legal or equitable claim, in addition to the amount contributed by him for the purchase of said real estate.

And said complainant further says that the value of said real estate so fraudulently conveyed to said Sadie E., together with the improvements thereon made by said Crossman, is less than the amount of said judgment against said John R. Crossman, and that the value of said real estate so fraudulently conveyed, together with the value of the money so fraudulently paid said Sadie E., in addition to the money paid for the purchase of said real estate so fraudulently conveyed, is equal to or exceeds the amount now due on said judgment.

All which actions and doings of said defendants were intended by said defendants to hinder, delay and defeat said complainant in the recovery of said debt, due to said complainant, are in violation of the rights of said bank as a creditor of said John R. Crossman, and contrary to equity and good conscience, and tend to the wrong and injury of said complainant. In consideration whereof, and for as much as said complainant has no adequate remedy at law in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relivable; to the end, therefore, that said complainant shall have relief in the premises, said complainant prays that this honorable court will order and decree that said defendants shall jointly or severally, as this court shall deem that justice and equity shall require, pay over and account for all property and sums of money belonging to the said John R. Crossman, now fraudulently held by said Sadie E. Briggs in violation of the equitable rights of said bank as a creditor, and that said complainant shall have such other relief as this court shall deem proper, so that said judgment of said complainant may be satisfied therefrom.

June 21, 1884. (Duly sworn to.)

ANSWER OF JOHN R. CROSSMAN.

And now the said John R. Crossman comes, and reserving to himself all manner of objections to the imperfections and insufficiencies to the plaintiff's bill, the same as if especially demurred to, particularly the failure to state a case which the court can legally take cognizance of, answers as follows:

That on the 11th day of August, 1873, he did borrow of the plaintiff the sum of \$700, and gave his note therefor as stated in plaintiff's bill, and amply secured the payment of said note by a mortgage of real estate.

That the plaintiff has an execution against him as set forth in plaintiff's bill, but he says the plaintiff is not, in equity, entitled to have any execution against him on said note; that the plaintiff had the benefit of said mortgage, took the land mortgaged, and sold it at private sale, without the knowledge of the defendant, for about one-third of its real value; and defendant supposes that said execution is for the balance due on said note; that he being ignorant as to his legal rights, did not defend the action brought on said note, as he ought to have done; that the land mortgaged and sold as above was, at the time of the sale, more than sufficient on a fair sale to pay said note.

Defendant admits that in September, 1876, acting for his daughter, then Sadie E. Crossman, at her request, did make a trade for a small place in China, selected by her, at the price of \$375, and paid that sum for it, and the deed was made to her, but he denies that the money paid, or any part thereof, belonged to him; on the contrary, he says it belonged to her and was her own money, about \$300 of it having come to her from deceased relatives, the rest she had earned by her labor.

Defendant also admits that he did soon afterward erect a stable thereon, costing about \$200, and also that he paid money to her, but it was money due to her for wages, and not all that he owed her.

Now the defendant most positively and emphatically says that neither at the time he made the trade for the above-named parcel of land, and paid the money for it, nor when he built the stable on it, nor when he paid his said daughter on her wages, nor at any other time, did he combine and confederate with his said daughter to defraud the plaintiff; that such a thought never entered his mind; that he always believed and still believes that the mortgage the plaintiff had was entirely sufficient to pay the debt of the plaintiff.

JOHN R. CROSSMAN.

December 14, 1884. Duly sworn to.

ANSWER OF SADIE E. CROSSMAN.

And now the said Sadie E. Briggs comes, and reserving to herself all manner of objections to the imperfections and insufficiencies of the plaintiff's bill, the same as if especially demurred to, particularly the failure to state a case of which the court can legally take cognizance, answers as follows:

That, as to all that part of the plaintiff's bill which relates to the debt, and the suit in which execution was recovered, she has no knowledge except upon information, and makes no further answer.

That as to the residue of said bill she says that in September, 1876, she had some money, about \$300 of which came to her from deceased relatives, and the rest as wages for her labor, and wished to invest a portion of it in real estate, and selected a place which she thought she would like, and requested her father, the said John R. Crossman, to trade for it if he could for her, and he did at the price of \$375, which she paid with her own money and took a deed. She admits that the said John R. Crossman built a stable on the same place, and afterward, on a settlement with her, paid her money that was due her for labor, but did not pay all that was due.

Now she says most positively and emphatically that neither at the time when she bought said parcel of land, nor when a stable was built on it, nor when her father paid her for labor, nor at any other time, did she combine and confederate with her father, the said John R. Crossman, to defraud the plaintiff; that she had no such intention, and does not believe her father ever had; from information and belief she considered the mortgage the plaintiff held entirely sufficient to secure the debt.

SADIE E. BRIGGS.

Duly sworn to.

S. & L. Titcomb, for plaintiff. *R. W. Black*, for defendants.

PER CURIAM. We perceive no question of unsettled law in this case — it is a question of fact. Making a decision, as if sitting with jury powers, we think the complainant is entitled to relief.

The property in question is a small homestead, bought by one defendant — father — in his daughter's name. She is the other defendant. He has always occupied and controlled it as his own. The story by which the daughter claims it as her own is, that she earned the purchase-money by hiring out with her father from the age of fourteen until she was twenty-one, charging for her services while they belonged, as a matter of law, to him. The preposterous story is inconsistent with all the facts in the case. She claims her father owed her for furniture which her stepmother gave her. The stepmother's will is introduced, giving her none. But the will did give her \$50 which went into her father's hands. The amount with its interest and all accretions may possibly be \$100 at this time. The burden of proof being upon the complainants, it may be just to allow that the daughter has that amount — \$100 — of lien upon the title to the land.

Bill sustained with costs. A proper decree to be filed in accordance with the rescript.

NEW YORK COURT OF APPEALS.

DENTON, *App't*, v. STANFORD, *Resp't*.*

December 14, 1886.

EXECUTOR AND ADMINISTRATOR — TRUSTEE—ACCOUNTING—SURROGATE'S DECREE.

The rule that an executor or trustee residing in this State and deriving his authority from a will executed and admitted to probate here cannot invest trust funds in mortgages on real estate situated out of the State has some exceptions.

The trustees sold land belonging to the estate situated in the State of New Jersey. Not being able to obtain cash they took a first mortgage upon the property and invested the trust funds in the mortgage which was supposed at the time to be ample security. It turned out that owing to a defect in the title of the property the mortgage, upon foreclosure thereof, realized less than the amount of the trust. *Held*, that the case came within an exception to the rule above stated, and that the trustees could not be held personally liable for the deficiency for having invested the trust funds in a mortgage on property out of the State.

The decree of a surrogate upon a final accounting, after citations personally served upon all the parties interested, is conclusive upon such parties so long as it remains unreversed.

Appeal from a judgment of the general term affirming an order of the surrogate of the county of Orange, dismissing the petition as to all the petitioners herein.

The opinion fully states the facts.

Benjamin Low, for appellants. *F. V. Sanford*, for respondents.

EARL, J. Samuel Denton died April 7, 1874, leaving a will in which these respondents were appointed executors, and leaving personal estate inventoried at about \$48,000, but actually worth much less. He gave legacies to various persons, and created trusts and made these respondents trustees of \$3,000, and ordered the interest to be paid annually to Nathaniel R. Denton, and at his death the principal sum to be divided between his children; of \$1,000, and ordered the interest to be paid annually to John Baird, and at his death the principal sum to be divided between his children, and he also made them trustees of \$500, for the benefit of George W. Denton.

Previous to his death he held a mortgage upon premises situated in the State of New Jersey, and he there commenced a foreclosure of that mortgage in the court of chancery, and obtained a judgment of foreclosure directing a sale of the mortgaged premises. In pursuance of that judgment the premises were sold and bid off for the testator by his attorney, for the sum of about \$11,000, which was the amount of the prior liens and incumbrances upon the premises together with the costs of the foreclosure; but before the sale was consummated and the deed given he died. After his death the executors were called upon to complete the sale and pay the purchase-price, and on the 8th day of June, 1874, they took the deed in their individual names but for the benefit of the estate. All this they did acting in good faith, under the advice of counsel and in the exercise of reasonable prudence and

* Affirming 39 Hun, 487.

care. They held this real estate until April 2, 1877, in the mean time renting it and making diligent efforts to sell it; and having failed in such efforts, on that day they conveyed it to John Burt for \$6,000, and on the same day he conveyed it to Mary F. Maples, and she executed to Burt two mortgages, a first mortgage to secure \$4,500, and a second one to secure \$1,500, of the purchase-money. The mortgage for \$4,500 was assigned to the executors as trustees for the security and as an investment of the funds belonging to the three trusts above mentioned. Subsequently to that date the executors rendered a final account of their proceedings after citations personally served upon all these petitioners. Upon that accounting it appeared that they had paid all the legacies except those invested in and represented by the mortgage for \$4,500, and another trust of \$1,500; and the surrogate made a decree in which he adjudged that the account of the executors should be finally settled and allowed as filed and adjusted, and the decree recited further, as follows: "And it further appearing that said executors have the sum of \$6,000 invested on bond and mortgage for the following persons: the sum of \$3,000 for said Nathaniel R. Denton; the sum of \$1,000 for John Baird; the sum of \$500 for George W. Denton; and the sum of \$1,500 for the said Emily Conklin."

And it further appearing that said legatees, Nathaniel R. Denton, John Baird and George W. Denton, claim interest on their respective legacies from the date of the death of said Samuel Denton, which occurred on the 7th day of April, 1874; and after hearing the respective counsel in this matter and due deliberation being had thereon, it is ordered, adjudged and decreed that said executors pay to Nathaniel R. Denton the interest on his said legacy of \$3,000 from April 7, 1874, being the sum of \$210, and that they pay to John Baird the interest on his said legacy of \$1,000 for the same period of time, being the sum of \$70, and that they pay to the general guardian of said George W. Denton the interest on his said legacy of \$500, for the like period of time, being the sum of \$35, said interest amounting in all to the sum of \$315, and for which amount said executors are credited in the foregoing statement; and it was further decreed that the executors upon complying with the terms of the decree should be discharged. Thereafter interest on the two mortgages was regularly paid down to the 1st day of April, 1882, and paid over to the persons entitled thereto under the various trusts and the decree of the surrogate. Subsequently, it turned out that, unknown to the executors and probably also to the testator, there was a defect in the title to the real estate, and in consequence thereof the mortgagor ceased to pay the interest upon the mortgage for \$4,500, and it was foreclosed by the executors, and there was realized upon such foreclosure after deducting the costs and expenses of the same nearly \$2,300, for which they have accounted. After that time no interest was paid to these petitioners, and they filed this petition in the surrogate's court calling the trustees to account for the money invested in the New Jersey real estate, and asking that they be made personally liable for any deficiency in the trust fund.

There is nothing in the proof or the findings of the surrogate impeach-

ing the perfect good faith of the executors in all their transactions. The testator having bid off the real estate in New Jersey, and, as we must assume, having become personally obligated to pay his bid, and to perform his contract of purchase, these executors representing his estate were bound to perform that contract. They were not obliged to wait until it was enforced against them by legal proceedings, but they had the right voluntarily to discharge the obligation which their testator had incurred.

It matters not that they paid the money and took the deed before they had qualified as executors. After they had qualified they could ratify what they had previously done, and thus make that legal which was before illegal. They cannot be charged with a *devastavit* in taking money of the estate before they had received their letters, and acting in good faith, and with what then appeared to be reasonable prudence, using it to discharge an obligation apparently valid resting upon their testator. They thus found themselves with this land belonging to the estate situated in the State of New Jersey. They sold it for the best price they could obtain, which was, without their fault, much less than cost. Having paid all the legacies which were due and payable, and which they were bound to discharge in cash, they took the two mortgages for \$6,000 to represent the trust funds which they held. The mortgage for \$4,500, in which these petitioners were interested, was apparently adequate security.

While it is a general rule that an executor or trustee residing in this State and deriving his authority from a will executed and admitted to probate here, cannot invest trust funds in mortgages on real estate situated out of the State, yet as stated in *Ormiston v. Olcott*, 84 N. Y. 339, that rule is not universal and has some exceptions. There FINCH, J., said: "The rule should not be made arbitrary and inflexible, and so rigid as to admit of no possible exceptions, for it is merely an outgrowth or consequence of the broader and admitted proposition that the duty of a trustee in making investments is to employ such diligence and such prudence as in general prudent men of discretion and intelligence in such matters employ in their own like affairs. While, therefore, we are not disposed to say that an investment by a trustee in another State can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance and of foreign tribunal, will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity or a very pressing emergency."

We think this investment comes within the exceptions of the rule. Here was land belonging to the estate and the trustees sold it. Not being able to obtain cash they took a first mortgage, which was supposed to be ample security to represent the trusts. They did not take available funds and carry them out of the State and there invest them in real estate, but they invested the trust funds in a mortgage which regularly and legitimately came to them upon land belonging to the estate which they sold, and we cannot say that it was a breach of duty

on their part so to invest them. And if there were nothing more in the case the loss upon the investment, however disastrous to these petitioners, could not be cast upon the trustees.

But we think, also, that the decree of the surrogate upon the final accounting of the executors furnishes absolute protection to them. These petitioners were parties to that accounting, and it does not appear that any objection was there made to the payment of \$11,000 in discharge of the testator's bid, or to the mortgage of \$4,500, taken in part to secure the two sums of \$3,000 and \$1,000, in which the petitioners were interested. Upon that accounting the executors were charged with the whole amount of the inventory and with the increase thereof, and they were credited by loss on the inventory, by expenses and legacies paid, and by \$6,000 invested in these two mortgages, and it appears in the decree that the \$6,000 included the trust funds in which these petitioners are interested. That decree, which has never been impeached or reversed, finally settled and allowed the accounts thus presented. So long as it remains in force none of the parties thereto can object that the \$11,000 was not properly paid for the real estate in New Jersey, that the two mortgages, amounting to \$6,000, were not properly taken, or that the mortgage for \$4,500 did not represent the two trust funds in which the petitioners claim an interest. Code, § 2742; *In the Matter of Tilden*, 98 N. Y. 434; *In the Matter of Hawley*, 100 id. 206; S. C., 2 East. Rep'r, 656.

We are, therefore, of opinion upon both grounds that the decision of the surrogate was right, and that the judgment of the general term should be affirmed, with costs.

All concur, except FINCH, J., not voting.

Judgment affirmed.

McMASTER, *App't*, v. THE STATE, *Resp't*.

December 7, 1886.

CONTRACT — RETROSPECTIVE LAWS.

The acts, chapter 323, Laws of 1874, and chapter 264, Laws of 1875, relating to the construction of the Buffalo State Asylum, and appropriating money for that purpose, did not abrogate or interfere with existing contracts which had been previously entered into for work upon the buildings. Such acts had reference to future contracts only.

It is a fundamental rule, founded in wisdom and sound public policy, that unless the very plain meaning of the language requires it, laws should not be so construed as to have retrospective operation, or to affect existing contracts or acts already done.

Appeal from order and award of the board of claims, dated February 12, 1885, dismissing said claim and awarding nothing.

The opinion states the facts.

J. T. Parkhurst, for appellant. D. O'Brien, for respondent.

EARL, J. In 1870 the legislature passed the act, chapter 378, "to establish and organize the Buffalo State Asylum for the Insane." The governor was authorized to appoint, by and with the consent of the senate, ten managers for the asylum, who, among other duties, were to procure plans, designs and specifications for the construction of the necessary buildings, and to contract for the construction of the same,

provided such plans, designs, specifications, contracts and the terms thereof should be approved by the governor, State engineer, and comptroller, and further provided that the managers should not adopt any plans for the buildings nor alter or change the plans adopted without the assent of the State officers named. In pursuance of the act the governor appointed the managers, and they prepared plans, designs and specifications which were approved by the State officers. The plans provided for a central building and five connecting male wards upon one side designated A, B, C, D and E, and five female wards upon the other side designated by the same letters, and several out buildings.

The managers afterward advertised for bids for furnishing the dimension stone and block work required for the buildings, and for the cutting of the same, and the firm of Peck & Co. were the lowest bidders for such materials and work, and the managers thereupon awarded the contracts for the materials and work to that firm at the prices bid for them, and the contracts were afterward duly and formally executed. From time to time during the years 1871, 1872, 1873, 1874, 1875, and until the month of May, 1876, the firm furnished upon the asylum ground dimension stone and blocks, and cut and prepared the same, and such materials were measured and accepted by the supervising architect and superintendents, and used in the construction and completion of certain of the buildings referred to in the contracts, drawings, plans and specifications. On the 25th day of May, 1876, the managers passed the following resolution: "*Resolved*, that the plans of both ends of the asylum buildings, so far as they refer to wards C, D and E, be so modified as to permit the same to be constructed of brick with sandstone trimmings instead of stone entirely, and that the plans when so modified be presented to the proper State officers for their approval as required by law." On the 7th day of July, 1876, plans in accordance with this resolution were approved by the proper State officers, and on the seventeenth day of August were finally adopted by the managers. This change in the plans was made without the consent of Peck & Co., but they furnished and cut whatever stone was required from time to time by the managers and building superintendent to be furnished for the construction of the buildings according to such modified plans, and received compensation in full for such materials and work. At the time of the passage of the resolution above set forth, the walls of the central building and male wards A and B were completed according to the original plans, but the walls of the male wards C, D and E were not then built, and they were subsequently in 1876 and 1877, prior to the fifth day of November in the last year, built according to the modified plans. At the last date the managers passed the following resolution: "*Resolved*, that the building superintendent notify Peck & Co. to remove the stone belonging to them from the asylum grounds within ten days from the time they receive such notification from the building superintendent." Such notification was given on the next day, and thereafter the contractors were not permitted to furnish more stone or further to perform their contracts. The female wards have never been constructed, and the buildings have been recognized as completed.

In the year 1881 the claim for damages of Peck & Co. for alleged breach of their contracts on the part of the State was duly assigned to this claimant; and in the month of January, 1882, he duly executed, verified and presented to the State board of audit his petition, setting forth the particulars of his claim and praying for the allowance thereof. That petition was pending and undetermined before the board of audit, and was by law transferred to the board of claims when that board was constituted in 1883.

The claim was brought to a hearing before the board of claims, and it found, among other things, that Peck & Co. sustained damages from the breach of the contracts on the part of the State, but dismissed the claim on the sole ground that it was barred by the statute of limitations; and whether it was so barred or not is the sole question of our determination.

It is claimed, on behalf of the State, that the contracts were abrogated by the acts, chapter 323 of the Laws of 1874, and chapter 264 of the Laws of 1875, and that the breach of the contracts was not later than the date of the passage of the last act, which was more than six years before the presentation of the claims to the board of audit. On the other hand the claimant contends that the breach which gave his assignors a cause of action was not earlier than the 25th day of May, 1876, within six years before the presentation of the claim.

The act, chapter 323 of 1874, appropriated for "the Buffalo State Asylum for the Insane, to be expended only for the completion of the buildings already commenced, the sum of \$150,000." This provision in no way interfered with the contracts. It simply directed how the money thus appropriated should be used, and in no way worked a repudiation of the contracts. The act also contained the following provision: "The governor is hereby authorized to appoint two superintending builders to take charge of the following buildings in process of construction, namely, the Buffalo State Asylum for the Insane, the State Reformatory at Elmira, the Hudson River State Hospital for the Insane at Poughkeepsie, and the State Homoeopathic Asylum for the Insane at Middletown, to superintend the construction and completion thereof. The persons appointed under this provision shall be vested, so far as the construction of said buildings is concerned, with all the duties, powers and responsibilities heretofore imposed or conferred upon the commissioners or managers heretofore appointed to take care of such buildings respectively, which said commissioners and managers are hereby superseded as to the powers and duties herein referred to. The purchasing of the materials and all the things connected with the erection of said buildings shall be done by contract, and all contracts shall be awarded to the lowest responsible bidder after being advertised as is now required by law for the advertising and letting of State work on the canals."

This provision did not entirely supersede the managers appointed under the act of 1870, but substituted in their stead only, so far as concerned the construction of the asylum buildings, two superintending builders. It did not alter the plans for the buildings, nor expressly abrogate or repudiate any contract which the managers had entered

into for the construction of the buildings. It cannot be inferred from the language used that the legislature meant to abrogate valid existing contracts, and thus leave the State liable for damages for their breach.

The contracts of Peck & Co. covered only a portion of the material and work required for the buildings, and, as the act of 1870 did not require that contracts should be let at public bidding, this act required that contracts should be so let, and all its language can have full force by confining it to future contracts. It looked to the future and did not purport to interfere with what had already been done with materials already purchased, or valid contracts already made in the very mode it prescribed. Suppose the contracts had been re-let at a lower price, the diminished price might at least measure, though not necessarily limit, the damages of Peck & Co. caused by the breach of their contracts, and the State would gain nothing. The construction contended for, on behalf of the defendant, so unjust to the contractors and injurious to the State, should not be adopted unless required by the plain meaning of the language used, and we think is inadmissible.

That the statute of 1874 cannot be so construed is made more manifest by reference to the act of 1875, which, it is also contended, abrogated the contracts. Section 1 of that act provides as follows: "The governor is hereby authorized to appoint three building superintendents, of practical experience, who shall respectively have charge of the construction of the Hudson River State Hospital for the Insane at Poughkeepsie, and the State Homœopathic Asylum for the Insane at Middletown, and the Buffalo Asylum for the Insane. The purchasing of the materials and all things connected with the erection of new buildings and the labor upon the same, shall be done by the managers thereof by contract, and the contracts shall be awarded to the lowest responsible bidders after being advertised in the State papers, and in at least two papers published in the locality where the work is to be done, once in each week for four weeks consecutively, immediately preceding the letting of said work, which notice of letting, to be signed by the managers, shall state the work to be let, the quantity and quality of materials to be bid for, and the length of time which will be given for the completion of the work or the delivery of the materials, the amount of the security required, bonds to be furnished for the faithful performance of the contracts. Before said work and materials shall be advertised and let by the managers aforesaid, full detailed plans and specifications of said work shall be made, and approved of by the lieutenant-governor, attorney-general and comptroller of the State in writing; and said plans and specifications, thus made and approved, shall not be altered without the consent and approval, in writing, of the lieutenant-governor, attorney-general and comptroller. The contracts for such labor and materials shall be made by the managers aforesaid after the approval of the lieutenant-governor, attorney-general and comptroller, in writing, indorsed thereon, after having been furnished by the said managers with the bids for said work and materials, which shall be filed by the comptroller in his office." For the same reasons before stated in reference to similar language used in the act of 1874, this section must be held to have reference to future contracts in the con-

struction of the buildings, and all its language can have effect by confining it to such contracts. It would be quite preposterous to suppose that the legislature meant by this section to abrogate not only all the contracts existing prior to the act of 1874, but all the contracts let in pursuance of that act, and expressly authorized thereby; and yet the act would have to receive such a construction if the act of 1874 were construed, as it is claimed it should be, on behalf of the defendant. That is if the act of 1874 abrogated all the contracts theretofore made, then the act of 1875 abrogated all the contracts made before its passage. It is plain that both acts were concerned with the future, and had reference to future work and materials and future contracts.

It is a fundamental rule founded in wisdom and sound public policy that unless the very plain meaning of the language requires it, laws should not be so construed as to have retrospective operation, or to affect existing contracts or acts already legally done.

This obvious construction of the two acts is one that all the persons connected with the construction of the buildings understood and acted upon. The managers and superintending builders all recognized these contracts as subsisting, and the contractors continued to perform them long after the passage of those acts, and it does not appear that any one, prior to the hearing of this matter before the board of claims ever claimed that these contracts were abrogated or broken by these acts.

The cases of *Lord v. Thomas*, 64 N. Y. 107, and *Donalds v. The State*, 89 id. 35, are in no way in conflict with the views here expressed. They involved the construction and effect besides the provision above quoted from the act of 1874 of the following clause therein: "For the State Reformatory at Elmira the sum of \$300,000 provided the plans of the building be so changed as to render such sum sufficient to complete the center building and the south wing so as to receive convicts; such change of plans to be approved of and certified by the governor and comptroller." A superintending builder was appointed and the plans were so changed as to make the contract which had previously been entered into wholly inapplicable, and the contractor was absolutely prohibited from the further performance of his contract; and under such circumstances it was held that the contract had been abrogated and broken. Here the plans were not changed and were not ordered to be changed by either of the acts, and there is nothing from which an intent to abrogate the contract can be justly inferred.

We have reached this conclusion without considering the allegations of the claimant that the State subsequently to 1875 recognized and ratified the contract as valid and subsisting, and also that it became estopped from denying the validity and continued existence of the contracts subsequently to that time by virtue of the judgment against it in the action brought by it against Peck & Co., to recover back money paid under the contracts.

We have confined our attention to the one point—the statute of limitations—upon which the board of claims based its decision. The case was settled and prepared to present that point alone, and it would not be proper to consider any other.

In conclusion we repeat, as peculiarly applicable to this case, what

was said in *Corkings v. The State*, 99 N. Y. 499: "When the State has no better or other defense than the statute of limitations it should, at least both upon the law and the facts, establish that defense with reasonable clearness and certainty."

The decision of the board of claims should be reversed and a new hearing ordered, costs of this court to abide event.

RUGER, Ch. J., RAPALLO and FINCH, JJ., concur; DANFORTH, J., dissents; ANDREWS and MILLER, JJ., not voting.

Judgment reversed.

LAMMER, *App't*, v. STODDARD, *Resp't*.

November 23, 1886.

TRUSTEE — STATUTE OF LIMITATIONS.

The finding of the trial court upon a question of fact, founded upon sufficient evidence, and affirmed by the general term, concludes this court.

The rule that the statute of limitations does not begin to run against the beneficiary of an actual subsisting trust until the trustee has openly, to the knowledge of the beneficiary, renounced the trust, does not apply to a trustee *ex maleficio* or by implication or construction of law. As to such a trustee the statute begins to run from the time the wrongful act was committed.

Appeal from a judgment of the general term of the city court of Brooklyn, affirming a judgment rendered in favor of the defendants, after a trial before the judge without a jury.

Joseph Lammer died February 27, 1831, leaving a widow, Mary Lammer, and five children, Edward, Fanny, Joseph, Clarissa and John A., the last three being the children also of Mary, who was his second wife, and being at their father's death aged respectively, seven, six and three years.

Joseph Lammer also left personal estate amounting to upward of \$36,000, and a will in which he bequeathed to his wife absolutely the sum of \$2,000, and created a trust as follows: "I give and bequeath unto my said wife, Mary, the further sum of \$3,000, lawful money aforesaid, to be paid to her as soon as conveniently may be after my decease, in trust, nevertheless, that she, my said wife, shall have, use and take the interest accruing and to arise from the said \$3,000, during the minority of my sons, Joseph and John, and daughter, Clarissa, to be applied for and toward the support, maintenance and education of my said three children, and to pay to the said children, Joseph, John and Clarissa, as they shall respectively arrive at the age of twenty-one years, the sum of \$1,000 each." "My will is that the sum of \$3,000, hereinbefore given in trust to my said wife, Mary, shall be by her put at interest by good bond and mortgage security upon real estate, to be approved of by my executors hereinafter named, and in case either or all of my said children, Joseph, John and Clarissa, shall die during their minority and without lawful issue, then my will is, and I do hereby give and bequeath unto my said wife, Mary, the sum or sums of money which such child or children would have been entitled to receive if he, she or they had lived to the age of twenty-one years." And he appointed his wife and his son, Edward, executors of his will. The will was admitted to probate, the executors qualified as such, and filed an inven-

tory May 24, 1831. The \$3,000 for the trust fund was paid to Mary Lammer, and on the 7th day of June, 1831, she loaned \$3,000 to one Talbot and took his bond and mortgage to secure the same, and they were paid June 1, 1833.

At the latter date she loaned the same amount to one Smith, and took his bond and mortgage to secure the same, and they were paid February 3, 1836. About the day last named she loaned Edward Lammer \$5,000 and took from him a mortgage dated February first, and acknowledged February 5, 1836, conditioned to pay that sum with interest on the 1st day of February, 1837. It appears from the recitals in the mortgage that a bond was also given to which the mortgage was collateral. The real estate mentioned in this mortgage was covered by a prior purchase-money mortgage given by Edward Lammer, which was foreclosed in 1837, and the real estate was sold upon such foreclosure for an amount which left nothing to apply upon the mortgage given to Mary Lammer.

Edward Lammer was a merchant in New York, and was burned out by the great fire which occurred December 16, 1835, and thereby became financially embarrassed and unable to pay his debts. A few years thereafter he became solvent and so continued to the time of his death in July, 1884, when he left an estate inventoried and valued at nearly \$65,000. He was never married, and he left a will in which he bequeathed to his half sister and brother, Clarissa and John, each \$1,000, and gave the remainder of his estate to other relatives. Joseph Lammer died in 1840, and Mary Lammer died December 28, 1870. She always lived in Brooklyn, and Edward Lammer lived in the same city and in New York, and during twenty years prior to his death he made a monthly allowance of \$20 to Clarissa which, while she took care of her sick mother, was increased to \$26.

After the death of Mary Lammer the mortgage given to her by Edward was found to be uncanceled upon the record. Clarissa was appointed administratrix of her mother's estate, and then she and her brother John A. commenced this action to enforce the trust as to the \$3,000 against the estate of Edward.

The trial judge found as a matter of fact that Edward had paid the amount of the mortgage to Mary Lammer in her life-time, and refused to find that the trust fund was included in the \$5,000 loaned to him, and he dismissed the complaint.

P. V. R. Stanton, for appellants. *Jesse Johnson*, for respondents.

EARL, J. The finding of the trial court affirmed by the general term, that Edward Lammer had paid to Mary Lammer the amount loaned to him by her which was secured by his mortgage, was founded upon sufficient evidence and concludes us. The loan was made forty-eight years before Edward's death and thirty-four years before Mrs. Lammer's death, and during most of that time he possessed ample pecuniary ability to pay. She was not shown to possess much means, and presumably needed the money for the support of herself and infant children. She and Edward always resided near each other, and during twenty years he made considerable allowance to his sister for

the benefit of herself and mother, thus showing that he was not only disposed to be just but liberal. The bond and mortgage were not in her possession at her death, were not then shown to be in existence, and were never heard of until shortly before the commencement of this action, by either of the plaintiffs, the youngest of whom at her death was forty-two years old. Under such circumstances the non-production of the bond and mortgage furnishes very satisfactory and conclusive evidence of their payment. *Bergan v. Urbahn*, 83 N. Y. 49.

But the statute of limitations furnishes an equally conclusive defense to this action. If it be assumed that the trust fund was loaned to Edward Lammer with notice of the trust, under such circumstances that the trust within a proper time could have been enforced against him or his estate, the lapse of time would still stand in plaintiff's pathway. If this were an action to recover the debt evidenced by the bond and mortgage, it is conceded that it would have been barred. But the action is to establish and enforce a trust, and hence the claim is made that it is not barred. It is undoubtedly generally true that as against a trustee of an actual, express, subsisting trust, the statute does not begin to run against the beneficiary until the trustee has openly to the knowledge of the beneficiary renounced, disclaimed or repudiated the trust. But Edward Lammer was not the actual trustee of this fund, and he never acknowledged a trust as to the money loaned him. He could at most have been declared a trustee *ex maleficio*, or by implication or construction of law, and in such a case the statute begins to run from the time the wrong was committed by which the party became chargeable as trustee by implication. *Wilmerding v. Russ*, 33 Conn. 67; *Arkhurst's Appeal*, 60 Penn. St. 290; *McClure v. Shephard*, 21 N. J. Eq. 76; *Decouche v. Savetier*, 3 Johns. Ch. 190, 216; *Kane v. Bloodgood*, 7 id. 90; S. C., 11 Am. Dec. 417; *Ward v. Smith*, 3 Sandf. Ch. 592; *Higgins v. Higgins*, 14 Abb. N. C. 13; *Clark v. Boorman*, 18 Wall. 493; *Perry Trusts*, § 865.

We, therefore, see no reason to doubt that the judgment below was right, and it should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE, EX REL. SUPERINTENDENT OF THE POOR, *Resp'ts*, v. BOARD OF SUPERVISORS, *App'lts*.

November 30, 1886.

COUNTY AND TOWN POOR — REPEAL BY IMPLICATION.

The provisions of the act, chapter 28, Laws of 1882, making the town of Oswegatchie, county of St. Lawrence, a separate and distinct poor district, did not operate as a repeal of the privilege extended to the supervisors of that county by the act, chapter 245, Laws of 1846, to adopt the "Livingston county act," chapter 234, Laws of 1845.

The general policy of the law is adverse to repeal by implication, and special rules of interpretation require the provisions of different statutes to be so construed as to harmonize and avoid conflict, unless the plain meaning of the language is thereby violated.

Appeal from order of general term affirming order for peremptory writ of *mandamus*.

The point at issue is as to the construction of the statutes providing for the support of the poor.

The claim of the town of Oswegatchie, the relator, is for moneys expended by it for the "temporary relief" of county paupers.

The county claimed the town should bear the expense, and the board of supervisors declined to audit the bill. The town procured this writ to compel such audit.

Leslie W. Russell, for appellants. *D. O'Brien*, attorney-general, for respondents.

RUGER, Ch. J. The hearing of the application in question was had upon affidavits furnished by the relators, containing a statement of the facts upon which the relief was claimed. These statements were not traversed by the defendants, and by proceeding to a hearing without doing so they admitted their truth. The course pursued was equivalent to a demurrer on the part of defendants, and it can succeed only by showing that upon the facts stated the relator was not in law entitled to the relief demanded.

The affidavits allege that the distinction between town and county poor at the time the transactions in question occurred existed in St. Lawrence county, and that the superintendents of the poor of the town of Oswegatchie had necessarily expended for out-door relief in the temporary support of county paupers a certain sum of money. That an itemized account of such expenditures duly verified was made out by the relators, and presented to the defendants at their annual session in 1884, with a request that the same be audited and allowed. That said board of supervisors "refused to audit or allow said account or any part thereof, on the ground that through its action in 1883 it had adopted the Livingston county act, and that by the alleged adoption of said act, the said corporation could not make a legal charge against the county of St. Lawrence for out-door relief for county paupers." The statement thus made was equivalent to a denial by the defendants of the allegation of the relator, that the distinction between county and town poor existed in said county, and formed an issue of law on that question.

It is not denied but that the action of the board of supervisors in adopting the Livingston county act, if legal, abolished the distinction between town and county poor with reference to temporary relief in St. Lawrence county, and the question is whether such board had power to adopt it.

It is claimed by the respondent that the enactment of chapter 28 of the Laws of 1882, making the town of Oswegatchie a separate and distinct poor district, operated as a repeal of the privilege extended by chapter 245, Laws of 1846, to the supervisors of that county to adopt the Livingston county act. This claim is based upon the theory that there is such a repugnancy between that act and chapter 28 of the Laws of 1882, that they cannot both be executed and administered, and that it must be inferred therefrom that the legislature intended to repeal the privilege conferred upon boards of supervisors by the Laws of 1846, to adopt the provisions of a hostile and repugnant act.

Upon a careful examination of the several acts referred to, and of the provisions of the Revised Statutes relating thereto, we have been unable to see any such repugnance between those acts as is claimed to exist.

By the general law of the State, boards of supervisors have power at will to abolish or revive the distinctions existing in their counties between town and county poor. 2 Rev. Stat. (7th ed.) 930. They also had power to abolish such distinction, and make the support of all the poor of the county a county charge. 3 Rev. Stat. (7th ed.) 1858, § 24.

By chapter 334 of the Laws of 1845, commonly called the Livingston county act, all the temporary relief afforded to paupers in that county was made a charge upon the several towns in which said paupers resided. By chapter 245 of the Laws of 1846, the boards of supervisors of any county in the State were authorized to adopt the provisions of this act, and extend and apply the same to the respective counties. The board of supervisors of St. Lawrence county did in 1883, and presumably before any of the transactions in the litigation occurred, by resolution adopt the provisions of said Livingston county act. The necessary effect of this action, if duly authorized, was to make such temporary relief as might be extended to paupers in the several towns of St. Lawrence county, by the authorities thereof, a town charge.

We are of the opinion, however, if the adoption of the act in question conflicted with or was repugnant to the provisions of chapter 28 of the Laws of 1882, that the board of supervisors had no legal power to accept the privilege accorded by the act of 1846. It cannot be supposed that the legislature provided a law to regulate the relations existing between a county and its several towns with respect to the support of the poor and then left it optional with either of said parties to nullify the legislative will at its pleasure.

The only affirmative provision in the law of 1882 defining the liabilities of the respective towns in the county of St. Lawrence, and of the county for the support of the poor, is contained in the first section of the act reading as follows: "The town of Oswegatchie shall not hereafter be subject to taxation for the support or maintenance of the town poor of or in the other towns of the county of St. Lawrence, nor shall the other towns of the county of St. Lawrence be taxed or required to contribute to the support of the town poor of or in the town of Oswegatchie, but such town of Oswegatchie, for all the purposes of supporting its poor within its limits, and carrying into effect the laws of the State, shall be separate and in distinct districts." It will be observed that no reference is here made to county poor, and the whole force of the enactment is direct to the rights and liabilities of the several towns in respect to town poor. The act then proceeds and among other things provides that five persons named shall constitute a corporation under the name of "The Superintendents of the Poor of the Town of Oswegatchie," for the purpose of administering the poor laws in such town. They are to have the sole and exclusive care and management of the poor in such town, and are required to provide for

and maintain such persons in the manner mentioned in such act, and for that purpose are invested with all of the powers and authority now vested by law in overseers of the poor in towns and in superintendents of the poor of counties not inconsistent with the provisions of this act.

They are required to visit the poor at their residences, and inquire into their circumstances and ability to support themselves, and in their discretion to direct either permanent or temporary relief for such persons. They are also authorized to "so contract for, purchase and provide provisions, fuel, clothing, and other necessities for the support of or distribution among the poor, as in their judgment they may deem necessary." It was further provided "that nothing in this act shall be construed as to require or compel the town of Oswegatchie to support any county pauper, or State pauper. Neither shall it be construed as exempting or relieving the town of Oswegatchie from paying its full share of the expense of supporting the county or State poor." It is not claimed that this act establishes any new rule for the support of town poor in the several towns of St. Lawrence county, and it is evident that it merely gave the form of an especial statute to rights and liabilities already existing and in full force under the general laws of the State. The act expressly disclaimed any intention to interfere thereby with, or affect the several liabilities of the parties in respect to the temporary support of county paupers in such county, and left such liabilities as they before existed, subject to the general powers conferred upon boards of supervisors to regulate the subject. As we have seen such boards had the power to abolish or revive such distinctions, or to make the temporary support of all paupers a county charge, or as by the Livingston county act, altogether a town charge.

By the adoption of the Livingston county act, the board of supervisors have simply added to the responsibilities of the several towns of the county by imposing upon them, respectively, the duty of extending temporary relief to such county paupers as might be within their several jurisdictions needing support.

It is the duty, primarily, of the local authorities to provide for and support all of the poor within their jurisdiction, and the only effect of a law abolishing the distinction between town and county paupers is to deprive the town of the right of reimbursement from the county for such expenses where the Livingston county rule prevails.

While this act changed the existing law as to the temporary support of county paupers in the town of Oswegatchie, it did the same thing in all of the other towns of the county, and if thereby the responsibilities of the town of Oswegatchie were increased in respect to the support of county poor in its jurisdiction, they were thereby relieved from liability for such expenses incurred in the other towns of the county.

It seems to us that the board of supervisors had an undoubted right to make these provisions. The general policy of the law is adverse to repeal by implication, and special rules of interpretation require the provisions of different statutes to be so construed as to harmonize and avoid conflict unless the plain meaning of the language is thereby violated. We can, however, see nothing in the act of 1882 which either expressly or by reasonable implication conflicts with the possession of

the power exercised on the part of the supervisors. There is nothing in the act expressly restricting the powers of the board of supervisors in this respect, and we can see no evidence in the act of an intention on the part of the legislature so to do. The town of Oswegatchie is, except so far as it is exempted from their control by the act of 1882, subject to the provisions of the general statutes of the State in respect to the support of its county poor, and can claim no independence therefrom unless by virtue of some special provision of law. We find no such in the act of 1882.

The orders of the general and special terms should, therefore, be reversed, and the application for a *mandamus* denied, with costs.

All concur.

Orders reversed.

FITCH, *Resp't*, v. McMAHON, *App'l't*.

December 17, 1886.

FRAUD IN PURCHASE OF GOODS.

The inability of the officer to discover goods which had been fraudulently obtained by the defendant justifies the further inference that they had been fraudulently concealed or disposed of by him for the purpose of preventing the true owner from recovering their possession.

Appeal from an order of the general term of the supreme court in second department, affirming an order of the special term denying motion to vacate an order of arrest granted in this action.

The action is in replevin and brought to recover certain goods and chattels alleged to have been fraudulently obtained by the defendant from his creditors mentioned in the complaint, who assigned their right, title and interest to said chattels to the plaintiff who brought the action.

The sheriff of the county of Kings, pursuant to the writ of replevin, seized a portion of the personal property mentioned in the writ, and returned that the remaining portion of said property had been assigned, concealed, removed or disposed of, so that he could not find or take the same.

The affidavits upon which the order of arrest was granted, charging fraud, are not denied. The court granted the order of arrest upon the ground that the defendant had concealed, removed or disposed of some of the goods and chattels, that they could not be found by the sheriff.

The defendant claimed that the evidence presented to the judge was not sufficient to confer jurisdiction to grant the order.

Wm. J. Gaynor, for appellant. Abram Kling, for respondent.

PER CURIAM. The ground of arrest, as stated in the order, is that specified in subdivision 1 of section 550 of the Code of Civil Procedure. The affidavits tended to establish that the goods purchased by the defendant from Benjamin Fitch & Co. were obtained by fraud. The affidavit of Fitch shows that between the 1st of September and the 21st of October, 1885, his firm sold to the defendant goods and merchandise of the value and kind alleged in the first cause of action set out in the complaint, upon his representation that he was doing a good business, which the affiant alleges was untrue, "which appears by

the affidavits annexed," and to which he refers. It appears by reference to their affidavits that on the 13th of November, 1885, twenty-three days after the last sale by Fitch & Co., the defendant made a general assignment to one of his sons, with a fraudulent preference in favor of a son residing in England, of \$4,220, and that his assets, at the time of his assignment, were \$7,212.25, and his liabilities about \$14,308.17. It is a reasonable inference from these facts that the defendant's representations to Fitch & Co., that he was doing a good business, upon the faith of which Fitch & Co. sold the goods, were false.

The fraud in the purchase of the goods justified the further inference that the inability of the sheriff to find the goods and take them on the requisition was in consequence of a fraudulent disposition or concealment of the goods by the defendant in pursuance of his original fraud, with intent that they should not be taken, and to deprive the true owner of the benefit thereof. *Barnett v. Selling*, 70 N. Y. 492.

The affidavits presented a case justifying the judge granting the order in deciding that a cause of arrest under subdivision 1, section 550, was made out. The evidence presented to the judge was not as full and satisfactory as might be desired, but there was enough to confer jurisdiction to grant the order. We assent to the contention of the defendant's attorney that the allegation in the complaint that the defendant "wrongfully took" the chattels for which the action was brought, did not necessarily imply a fraudulent taking, and that the right to arrest depended upon an extrinsic fact to be shown. But we think the requisite extrinsic fact was shown, or at least there was evidence tending to show it, which gave the judge jurisdiction.

The order should be affirmed.

All concur.

Order affirmed.

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD OF NEW JERSEY AND PHILADELPHIA AND READING
RAILROAD v. STATE BOARD OF ASSESSORS.

December 20, 1886.

Under the act constituting a State board of assessors to value the property of railroads and canals the case to be reviewed on *certiorari* by the supreme court should be made by the proofs and exceptions on the appeal before such board and not on a rule to take testimony granted by the supreme court.

In estimating the value of railroad property the cost of the acquisition of such property is not an absolute criterion of such value but is an important element in the circumstances on which a judgment on the subject is to be formed.

The act directs the valuation of the property of these two classes of companies to be made in a distributive mode, that is: 1st. On the main stem; 2d. The other real estate used for railroad purposes; 3d. The tangible personal property; 4th. The franchises. *Held*, that such system of valuations has been declared by the court of errors to be constitutional and unobjectionable.

Further *held*, that the valuations of such property, including the franchises, is legal, and as there is no clear evidence showing the same to be exorbitant, they cannot be modified.

The act in section 6 directs, that whenever in any taxing district there are several branch roads, belonging to or controlled by one company, the State board shall designate one of such lines as the main stem, and that the others shall be valued as property used for railroad purposes, thereby subjecting such respective parts of the property thus separated to a different rate of taxation. *Held*, that although such distribution of property with a view to variant taxation was to be justified by force of the decision in these cases by the court of errors, still such system was invalid inasmuch as it left it to the unguided judgment of the State board to decide which of such branches should be subjected to the higher rate of taxation.

Section 4 of the act directs that in case the valuations of the State board of railroad and canal property shall be relatively higher than the value of the property of other persons in any taxing district, as ascertained by the local assessors, the said board should accept, as a correct standard of value, the valuations of such local assessors. It was shown that the local assessors illegally took but a percentage of what they deemed the true value of the property appraised by them. *Held*, that the State board could not take such reduced valuations as its standard of value.

Section 9 of the act provides that in case of a railroad of this State being under lease to a foreign corporation, any tangible personal property of such foreign company, if used or kept but a part of the time in this State, shall be assessed such proportionate part of its value as the time it is used or kept in this State during the year preceding the first day of January designated in the act bears to the whole year; and it appearing that certain engines and cars that were used on its leased lines in this State by the Philadelphia and Reading Railroad Company in the course of interstate commerce, such company having in use a full local equipment of such leased lines which was duly taxed in this State. *Held*, that the tax upon such property employed in interstate commerce was illegal, being in contravention of that clause of the Constitution of the United States that gives to congress the exclusive regulation of commerce between the several States.

B. Williamson, Joseph D. Bedls, George R. Kaercher and Robert W. De Forest, for plaintiffs. *Attorney-General and Barker Cummere*, for State.

BEASLEY, Ch. J. The two companies above named have been selected for the purposes of this opinion, as the representatives of the numerous prosecutors of the writs of *certiorari* now before the court,

because in these two cases most of the important questions are presented for decision, which are common to this entire class of litigants. It is to be understood therefore, that whatever is adjudged touching such general topics must be taken as a determination of the subject in each respective case.

The prosecutors of these writs are before the courts seeking a review of certain assessments of taxes made upon their property by the State board of assessors, under the statute entitled "An act for the taxation of railroad and canal property," approved 10th April, 1884. Pamph. L. 1884, p. 142.

It is the sixteenth section of this enactment that imposes on this court its present duty, by giving to the company assessed on the one side, and to the attorney-general on the other, the right to a *certiorari*, and by declaring that upon such writ relief may be had, "as well in cases where it is claimed that the amount of tax is excessive or insufficient, as in cases where it is claimed that the principle upon which the assessment is made is erroneous." By force of this provision the court is now appealed to in behalf of those companies to declare that certain parts of their assessments are erroneous, either because they are founded on exorbitant valuations of their property, which have been induced by error of judgment, or by the adoption of false principles of appraisal, or because the taxes themselves have been put upon them in disregard of the Constitution of this State, or of that of the United States.

Before, however, entering upon the consideration of these topics it appears to us proper to premise that the mode adopted in bringing these procedures before the court must not be taken as an approved precedent for future action. In the present instances the course taken has been this, the State board made its assessments, and the companies, feeling themselves aggrieved, appealed to the board for a review, as they were entitled to do by force of a provision to that effect in the statute; from the adjudication thus resulting the proceedings were removed to this court by these *certiorari*, and thereupon, in pursuance of authority given by a rule of court, testimony was taken, and it is upon that testimony that the cases have been heard and are now to be decided by us. From this statement it is evident that, as the matter stands, we are trying these matters *de novo*, and are not altogether reviewing the action of the State board. We do not think that the statute justifies such a proceeding; it does not appear to have been the legislative design to throw upon us such a burden as this, or to convert the court into a board of assessors to ascertain the values of this vast mass of multifarious property, founding its judgment on evidence taken under its authority, and for the first time introduced into the case. Our interpretation of this part of the statute is that it requires the substantial case to be laid *in extenso* before the State board, and exceptions to be there taken, and that it is the case so made, so far as it has been excepted to, that is removable to this court for review. In our opinion no general rule to take new evidence should be allowed by this court, either on the allowance of the *certiorari* or upon its return. This is evinced by the general adjustments of the section giving this

remedy, and particularly by the fact that a *certiorari* is not permitted, "unless the applicant has applied to the board to review the assessment." The result in the present instance should serve as a warning to the court against any endeavor to try these cases anew on these appellate proceedings, as we have in our hands several volumes of arithmetical details, which, to understand in their various applications, would require months of labor.

With these preliminary remarks, we will proceed to dispose of the principal matters to which our attention has been called in the briefs of the several counsel.

Objection is made, in various respects, to the valuations of property which have been returned by the State board.

The first exception in this vein is, that instead of ascertaining the true value of the lands of these companies, the board, after ascertaining such value, multiplied the sum thus settled by the numbers two or three, and adopted the product as the market or true value of the property. It is insisted that by this course these officers have assessed these lands at two or three times their real value.

But we have failed to see either the illegality or injustice of this part of the proceeding. The problem is, not what land for agricultural or building purposes is worth, but what a narrow strip of land, with valuable easements annexed to it, adapted to railroad uses, will bring in the market. That such strip of land, to be applied in such a manner, cannot be bought at the price that the adjacent lands sell for by the acre, is at once obvious. When a railroad is located so as to pass through a building plot, or a farm, the damage done to the part of the land not appropriated is generally many times the value of the land so taken, estimating its value by the acre; and, consequently, the owner of the required land will not sell it, except at a price that will compensate him as well for the land he sells as for the damage sustained by the residue of his property. There is no reason to suppose that the land thus acquired, if sold in the market for railroad purposes, will not bring a sum equal to the cost of its acquisition. The consequence is that even if we assume these valuations to have been made in the manner alleged by the plaintiffs, and which fact is disputed by the counsel for the State, still it is plain that the State board could not have reasonably estimated the lands in question by the measure of the value of the adjacent lands; and as there is nothing before us from which we can perceive that the result which has been attained by the methods used by the board is manifestly wrong or exorbitant, the appraisals in question cannot be annulled or reformed.

But it is again objected that the State board in estimating the value of these roads and structures took, as the absolute standard of value, either the original cost of acquisition and construction, less wear and tear, or the cost of reproduction.

We think this premise is not to be conceded, for there is no evidence from which it can reasonably be inferred that so fallacious a measure of value was adopted. It is common knowledge that what a thing has cost is no infallible criterion of its market value; it is, therefore, to the highest degree improbable that the officers composing this board, who

have manifested so conspicuously both capacity and knowledge with reference to the multiform and intricate subjects embraced in these suits, could have fallen into an error so utterly puerile. That the board ascertained the cost of acquisition and construction is beyond doubt; it could scarcely perform its functions intelligently without doing so, for such cost, though not an incontestible evidence of changeable value, is, nevertheless, almost always an important particular in the mass of circumstances laying the basis of a rational judgment touching the value of any thing as an article of sale. That the State board used cost in the way thus indicated is clear, but it is not shown that it was used as an absolute measure. The inference drawn by counsel, that because the cost ascertained and proved by the engineers who were the witnesses called by the State, very often agree in amount quite closely with the valuations found by the board, therefore the standard of cost was adopted by the board, is, we think, not warranted. Such approximations between these respective valuations were to be expected, for no reason is perceived why the property of a successful railroad is not worth about the sum that it would cost to replace it, allowance being made for its depreciation from use.

Again, it is urged that it is not practicable to make a constitutional valuation of property for the purpose of taxation by the distributive method defined in this statute.

The statutable direction referred to is that the State board shall value separately (1) the main-stem, consisting of a strip one hundred feet in width, with its superincumbent structures; (2) the other real estate used for railroad purposes; (3) the tangible personal property; (4) the franchises.

But we think that this general objection we are not called upon to consider, inasmuch, as, in our opinion, the court of errors has passed upon the question and declared this contention to be untenable. This system of disjunctive valuations lies at the basis of this act; it could not be executed on any other plan; consequently when the act was vindicated on constitutional grounds, the system thus essential to it was likewise vindicated.

But it is further said, that, admitting the constitutionality of the system just mentioned, the methods of valuation applied to the franchises of these companies are illegal and their results unjust and oppressive.

The State board has in its return specifically stated the mode it pursued in valuing this species of property. This is the language of the return:

"And the said board do further certify and return that, for the purpose of ascertaining the value of the franchise of the several corporations whose franchises were taxable under the provisions of the act above mentioned, they adopted the following rules and principles as equitable and just for the purpose, to-wit: that the amount of the capital stock and of the funded and other debts of each corporation or person taxable under the act aforesaid should be ascertained, and that the value thereof should be ascertained; and that, in all cases where the aggregate amount of the value of the capital stock and of the securities representing said debts, exceeded the value of the entire amount of the

tangible property of such corporation, the value of the franchise should be ascertained by deducting from the aggregate amount of the value of such capital stock and of the securities representing said debts, the aggregate amount of the value of said tangible property, and that sixty per centum of the amount remaining in each case should be taken and held to be the value of the franchise of such corporation; and that, in all cases where the amount of the value of the capital stock and of the securities representing said debts was less than the value of the entire amount of the tangible property of such corporation, the gross earnings of such corporation should be ascertained, and that twenty per centum of such gross earnings — being an amount which would make the tax upon the franchise of such corporation a sum equal to one-tenth of one per centum upon such gross earnings — should be taken and held to be the value of the franchise of such corporation."

At the outset of our inquiry into this article of objection it is well to say that we do not feel that the duty is incumbent on us to express any opinion with respect to the formula by which the board arrived at the sum which it declared to be the true value of these franchises. Our only concern is to know whether the properties, including the franchises, have been put at their true value. That there is a salable value in railroads that carry on a profitable business, that is far beyond the naked value of the real and tangible property used for railroad purposes, we think is manifest, and it does no harm to any one to call such additional value, or some part of it, by the name of franchise. It seems to us unquestionable that the marketable value of a successful railroad is generally greatly in excess of the value of its road-bed, equipments and other tangible possessions. The location of the road, the places or territories it connects, its capabilities for future expansion, are all elements going to make up its productiveness as a vendible thing in the market. It would be unreasonable to affirm that a road connecting two hamlets would, under usual conditions, bring as much if sold, as a road connecting two large cities, the cost or abstract value of the two being equal. This additional value of the road imparted to it by reason of its location, etc., will be called, for the sake of brevity, its adventitious value.

We understand, then, that what this board has done is this, viz.: that it first ascertained the value of the road-bed, structures and tangible property, treating them as adapted to railroad uses, but without reference to the location of the particular road or its capabilities, and in those cases in which it was found that the market value of the stock of the company indicated an excess of value beyond this appraised value of its property, after the deduction of its debts, the board proceeded to find this factor which obviously enhanced the value of the road as an entirety, and which has not been enhanced in the estimations already made. This unvalued factor was ascertained by adding to the market value of the stock the debts of the company, and deducting from the sum so found the value of the corporate property as appraised by the board. It is plain that the subtrahend obtained by this process represents what had been above styled the adventitious value of the entire road, its chartered privileges included. It was sixty per cent of the

sum thus found that the board, calling it the value of the franchise, added to the sum of the valuations made by it, in manner already mentioned of the real and tangible property of the company; and it was thus by the addition of the abstract value and of the adventitious value of the road that the entire value was found. It is quite impossible for the court to say that the result thus reached is in anywise erroneous or excessive. It is certainly not excessive if the market value of the stock of the company infallibly proved the value of its possessions after the deduction of its debts, for the board has discounted largely from its estimate obtained on that basis. We can perceive nothing in the facts before us that would justify us in interfering with valuations of this class. We do not consider that we have the right to alter or annul any of the proceedings of this body of officers except for palpable error, for it is not to be overlooked that the statute in question expressly declares that these assessors "shall be entitled to use their personal knowledge and judgment as to the value of the property," a capacity with which this court is not endued by the legislature.

Regarding the second method devised by the board for the ascertainment of the value of these corporate privileges, and which was applied to the class of roads that may be denominated unproductive roads, we have concluded that such method was plainly fallacious, and must accordingly be disapproved of by us. It will be perceived from the report already quoted, that in all cases where the amount of the value of the capital stock and of the securities representing the debts was less than the entire amount of the estimated value of the tangible property of the corporation, the board ascertained the amount of the gross earnings of the company, and took twenty per cent of such earnings as the value of the franchise. But we have been utterly unable to find, under the conditions stated, any value to such franchises, other than the expense of their acquisition under the general railroad law of the State. The property of these companies was estimated on the basis of its being railroad property; that is, that it was adapted to such uses, and would be so applied. In these instances, unlike the class just disposed of, the market value of the stock does not indicate the presence of any other factor adding a value in the entire road in excess of the estimation thus made. Under these circumstances is it not certain that a purchaser of the road would not give for it any thing more than the value of the real and personal property, and the cost of acquiring the franchise in the statutory mode, for in these cases the road has no adventitious value, at least none such is apparent in the price of the stock.

Our conclusion consequently on this branch of the case is, that the valuations of the franchises made in this latter method, and on the basis of gross earnings, must be discarded, and in lieu thereof a merely nominal sum must be substituted.

The solution of the next question has been a work of some difficulty. In the sixth section of the act we are considering will be found a provision in the following words, viz.: "That whenever in any taxing district there shall be several branch lines of railroad belonging to or controlled by one company or operated under one management, the assessors shall designate one of such lines as the main-stem, and the

value of the others shall be included in the separate valuation provided for in the second subdivision of section 3 of this bill."

It will be found, upon consulting section 3 of the act thus referred to, that the property to be assessed by its force is required to be assessed at a higher rate than that put upon the main-stem, so that in point of fact, in the execution of this law, wherever more than two branch roads have been found in any taxing district, one has been denominated main-stem by the board and has consequently been assessed at a lower rate than the rest of such branches.

From this presentation of this statutory provision, as applied to the facts, it will be observed that here are railroad branches identical in all essential characteristics and apply to an identical use, separated for the purpose of taxation and assessed under a multifarious rule, the result being that such properties, by an arbitrary legislative fiat, are unequally burdened. It appears from the proof before us that in several instances where there were three branch roads in one taxing district, being under one management, though owned by different companies, one of them has been denominated as a main-stem by the State board in compliance with the act, and has thus been assessed at a higher rate than the other two. This selection of a main-stem is made at the will of this official body, uncontrolled by any legislative standard and unguided by any peculiarity in the individuals of the class to be selected from, for they are in all respects alike.

If the problem thus presented were to be solved by reasoning *a priori*, I should have no hesitation in declaring such an assessment to be illegal. But such is not the present posture of this question. When these cases in the general phases were before this court, the clause of the Constitution of the State that prescribes "that property shall be assessed under general laws and by uniform rules," was expounded to require the inclusion in the assemblage of things to be taxed of every thing possessed of a like nature and of like characteristics, and that the things so brought into association should be subjected to an equitable burden. By force of the requirement that the assessment should be made under "general laws." It was deemed that when a tax was sought to be imposed upon things possessed of a certain nature and characteristics, all the things corresponding in these particulars must be embraced in the act; that a part of such things could not be taxed and a part exempted. And it was further thought that the second requirement that these assessments were to be made by "uniform rules," guaranteed that all the things thus classified would be taxed at the same rate; that the things classed would not be subdivided into groups, as it was conceived was done under the present law, and such groups unequally burdened. The view entertained was that before the introduction of this constitutional regulation, it was not entirely certain whether things might not be grouped instead of being classified, for the purpose of taxing them, and it was equally uncertain whether having been properly classified, the class so formed could not be broken into parts to the end that they might be taxed at different rates. These regulations thus construed were not only consistent, but the latter was the essential complement of the former; it was thought to be far

from difficult to give to either of them a meaning that would dispense with the necessity of the existence of the other, but by excepting both in the sense indicated they harmonized in effecting the highly desirable result that all similar property should be similarly taxed. Testing the act now under advisement by this theory, it was pronounced by this court to be in contravention of the Constitution, inasmuch as it grouped the property, real and personal, which was owned or used in their business by railroad and canal companies, and taxed it at the same time that all similar property owned by other persons was left untaxed. This view was not concurred in by the supreme court on review; the law separating the possessions of these two descriptions of corporations from all other property and separately and exclusively taxing them, was declared to be a constitutional exercise of legislative authority; and the point of inquiry consequently is to determine the principle upon which that decision rests in order to apply it to the novel phases of this case that we are called upon to decide.

It will be observed that the first question is whether the legislature could cause these branch railroads to be separated into groups, and direct variant rates of tax to be placed on such groups. As such roads, considered intrinsically and with respect to their uses, and not to be discriminated, such a distribution, it is plain, can be justified only on the assumption that it is lawful for the legislature to select for taxation what property it pleases out of a mass of property identical both as to essence and application. The inquiry, therefore, is, has the court of errors laid down as the basis of its decision a principle that recognizes the existence of such an untrammelled power?

After a careful examination of the subject I have come to the conclusion that this question must be answered in the affirmative. It seems to me indubitable that it has been established in this State that property of any kind can be grouped for taxation arbitrarily by the legislature.

As has already appeared, this court had decided that the legislature, in the course of taxing property, could not take part of a class and tax exclusively such part, and that the properties of railroad and canal companies standing by themselves were a group and not a class, but the superior court held the contrary of this, declaring that such an assemblage of properties constituted a true class on which distinct taxes could be lawfully imposed. The ground of this conclusion was not that the things thus selected were in their essential characteristics alike, and they were unlike other things belonging to other persons. Inasmuch as the land in the use of a railroad company did not, in any important respect, differ from other lands, inasmuch as a boat employed by a canal company did not in any material feature, vary from other boats, it was obvious that such things could not be set apart from other land and other boats by reason of their intrinsic dissimilitude. It was impossible for the court to declare that the real and tangible personal property of a railroad was like the real and tangible personal property of a canal, and was unlike all other property, and on account of such likeness *inter se*, and such dissimilarity to other objects could be placed in a group by themselves and sepa-

ately taxed. It was self-evident that railroad property was unlike canal property, and no attempt was, therefore, made to assimilate them with a view to a classification, but they were applied to the same common use, and it was by this link they were accordingly bound together for the purpose of taxation. The fact that these properties were put to the same use was the basis laid by the court of errors of their classification. In his opinion the learned chancellor, upon this subject, expresses his views in these words, viz.: "In the act under consideration the legislature has separated for taxation not all the property of railroad and canal companies, but only so much of it as is used for the particular purposes of these corporations, and has imposed upon the property so separated a tax for State purposes and tax for county and municipal purposes. The property of such companies not used for special purposes is left to be taxed in the same manner as other like property. The property separated, so far from being taken by mere arbitrary selection, is all of it so circumstanced by the peculiar use to which it is put, as to make it, on that account, a class by itself." And Mr. Justice Dixon, with characteristic clearness, thus formulates the same principle of classification. He says: "The property to be assessed is all property used for railroad purposes, and all property used for canal purposes. This is, in my judgment, a legitimate classification. It is true that things used for railroad and canal purposes are not in essence different from such things when put to other uses. But the classification of property need not rest on the essence of things. The *use* made of them forms as just and as common a basis of classification as does their essence."

From these extracts the *ratio decidendi* is clearly apparent, and from the foundation thus laid it seems inevitably to follow that when the statute was vindicated the power of the legislature to take at will part of a class of property, the whole class being devoted to the same use, and to tax such part exclusively was likewise originated. For when it was declared that these two kinds of unlike properties, on account of their common use, would constitute a class to be separately taxed, it cannot be assumed that the fact was overlooked that such property was only a part of that devoted to such use. The properties of all railroads and canals are commercial instrumentalities, the common use to which they are put being the transportation of persons and merchandise from place to place. But such properties are merely a part of the property devoted to such use. The properties of these two classes of corporations do not differ in the least degree in this respect from the properties of all other common carriers. No one can say that railroad property can be discriminated by its use from that of an express company or a ferry company, or from that of any other person, natural or artificial, whose business it is to carry for hire articles of traffic from one place to another. A canal, with respect to its employment as property, is undistinguishable from a turnpike, they each furnish a way for the transit of persons and property on the payment of tolls, the only material difference between such ways being that the one is constituted of water and the other of earth. The property of a city horse car company is employed in carrying persons from place to place as a common

carrier, and it seems quite impossible to make a discrimination, in respect to the use of its property, between it and a railroad company, and it seems equally impossible to affirm that it is not more like, in all matters of use or conformation, to a railroad company than a canal company is. In view then of the fact that this act that thus groups for taxation the properties of railroads and canals that have no resemblance to each other except from the circumstance that they are similarly used as instruments of commercial transportation, and that such act does not embrace the properties of turnpike, city horse car railroads or those of other common carriers which are all alike used as instruments of commercial transportation, has been approved by the court of errors, there appears to be no other conclusion to be drawn than that the right of the legislature to set aside any groups of property for special taxation has received the sanction of that tribunal.

So we are necessarily led to the same conclusion when we turn our attention to another feature of this statute, and which has, likewise, received the approval of the court of last resort. I refer to that part of the act which directs that the main-stem of each railroad, and the water way of each canal, of the width of one hundred feet, shall be separated from all the other property of such companies used in their business, and that the property contained in such separated area, together with the included structures, shall be taxed at a lesser rate than the land thus placed outside of such area. It will be observed, therefore, that if one of these companies happens to own more property used in its business, which stands outside of such main-stem, than is possessed by another company, the former is burdened by a higher tax than the latter is, although the properties thus differentiated by the amounts of their respective taxes are identical both in kind and with respect to use, and although the quantity of land owned by such respective companies is the same and may be precisely of the same value. Let us suppose, for the sake of perspicuity, one company to own in a certain taxing district one hundred acres of land, the whole of such tract, with the structures upon it, being within the area denominated main-stem, and being of the value say of \$100,000; and another company to own a similar tract with structures similar in all respects and of similar value, one-half of which is outside of such main-stem, the result will be that this extraneous half will be taxed at a heavier rate than any part of those of the first-mentioned company will be taxed at, the things are the same, the value is the same, and the use is the same, but the taxes are unequal. The direction of the act was to tear asunder objects which are inseparable both from their nature and use, and that a dissimilar tax should be put upon such disjointed fragments. We have not been told upon what basis such a grouping was to be vested; all that we know is that the court of last resort has announced that such a scheme of taxation is constitutional, and that this was a taxing "under general laws" and by a uniform rule. I can entertain no doubt that the legislative act done was an arbitrary grouping of this property for the purpose of taxation, and that as such act has been approved of by the highest court in the State, the legislative power, to the extent herein exhibited, has been established.

Consequently accrediting to the legislative department of the government the prerogative just stated, no reason is perceived why the law-makers were not competent to separate these branch roads, already indicated, into groups with a view to taxing them at different rates. Such an act is plainly mere arbitrary selection; but not more so than selecting the properties of railroads and canals on the basis of their use out of all other property employed in such use. Had the legislature itself declared that where there were several branch roads in one taxing district, a particular one of such roads should be treated as the main-stem and taxed accordingly, and that the others should be taken as branches and as such taxed at a greater rate, I could not have judicially pronounced, whatever my private views may be, such an exertion of power illegitimate because the existence of such a power has been recognized as I deem is clear by the court of last resort. But the present problem does not stand before us thus simply conditioned; the legislature has not itself declared which of these branches is to be selected as main-stem, but has delegated the power to make such selection to the State board.

In other words, this body of officers is authorized to say which branch out of three or more shall be chosen as main-stem, and shall thereby be exempted from a part of the tax to which the rest will be liable. The legislature has not provided any standard by which the selection in question is to be made; every thing in this matter being left to the unguided discretion of the designated officials. It has been held in this court on several occasions that in the exercising of the taxing power, both the amount of the tax and the subjects to be subjected to it must be fixed by the legislature itself, or some standard must be provided by it whereby such matters may be plainly ascertained. Neither of such things can be left at large to be decided by the judgment of any set of officers. Such we understand to have been the view heretofore taken of this subject. But as the matter now stands we do not feel that it is entirely free from difficulty. It has been decided in an authoritative form, as has already been shown, that methods of taxation are constitutional, which, it must be owned, indicate the possession by the legislature of a power over the subject the bounds of which cannot at present be defined with precision. It is certainly to be regretted that when the court of last resort dealt with this statute it did not proceed to declare what power, if any, resides in the constitutional clause then in discussion before it. The subject was a most momentous one, especially at the present time, for it embraces the inquiry whether or not property in this State in the hands of private owners has any protection whatever by virtue of the fundamental law against aggressive taxation. But inasmuch as the judgment of the court of errors did not in express terms declare that the particular provision relative to the assessments of these branch roads was, in all respects, legal, we deem ourselves at liberty to decide the problem according to our own convictions with respect to the law of the subject. We, therefore, say that in our opinion this part of the act cannot be executed in the particular manner provided, and that such section being void these branch roads must be taxed according to the general mode defined in this law — that

is, each branch road must be assessed in part as main-stem and in part as property used for railroad purposes.

In the next place it is objected that the real estate of these companies used for railroad purposes, other than main-stem, has not been valued by the State board in accordance with the statutory direction.

We find the provision on this subject expressed in the terms following, viz.:

§ 4. That if the assessed value of the real estate of persons other than railroad or canal corporations in any taxing district wherein such railroad or canal property may be found, as ascertained by the assessors of such taxing district, is relatively lower than that which has been *laid upon the land of the several companies in said taxing district*, the said board shall be required to accept said valuation of the assessors for such taxing district *as a correct standard of value*, and to thereby correct or reduce the separate valuation provided for in the second subdivision of section 3 of this bill.

The complaint is, that in executing this provision the State board refused to take the standard of valuation thus provided.

The facts forming the basis of this position are these: The board reported, that "the main-stem and personal property of all railroads have been valued in accordance with the provision of the law at their full or true value, while the universal custom of local assessors is to value for taxation at a percentage of true value, ranging all the way from forty to eighty per cent, averaging, it is thought, about sixty-five per cent of true value."

It appears, therefore, that the board has taken true value as the standard, and has refused to discount any thing from such estimation on account of the custom of the local assessors in that respect. It is now insisted that the standard erected by the legislature for the use of the State board was true value *minus* this percentage of deduction.

But if this be the proper interpretation of the section the plain result is, that the whole provision is absolutely void. It was not competent for the legislature to put in force such a procedure. The Constitution says, in express terms, that property shall be assessed for taxation at "its true value," and if the legislature has authorized it to be assessed otherwise, such direction is nugatory, and the act must necessarily be enforced without reference to it.

But it is not clear that this was the legislative design, for looking at the entire section in question, it is conceived it may be understood as providing for cases in which the judgments of the State board and the local assessors are in disagreement touching the true value of the property in the several localities, and when the true value found by such local officers is less than the true value as found by the board the estimate of the former shall be the standard. When, therefore, it appears that the local officers find a given sum as value for the purposes of taxation, and at the same time state that such sum does not represent true value by a certain percentage that has been discounted, the valuation of the assessors which the board is required to apply as the "correct standard of value" is the sum that such local officers have found to be the true value, that is, the value put by them upon

the property without the deduction of any percentage. The true value which the assessors in point of fact find is one thing, and the value which they adopt is quite another, and it is the former that is required to be received as a measure by the board; but as there is nothing in the proofs from which we can draw the conclusion that such measure does not in substance coincide with the valuations which have been made of this property, this objection cannot prevail.

The last exception which will be disposed of at this time relates to the mode provided in section 9 of the act for the taxation of railroad property put in use in this State by foreign corporations.

The section referred to is in these words, viz.: "That if the property of any railroad or canal company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed, and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this State other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect of such property in like manner as any domestic railroad or canal company; any tangible personal property of such foreign company, if used or kept but a part of the time in this State, shall be assessed such proportionate part of its value as the time it is used or kept in this State during the year preceding the first day of January mentioned in section 21 hereof bears to the whole year."

Certain property of the Philadelphia and Reading Railroad Company, consisting of engines, cars, etc., which it has not derived as lessee, or otherwise, from any company whose property is operated by it in this State, has been taxed by the State board, under the provisions of the section thus recited. The Philadelphia and Reading Company is taxed in this manner because it is a foreign corporation operating a railroad in this State as a lessee. This corporation was incorporated under the laws of Pennsylvania, and has its principal office and place of business in the city of Philadelphia. The property taxed is held by it either as general or special owner. It is taxed on the basis of being used part of the time on the road leased by the company in this State, and the tax is graduated by the length, in point of time, of such use. It appears from the proofs that such use consists almost entirely in the transportation of passengers and merchandise across the territory of this State in the course of interstate commerce. The road is made up in part of leased roads in other States and in this State, and the equipments taxed are devoted to this business over the entire line. The company carries passengers and goods occasionally from place to place in this State by means of these trains and as an incident merely to its business of assisting in the commerce between the States.

The question, therefore, arises, what jurisdiction has this State, for the purposes of taxation, over this property?

It is obvious that these things have no *situs* in this State, they are merely here *in transitu*. The circumstance that they pass over a road in this State leased by the owner of them cannot so annex them to the road as to make them taxable as a part of it. The owner of the prop-

erty has a foreign domicile, which is the permanent *situs* of the property, it being brought into this jurisdiction solely in consequence of the general business followed by the corporation, and which has been already characterized.

It will also be noted that this is not a tax on the business of this company falling incidentally and in the distance on the property in question, but it is imposed, with absolute directness, upon these vehicles of interstate commerce. This is so plainly the case that the tax increases in proportion to the increase in the use of such vehicles in this State, and diminishes as such are diminished. The case is, therefore, entirely aside of that class of decisions cited in the briefs of counsel, which hold that, under certain conditions, a tax may be laid on the business of persons, although such tax may ultimately rest, in some degree, on the business of interstate commerce.

The leading case in this State, on the subject to be disposed of, is that of *The Erie Railway Company v. The State*, 2 Vr. 53, in which it was declared in the court of last resort that a tax could not be laid on the business of foreign corporations, such business consisting in the transportation of persons and things from State to State, for the reason that it was an infringement of the clause of the Constitution of the United States, which gave to congress the regulation of commerce between the several States. In that instance the tax was in form on the business of the company, but the court, looking beyond the form, considered that it was, in substance, on the persons and things carried, and was, therefore, illegitimate. In the case now before us the tax, as has been shown, is directly on the instruments essential to the commercial intercourse between the States, so that the present cases appear to be plainly subject to the principle established in the decision referred to.

This subject has also received much consideration, particularly of late, in the supreme and circuit courts of the United States. A conspicuous example in this train of decision is that of *Hays v. Pacific Mail Steamship Company*, 17 How. 596. That company was a corporation of New York, being the owner of vessels registered there which plied between New York city and San Francisco, and different ports of Oregon. Its principal office was in New York, but it had agencies established in Panama and in San Francisco, having also a naval dock and shipyard at Benicia, in California, for the purpose of furnishing and repairing its steamers, which usually remained only long enough at San Francisco to land and receive passengers and cargo, and at Benicia only for repairs and supplies. Taxes had been assessed upon these steamers in the State of California, and such was declared by the supreme court of the United States to be illegal, the grounds of judgment being assigned in the opinion in these words, viz.: "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they are not property abiding within its limits so as to become incorporated with the other personal property of the State; they were there but temporarily engaged in lawful trade and commerce with their *situs* at the home port where the vessels belonged, and where their owners were liable to be taxed for the capital invested, and where the taxes had been paid."

The same doctrine was embodied in the decision of the similar case of *The Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 197. That company was a corporation of this State, and run its boats from this State to a dock in the city of Philadelphia, of which dock it was the lessee. The boats were registered in this State. Taxes were laid on the company in Pennsylvania on the appraised value of its capital stock, which was adjudged to be illegal by the court of common pleas of the city of Philadelphia, for the reason that there was no other business carried on in the State of Pennsylvania, except the landing and receiving of passengers and freight, and which was a part of the commerce of the county, and which was, consequently, protected from the imposition of burdens by the State legislature. This judgment was affirmed on the same grounds, by the supreme court of the United States.

We think the aptness of these decisions as authorities in our present inquiry is clear. These vessels were exempted from taxation by the States whose territories they merely touched in passing, as they were the means of commercial inter-communication between the States. Nor do we deem that it would in any wise have affected the judgments in these cases if it had appeared that these vessels in passing had carried passengers or goods from one port to another in the State imposing the tax, as the vessels were obviously not within the jurisdiction of the State for the purpose of prosecuting a local trade, such local transportation being but an incident to the general business in which they were employed.

The case which is, perhaps, more nearly in point for present uses, at least with regard to its circumstances, is that of *The Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep'r, No. 5. The State of Tennessee had assessed upon that company a privilege tax of \$75 per annum, for running or using sleeping cars in the transportation of interstate passengers. Mr. Justice MATTHEWS, sitting in the United States circuit court, pronounced such imposition to be unconstitutional on the ground that the property taxed had no abiding place in the State, and being engaged in commerce between the States, was within the jurisdiction of Tennessee only *in transitu*.

The judgments rendered by this court in the cases of *State v. Engle*, 5 Vr. 425; and *State v. Carrigan*, 10 id. 35, are authorities of similar import.

It will be observed that the only distinction which can be alleged to exist between the substantial facts of the cases cited, and the present one, is the circumstance that the Reading Company is the lessee of these roads over which it passes its trains in crossing this State. But as we have already said we cannot perceive that such peculiarity can at all affect the rule by which the case is to be governed, inasmuch as the property in question is not brought into the State as the local equipment of these roads, but comes here necessarily in the course of the general business of the company, that business being the transportation of persons and property from State to State. If these engines and cars were in substance and effect the local appliances of these leased roads, they would then have a *situs* in this State, and could be taxed

accordingly; but such is plainly not the case, for the local equipments of their lines belong to the lessors, and though passing to the Reading Company under the lease, have been properly taxed by virtue of the statute to such lessors. The proofs before us clearly demonstrate that in no proper sense can the property in question be regarded as the equipments of the roads used by this company in this State. We look upon that property, and which is owned by a non-resident, as being here in this State solely because it is an instrumentality of interstate commerce, and we think, under such conditions, that it cannot be, to any degree, directly taxed by this State. Railroads have already become the great highways of the nation, and we think it of the first importance that the traffic connected with them should be as free as the air, so far as local exactions are concerned. This item of the tax must be deducted from the assessment.

But from the foregoing was it not to be understood that it is decided that a foreign railroad company, being possessed of no local equipment for a leased road lying in this territory, or having but an insufficient equipment, can by means of its through trains do a local business therein, and then claim entire exemption from taxation in this jurisdiction, on the ground that such trains were employed in the interstate commerce? We think that in such cases the property is devoted to two uses, that is in local as well as interstate commerce, and that, at least to the extent that it is employed in the former business, it is taxable by the State. Whenever, therefore, a foreign railroad company is using a leased line in this State, and has no adequate local equipment for such line, and does a substantial local business here, by many of its trains *in transitu* the property so used should be at least measurably taxed as being possessed of a *situs* in this State, and not to that extent being under the protection of the Federal Constitution. But when, as in the case of the Philadelphia and Reading Railroad Company, there is a reasonable local equipment used for local business, and the through trains of the company, in the prosecution evidently of its business of commerce between the States, and as an incident to such business, takes up passengers or goods and transports them from one place to another place in the State, we think the property so employed is not subjected to the taxing power of this State.

BROWN v. STATE.

December 24, 1886.

Whether an act is illegal and what constitutes a disorderly house is a question of law to be settled by the court, but it must be left to the jury to find as a question of fact whether satisfactory evidence is produced to show that the defendant is guilty of habitually permitting such acts upon his premises as are declared to be illegal.

Playing cards for beer to be purchased and paid for by the loser is gaming.

Argued at June term, 1886, before the Chief Justice and Justices DEPUÉ, VAN SYCKEL and KNAPP.

F. C. Marsh and J. R. English, for plaintiff. W. R. Wilson, for defendant.

VAN SYOKEL, J. The plaintiff in error, who is a licensed saloon-keeper in the city of Elizabeth, was convicted for keeping a disorderly house. The evidence upon which the conviction was based was that on Sunday, the 4th day of October, 1885, one person purchased a pint of ale at Brown's saloon, and another person went five or six times on the same day to the saloon and purchased each time a pint of beer. There was also evidence that on the same day persons were sitting around the tables in the saloon engaged in playing cards for beer and cigars.

The defendant below, by his counsel, requested the court to charge the jury that whether or not the repetition of illegal sales of spirituous or malt liquors at a drinking saloon on a single Sunday are of such character and frequency as to constitute habitual selling and thereby render the house disorderly, is a question for the jury to determine under the circumstances of each particular case.

The court was also requested to charge that evidence that cards were played by the frequenters of a drinking saloon, at which the stake was the price of the liquors drank or cigars smoked by the players, which price was to be paid by the loser to the seller of the liquors or cigars, did not, as a matter of law, constitute gaming, but it was a question for the jury whether it was gaming within the meaning of the indictment.

The court refused to charge according to either of said requests, and on the contrary charged :

First. That the mere repetition of illegal sales of spirituous or malt liquors at a drinking saloon on a single Sunday does constitute such saloon a disorderly house; and

Second. That card playing in the saloon for drinks or cigars constituted gaming within the meaning of the indictment.

Errors are assigned upon the refusal to charge as requested, and also upon the charge as given.

To constitute a disorderly house an habitual violation of the law must be permitted by its occupant.

Whether an act is illegal and what constitutes a disorderly house is a question of law to be settled by the court, but it must be left to the jury to settle as a question of fact, whether satisfactory evidence is produced to show that the defendant is guilty of habitually permitting infractions of the law upon his premises.

It is admitted that the sale of beer on Sunday is an infraction of the law, but *The State v. Hall*, 3 Vr. 158, is relied upon to maintain the proposition that there is no illegal element in allowing gaming at cards upon an agreement that the loser shall purchase of the proprietor the beer which the winner and loser shall drink.

The case cited holds that the practice of the loser of a game of ten pins paying for the use of the alley is not gaming. The case is not parallel, the loser of the game of ten pins did not agree to purchase and pay for drinks. It is just as clear gaming to play cards for a glass of beer as it is to play for a barrel or ten barrels of beer. The difference is only in the value of the stake played for.

Playing cards for beer constitutes gaming within the meaning of the indictment.

It is impossible to establish any inflexible standard by which the

evidence which should satisfy a jury in such cases shall be measured, or to specify how many repetitions of the illegal sale shall be necessary to create the prohibited nuisance. Each case must be adjudged according to its own circumstances:

If a man who had no bar fitted up and no provision made for supplying all who apply and no accommodations inviting the public, should sell liquor on a single Sunday, there would be an absence of circumstances to lead a jury to infer that he was engaged in the business of carrying on an illegal traffic.

On the contrary, if his premises are specially adapted to and furnished for the pursuit of the unlawful business, and persons who apply were generally admitted to enter his premises on a Sunday, then the further proof that there are repetitions of the sale of spirituous or malt liquors on that single Sunday would constitute a state of facts from which a jury would be justified in finding that the keeper of such a house was guilty of the common practice of violating the law. All the circumstances surrounding the case may be considered, and in order to establish the vicious character of the house, it is competent to show that the defendant, within a reasonable time next before the time laid in the indictment, as well as within the time laid in the indictment, permitted the alleged unlawful acts to be committed in his house.

The court below erred in refusing to leave it to the jury, as a question of fact, to find whether the defendant was guilty of habitually committing or allowing to be committed on his premises the illegal acts imputed to him.

Therefore the judgment of the quarter sessions must be reversed.

TITUS v. STATE.

December 28, 1886.

When a statute in defining a crime refers by name to another well-known crime, and makes such named crime a constituent of the defined crime, in an indictment for the latter it is not sufficient to use the mere statutory language, but the particulars constituting the named crime must be shown.

In an indictment for murder, when the fact that the killing was in the commission of a rape is relied on to make such killing murder in the first degree, a count in the general form authorized by the forty-fifth section of the criminal procedure act is sufficient.

A verdict on a capital case will not be set aside unless the irregularities committed by the jury be of a nature to raise a suspicion that they may have prejudiced the prisoner.

Shipman & Son, for defendant. *Sylvester G. Smith* and *Henry S. Harris*, for State.

BEASLEY, Ch. J. This case is before us on a rule to show cause why the verdict should not be set aside and a new trial granted. The inquiry thus authorized, however, does not extend so far as to embrace the question whether the evidence was sufficient to sustain a conviction, for the case could not properly be opened to that extent as the proofs of the defendant's guilt were of the most convincing character. The rule as granted, and which has been referred to this court for its advisory opin-

ion, confines the investigation to three subjects which will be disposed of *seriatim*.

The first of the questions thus propounded is, whether the second count of the indictment in this case is good or bad?

The count thus challenged is in the words following, viz.:

It is obvious that this count has been fashioned upon the theory that if the State relies upon the circumstance that the alleged killing took place in the commission of a rape, the indictment must specifically exhibit such circumstance.

If this theory be correct it follows that no judgment can be founded upon the present verdict, for the count is, in our opinion, radically defective. The mistake of the pleader in this instance is the common one of substituting an inference of his own from a set of facts, in the place of showing the existence of such facts; he alleges that the defendant "did commit a rape," but does not lay a single fact from which the court can see that such conclusion is well founded. No reason is perceived why if it be necessary to show a rape, as one of the constituents of the offense of murder in the first degree, such crime should not be pleaded with the same formality as is requisite when it forms the sole basis of a count in an indictment.

The only attempted justification of this departure from the usual methods of criminal procedure is, that the pleader in describing the crime has followed the language of the statute; but even if it were to be admitted that the act referred to contains a description of the offense charged upon this defendant, nevertheless the count would necessarily be declared to be defective and insufficient, for it manifestly belongs to that class of cases that stand aside of the general rule, that in the indictment the crime may be described in the terms of the statute creating it. For in the section now in question murder in the first degree is defined in part by a reference to the crime of rape without setting forth the constituents of such crime, and consequently upon well-known principles such definition, if imparted without explanatory amplification into the indictment, will not suffice. Mr. Bishop, in his treatise on Criminal Procedure, states the doctrine in these words, viz.: "And generally where a statute merely designates an offense by the use of some word, technical or otherwise, yet does not describe the constituents of the offense, the indictment must state it according to its legal and, sometimes, its actual particulars." 1 Bish. Cr. Pro., § 373.

The count in question is fundamentally defective, and must be regarded as a nullity for all the purposes of this prosecution.

The second question is thus presented in the state of the case, viz.: "Conceding that the second count is bad, whether the evidence of a rape, or attempt to commit rape, can be used under the two other counts in order to constitute murder in the first degree."

The first of the two counts here referred to is drawn in conformity to the requirement of the forty-fifth section of the criminal procedure act, and charges, in general form, that the defendant "in and upon one Matilda Smith, in the peace, etc., did make an assault, and her, the said Matilda Smith, then and there feloniously, willfully and of his malice aforethought did kill and murder, contrary," etc.

The second of the counts mentioned is framed in common-law form, charging that the defendant murdered his victim by strangling her with his hands.

At the trial the jury was instructed that if it appeared that the killing was perpetrated by the defendant in committing or in attempting to commit a rape upon the woman, he should be found guilty of murder in the first degree, without reference to the question whether such killing was willful or unintentional.

The position of the counsel of the defendant upon the point is, that as there is no special count charging that the death of the woman occurred in the attempt to commit or in the commission of a rape upon her, the law will not permit such fact to be proved for the purpose of aggravating the killing, if it was unintentional, into the crime of murder in the first degree.

This contention is based on the sixty-eighth section of the crimes act which declares that "all murder that shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, rape, etc., shall be deemed murder in the first degree, and that all other kinds of murder shall be murder in the second degree."

The argument urged in support of the position that a special count was indispensable whenever the State relied on any of the statutory particulars connected with the killing, to intensify such killing into murder, was that as the act created and defined the offense, every constituent of the crime, embraced in such definition, must be stated in the indictment. But this proposition cannot be sustained, for it has been conclusively settled by the court of errors in this State in the case of *Graves v. State*, 16 Vr. 204-358, that the section relied on did not create any new crime, but "merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder." This decided case seems to us directly in point, for in that instance, the indictment being in the abbreviated form given by the statute, it was insisted that as such form did not embody the statement that the alleged killing was "willful, deliberate and premeditated," the pleading was insufficient, as it did not appear that murder within the statutory definition of the crime had been committed. The objection was overruled and the indictment was sustained, and it is obvious that if it be not necessary to set out in the count that the alleged killing was "willful, deliberate and premeditated," which is one of the categories of murder mentioned in the section, it cannot be necessary to show that the killing was in the commission of a rape, which is another of the categories of the same section. We think the adjudged case plainly rules the present one with respect to this subject.

The third and last objection raised by the defense relates to the alleged misconduct of some of the jurors after they had been put in charge of an officer, and had retired to their room to consider of their verdict.

Affidavits have been taken in this respect, and from them it appears

that certain of the jurors sent the constable in attendance to a jeweler and procured a magnifying glass and with it compared certain wood fibers that were adhering to the clothes of the murdered girl with those of a wooden platform that had been exhibited at the trial and upon which the State contended the murdered woman had been thrown down when she was violated. These clothes and this platform had been sent to the jury room by the court when the jury returned.

There can be no question that this conduct of these jurors was irregular, but after admitting this, the question remains whether the verdict should be set aside on this account.

The rule is well settled in this State, that any misconduct of the jury, to have the effect of invalidating their proceedings, must be of such a character as to raise a belief, or at least a suspicion, that the misbehavior complained of has in some measure prejudiced the case of the defendant. This principle of practice was much considered and its limitations plainly defined in the case of *The State v. Cucuel*, 2 Vr. 249, which was also an indictment for a capital offense, and although the lapses from the line of duty of some of the jurors was of a very marked character indeed, the court refused to annul the verdict because there was no reason to think that the verdict had in the least degree been affected by such irregularities. After a careful examination of the subject the general doctrine then announced was this, that a verdict will not be vacated even in a capital case on account of the misconduct or irregularity of a jury "unless it be such as might affect their impartiality or disqualify them from the proper exercise of their functions."

This being the established rule, the only question which supervenes is, whether, in the testimony taken, any thing has been shown that is calculated in any measure to excite a suspicion that the use of the magnifying glass, after its surreptitious introduction into the jury-room, has affected the verdict to the prejudice of the prisoner.

After considering this matter with due care we are clearly of opinion that there is not the slightest ground for such an inference, for the case, of necessity, stood before the jury after their instrumental scrutiny, precisely as it did before such experiment. Certain of the jurors were examined on the rule to take affidavits, and there is no room for even a pretense that the jurors, by means of the instrument in question, either made, or thought that they made, any discovery with respect to the case. All that they did or could do by the employment of the lens was to find that the fibers in the dress corresponded in all respects with those of the platform, and that perfect correspondence had been proved by an able and accomplished expert, who was a witness at the trial, and had made a microscopic examination of them. The entire identity of appearance of these woody filaments was an undisputed fact in the case, and the jury, therefore, knew such fact as well before making their test as they did afterward. The truth is that it is plain that the use of this glass was a measure tending rather to favor than to injure the prisoner, for the proofs of the State on this point needed no ocular verification, while on the other hand, if the jury had thought that they discovered a dissimilitude between the two

classes of fibers, the case made against the defendant would have been, to some extent, impaired.

If there had been conflicting testimony touching the matter thus looked into by the jury, the present motion would have assumed a very different aspect, but as these facts stand we are entirely satisfied that the irregularities in question did not, in the faintest degree, prejudice the defendant, nor did they even tend to do so.

These remarks should not be closed without adverting to the fact that some of the jurors were called as witnesses under the rule in this case to prove their own official misconduct or that of their fellows. Such course was conspicuously illegal; the court could not have based its action on such testimony, for it has been the long-established rule, that jurors cannot be called to the stand for such a purpose.

Let theoyer and terminer be informed that in the opinion of this court the rule to show cause should be discharged.

SUPREME COURT OF VERMONT.

ST. JOHNSBURY AND LAKE CHAMPLAIN R. R. Co. v. HUNT.

January 1, 1887.

RAILROAD — EVIDENCE.

The defendant brought an action and obtained a judgment against the plaintiff's engineer for injuries to his heifer, claimed to have been caused by negligence in running an engine; and while the writ was being served its train of cars was delayed for a short time. Thereupon the plaintiff commenced this action for malicious prosecution, alleging that the engine was properly managed at the time of the accident; that the defendant instituted his suit for the sole purpose of injuring the plaintiff by delaying its trains; and the declaration was sustained on demurrer. *Held*, that evidence was admissible to prove that the plaintiff had neither fenced its road nor built cattle-guards, to prove a cause of action, and, therefore, probable cause.

ENGINEER — AGENT.

An engineer is an agent within the meaning of the statute imposing a duty on railroads to fence their roads.

EVIDENCE — PROBABLE CAUSE.

The judgment in the case of the defendant against the engineer is not admissible as tending to show that defendant had a cause of action against him.

MALICIOUS PROSECUTION — LEGAL ADVICE A DEFENSE.

The fact that the defendant, before the commencement of the suit, took competent legal advice on a correct statement of all material facts known to him, or that he had reason to believe existed, and acted honestly upon it, believing that he had a cause of action, affords probable cause, and is a defense.*

Action on the case. Trial by jury, June term, 1885, Caledonia county, Ross, J., presiding. Judgment for the plaintiff. The defendant Hunt brought a suit and recovered a judgment in a justice court against one Collins, an engineer of plaintiff railroad company, for injuries to his heifer struck by a locomotive. Collins was arrested, while on duty, by the officer serving the writ, and the train was thereby

* See Moak's Underhill Torts, 169, 170; 4 Wait's Act. & Def. 354; 21 W. Dig. 54; 16 id. 240; 16 Eng. Rep. 86; 57 Iowa, 474; 100 Penn. St. 91.

delayed. This suit was brought to recover damages for such delay. See declaration in same case in 55 Vt. 570. The defendant introduced evidence tending to show that, before the commencement of the suit, he consulted an attorney "of competence and integrity," and disclosed to him all the facts attending the injury and the agency of said Collins in causing the injury; and asked the court to charge that such consultation and advice, if honestly followed, would make a full defense; but the court refused so to charge, and charged that it was only proof of good faith.

Ids & Stafford, for plaintiff. *Gleed & Hunt*, for defendant.

ROWELL, J. The declaration alleges that the defendant had no cause of action against Collins, and as tending to show that he had, he offered to show that plaintiff had neither fenced its road nor built cattle-guards along where the heifer was killed, and that she got on to the track for want thereof. Although the defendant was not bound to show that he had a cause of action against Collins, for if he had probable cause to believe and did believe that he had, it was enough, and he might then lawfully sue and arrest Collins, as he did, even as against the plaintiff, though he did it with the motive alleged; yet if he saw fit to assume the burden of showing that he had a cause of action, it was competent for him to do so, for as the greater includes the less, he would thereby be showing probable cause, and so the evidence should have been admitted if it bore on that question, as we think it did.

When a railroad is completed and in running order it is the statutory duty of the company to fence it with good and sufficient fences; and until its fences and cattle-guards are duly made, the corporation *and its agents* are made liable for the damage done by its agents or engines to cattle on the railroad, if occasioned by want of such fences and cattle-guards. Rev. Laws, §§ 3409, 3412.

The question on this point is, whether the word "agents," as first used in section 3412, includes engineers or not. The plaintiff contends that it does not, as they are the mere servants of the company, but embraces only those who by lease or other contract stand in place of the company and control and operate the road. But we think the word should be given a broader meaning, and was intended to embrace such servants as engineers, who are in fact agents of the company, and called so in section 3442, as are also firemen.

In *Clement v. Canfield*, 28 Vt. 302, it was contended that a lessee of a railroad company was not of the class of agents referred to in the statute, but that those only are embraced who are under the control of the company, as engineers, conductors and the like. In the opinion the chief justice seems to regard engineers and conductors as unquestionably embraced, and goes on to show that lessees are also embraced.

The New York statute of 1848 was precisely like ours in this respect and received a similar construction in *Suydam v. Moore*, 8 Barb. 358. That was an action against an engineer and a fireman for killing a cow. The company had not erected fences nor made cattle-guards where the cow got on to the track, and the accident was nearly or quite inevitable, but the defendants were held liable. The court

said that this neglect of the company had greatly increased the defendant's liability, but they were not bound to remain in its employment. That case is referred to approvingly in *Corwin v. New York and Erie R. Co.*, 13 N. Y. 50.

When this case was before the court on demurrer to the declaration — 55 Vt. 570 — it was held that there was nothing alleged to make the judgment in *Hunt v. Collins* an estoppel on this plaintiff. That judgment is now offered as evidence *tending* to show that Hunt had a cause of action against Collins. But if that judgment is *any* evidence in this behalf against the plaintiff it is *conclusive* evidence of probable cause for the suit in which it was rendered — *Hathaway v. Allen*, Brayt. 152; *Reynolds v. Kennedy*, 1 Wils. 232; *Cloon v. Gerry*, 13 Gray, 201 — and as nothing now appears in this case to make that judgment conclusive on the plaintiff that did not appear before, the former decision on this point must stand, for a decision once made in a case is final and conclusive in the case in which it is made.

If, before commencing suit against Collins, the defendant took competent legal advice on a full and correct statement of all the material facts known to him, or that he had reason to believe existed, and acted honestly upon it, believing he had a cause of action, it is a defense here because it affords probable cause for that suit; and the jury should have been so instructed. *Snow v. Allen*, 1 Stark. 502; BAYLEY, J., in *Ravenga v. Mackintosh*, 2 B. & C. 693; *Stone v. Swift*, 4 Pick. 389; *Stewart v. Sonneborn*, 98 U. S. 187; 1 Am. Lead. Cas. (4th ed.) 215; Bigelow Lead. Cas. Torts, 200; Cool. Torts, 183.

Judgment reversed and cause remanded.

STATE v. McCONE.

January 1, 1887.

CRIMINAL LAW — PLEADING — PERJURY — VOTER.

An indictment, charging the respondent with perjury committed before the board of civil authority in his attempt to get his name placed on the check-list of voters, is fatally defective, if the jurisdiction of the board is not set forth with certainty; and, if it is not alleged that he was not legally entitled to vote, nor to have his name on the list; thus where the allegations were that the board was in session to hear challenges to the qualifications of persons whose names were on the list, and all alterations to be made in the list, and that the respondent appeared and requested to have his name *added* to the list, it was *held* that there was no sufficient allegation that the board had authority.

Indictment for perjury. Heard on demurrer, September term, 1884, Essex county, Ross, J., presiding. Demurrer *pro forma* overruled.

It was alleged in the indictment, that the selectmen of Brighton, on the petition of twenty legal voters, made an alphabetical list of the names of all persons legally qualified to vote in said town; that the board of civil authority appointed the 6th day of September, 1880, "as a day for said board of civil authority to sit, hear and determine challenges to the qualifications of persons whose names were then and there on said board . . . at Brighton . . . on said sixth day . . . for the purpose of hearing and determining challenges to the qualifications of the persons whose names were then and there on said list, and

all alterations to be made in said list, said meeting being then and there held in pursuance of the appointment above set forth and the laws of this State, said board being then and there legally constituted and organized to hear and determine all alterations to be made in said list. John McCone, etc., on, etc., . . . appeared before said board and requested that his, said John McCone's, name should be included in said list; whereupon, before his name was placed in said list, he was challenged, etc. . . . he was then and there duly sworn and did take his corporal oath, etc. . . . did then and there falsely, willfully, etc., swear," etc. In the second count it was alleged that McCone appeared before the board, and requested that his name "be added to and inserted in said check-list."

F. D. Howe, State's attorney, for State. *Z. M. Mansur* and *Geo. N. Dale*, for respondent.

Ross, J. The contention is whether the indictment is legally sufficient when encountered by a demurrer. It is in two counts, and charges, or attempts to charge, the respondent with the commission of the crime of perjury before the board of the civil authority of the town of Brighton. The respondent's counsel claim that it is legally insufficient in many respects. It will be necessary to notice only a few of the claimed insufficiencies. It is not alleged in either count that the board of civil authority was constituted, or had authority, to make additions to the check-list at the session being held. It is alleged that the board was constituted and in session to hear and determine challenges to the qualifications of persons whose names were then on the check-list, and all alterations to be made in the list. If by the term "alterations in" is meant additions to the check-list, such meaning can only be gathered by inference. There is no sufficient allegation that the board had authority to add the names of persons to those then on the list. It is alleged that the respondent appeared before the board and requested to have his name added to, or inserted or included in, the check-list. It was upon this request that it is alleged the hearing was had and perjury committed, a subject over which it is not directly, and at least but inferentially, alleged that the board of civil authority had jurisdiction. The jurisdiction of the board in the matter, being special, should be set forth with certainty. It may be inferentially gathered from the entire indictment that the material question as respects the respondent, for trial by the board, was his right to vote in the then coming freemen's meeting in the town of Brighton; but no such allegation is to be found in either count of the indictment. This was the right which conferred the right to have his name placed on the check-list of the legal voters of the town. It was only with reference to this right that the alleged false testimony was material. Without a proper allegation that the respondent's right to vote in the then coming freemen's meeting was the material question to be determined by the board of civil authority, and that the board was duly constituted and had jurisdiction of this question, the alleged false testimony given by the respondent has no materiality and cannot support a conviction for perjury. There is no allegation in either count that the

respondent was not legally entitled to vote in the then coming free-men's meeting in the town of Brighton, and none that he was not legally entitled to have his name placed on the check list. Without considering the other defects claimed to have been found in the indictment, those specified, render the indictment fatally defective.

The respondent's exception to the *pro forma* judgment of the county court are sustained, the judgment overruling the demurrer reversed, and judgment rendered that the demurrer is sustained, the indictment adjudged insufficient and quashed, and the respondent discharged.

BATCHELDER v. JENNESS.

January 1, 1887.

CONDITIONAL SALE — GROWING CROPS — LIEN — DEED.

A reservation, in a deed of real estate, of crops to be grown thereon, as security for the purchase-money of the land, is not a conditional sale, within the meaning of the statute. R. L., § 1992.

PLEADING — EQUITABLE OWNER.

The assignee of a note, without any conveyance to him of the security, except such as the sale of the note effected, cannot maintain an action at law in his own name for the conversion of the security.

Trespass and trover for crops. Heard on a referee's report, September term, 1885, Washington county, POWERS, J., presiding. Judgment *pro forma* for the plaintiff.

It appeared from the report that in October, 1877, Luceba Bagley was the owner of a farm in Albany, in this State, on which was an outstanding mortgage to one Anderson; that in said October said Luceba, with her husband, Gideon Bagley, deeded the farm to Myron Dunn, Dunn assuming the Anderson mortgage; that the Bagleys in their deed retained a lien on the growing crops as follows: "And the crops raised on the farm are to be and remain the property of said Luceba Bagley until six notes are paid. . . . The crops only holden for the notes that become due the year the crops are raised;" that the notes were given for the purchase-money of the farm, one note payable each year, after the first year; and that the plaintiff bought of the said Luceba the note which matured in 1880. It further appeared that said Dunn went into possession of the farm, and raised on it the crops in question in the season of 1880; and that the defendant as sheriff attached the crops on a writ in favor of said Anderson against said Dunn, but the suit was brought upon an indebtedness other than said mortgage debt due to Anderson. The plaintiff to hold the crops under the lien reserved in said deed, and brought this suit for their conversion.

E. W. Bisbee, for plaintiff. *Grout & Miles*, for defendant.

Ross, J. I. The contention that the reservation of the crops to be grown upon the premises, to Luceba Bagley, until the note now owned by the plaintiff is paid, made in the deed from Gideon and Luceba Bagley to Myron Dunn, was a conditional sale of such crops by Luceba to Myron Dunn, and required by section 1992, Revised Laws, to be evidenced by a written memorandum signed by Dunn, and recorded in

the town clerk's office, cannot be sustained. At the time of the conveyance, the crops had only a potential existence in the soil of the premises, and were reserved from the operation of the conveyance to Luceba. Myron Dunn acquired no right to them except upon the payment of the note now owned by the plaintiff. His right to the crops was contingent upon payment of the note. Payment of the note was a condition precedent to any right to the crops in contention attaching to, or inhering in, Myron Dunn. The recent cases of *Walworth v. Jenness*, 58 Vt. 670, and *Dickerman v. Ray*, 55 id. 65, are full authority against this contention.

II. The defendant further contends that the plaintiff by the purchase of the note, which was to be paid before the crops became the property of Myron Dunn, acquired no legal title to the crops, and for that reason he cannot maintain an action of trespass or trover for the taking and sale of the crops by the defendant, as an officer, on legal process against Myron Dunn. The plaintiff never had possession of the crops, nor any right thereto, except that given by his ownership of the note, until the payment of which the legal title to the crops vested, by the reservation in the deed, in Luceba Bagley. She never made any conveyance or assignment of the crops in contention, other than such as the sale of the note to the plaintiff effected. By the purchase of the note, the plaintiff acquired an equitable right in the crops held for its payment. This equitable right he acquired against both Luceba Bagley and Myron Dunn. But it was only an equitable right that he thus acquired. The legal title to the crops are still vested in Luceba Bagley, the same as before she sold the note. After the sale she held such legal title for the benefit of the plaintiff. The plaintiff could become vested with the legal title to the crops only by a conveyance from Luceba Bagley. Without acquiring the legal title to the crops he cannot maintain this action at law for their conversion. This is held in *Crain v. Paine*, 4 Cush. 483, and *French v. Haskins*, 9 Gray, 195. The plaintiff's right to the crops is analogous to the right of the purchaser of a debt secured by mortgage, without an assignment of the mortgage. The security, whether it consists of real or personal property, equitably follows the debt secured, and the purchaser of the debt may avail himself of it in equity, without any assignment thereof, except that acquired by the purchase of the debt. He can avail himself of it in equity, because in that forum the party in interest can, and must sue without regard to the holder of the naked legal title. But at law it is otherwise. The purchaser of the debt secured by mortgage, after condition broken, cannot maintain a suit at law in ejectment for the recovery of the possession of the land without having a regular assignment of the mortgage to him. But he can maintain a suit in equity to foreclose the mortgage. The principle is no different when the security for the payment of the debt is personal rather than real property.

Smith v. Atkins, 18 Vt. 461, relied on by the plaintiff's counsel as an authority that the plaintiff can maintain this action in his own name, is not in conflict with the doctrine announced, and does not support the plaintiff's contention. That case only holds that the assignee of the debt, if he obtains possession of the personal property securing it, can

justify such possession as the agent of the assignor in whom the legal title to the personal property is, when assailed by an officer, who has attached the property on a debt against the person who would acquire title to the property by the payment of the debt. On the facts found by the referee, the plaintiff has not the legal title to the property in contention, and for that reason cannot maintain this action therefor, in his own name.

The judgment of the county court is reversed, and judgment rendered on the report of the referee for the defendant to recover his costs.

PROBATE COURT *v.* SAWYER.

January 1, 1887.

MARRIED WOMAN — PROBATE BOND — PLEA IN ABATEMENT.

When a married woman prosecutes a probate bond, the defect, if any, arising from the fact that the husband's name is not indorsed with hers upon the writ as prosecutor, can be reached only by plea in abatement, not by motion to dismiss.

HUSBAND AND WIFE — NON-JOINDER — AMENDMENT.

It is not error to allow an amendment by which a husband is joined with his wife in prosecuting a probate bond, when the defendant has merely moved to dismiss for non-joinder.

PRACTICE — ATTORNEY.

When leave is granted to the attorney of several heirs to prosecute a probate bond, it is not necessary that his name be indorsed on the writ.

PLEADING — DEMURRER — TRAVERSE.

In an action on a probate bond where the defendant pleaded that no person injured by the breach of the bond ever applied to the probate court for leave to prosecute, and that said court never granted such leave to any person injured or claiming to be injured, the plaintiff should traverse the plea instead of demurring.

Prosecution of probate bond. Heard April term, 1886, Lamoille county, POWERS, J., presiding.

Messrs. Brigham and McFarland, the attorneys for the heirs of Jonas Moore, signed the application to the probate court for leave to prosecute the bond. They also gave a bond to the defendants, conditioned that the said McFarland prosecute the suit to effect. The probate court granted permission to said McFarland, as attorney for said heirs, to prosecute said bond. The heirs were the widow of said Moore and his two daughters, who were married. The defendants filed a motion to dismiss, because the husbands were not joined as prosecutors; and also because the name of the person, to whom leave was granted to prosecute, was not indorsed upon the writ. The court overruled this motion, and allowed the plaintiff on motion to amend the writ by inserting, wherever necessary, the names of the husbands in the declaration, and by indorsing them as prosecutors upon the back of the writ. The defendants excepted and filed a special plea. The plaintiff demurred to the plea, and the court ruled that the plea, which is stated in the opinion, was insufficient; and thereupon the case was passed to the supreme court.

Brigham & McFarland, for plaintiff. *P. K. Gleed*, for defendants.

Ross, J. If it was necessary to indorse the names of the husbands of

Mrs. Clayton and Mrs. Smith with their names as prosecutors upon the writ—in regard to which no decision is made—the defect arising therefrom could be taken advantage of only by plea in abatement. 1 Chitty, 33; *Probate Court v. Strong*, 24 Vt. 146.

A motion to dismiss would not reach the defect, if any, as it does not appear from the record. The husbands were required to join, if at all, because of the marital relation. The wives being the heirs to the estate to whom their shares of the estate under our statute descended as their sole and separate property, were the real prosecutors. As the pleadings stood, the wives had the right to stand prosecutors without their husbands joining them. Hence, the defendants were not legally injured by allowing the husbands' names to be indorsed with those of their wives as prosecutors upon the writ.

There was no foundation in fact for the motion to dismiss because the name of the person to whom leave was granted to prosecute was not indorsed upon the back of the writ. The leave was granted to Mr. McFarland as the attorney of the heirs. This was granting leave to the heirs, the widow and two daughters, and not to the attorney as an individual. The attorney is the hand of his principal. He speaks and acts in the principal's name and stead. Hence no leave was granted to Mr. McFarland as an individual to prosecute the bond. The leave was to those whom he represented, the heirs of Jonas Moore's estate. There was no error in the action of the county court in overruling the motions to dismiss.

II. The demurrer admits the facts set forth in the defendants' plea. Among these are the facts that no person injured by the breach of the bond ever applied to the probate court for leave to prosecute the bond, and that the probate court never granted such leave to any person injured, or claiming to be injured, by the breach of the bond. With these facts admitted it follows that the prosecution is either by the probate court of its own motion, or at the instance of a person who had no right to prosecute the bond, neither of which would be lawful. *Probate Court v. Brainard*, 48 Vt. 620; *Probate Court v. Hull*, 58 id. 306.

The county court was, therefore, in error in adjudging the defendants' plea insufficient on demurrer. It does not make the plea insufficient that the facts thus admitted by other papers in the case were shown to be false. To have shown their falsity, the plaintiff should have traversed the plea.

For this cause the judgment of the county court is reversed and the cause remanded with leave to the plaintiff to withdraw his demurrer, and to reply to the defendants' plea, and for the case to be proceeded with.

Judgment reversed.

SUPREME COURT OF PENNSYLVANIA.

APPEAL OF CHARLES RICHARDSON ET AL.

October 4, 1886.

WILL — LEGACY — VESTING.

The residuary clause of a testator's will was as follows: "*Sixth* — And as to all the rest, residue and remainder of my estate, real and personal, wheresoever situate, I do give, devise, and bequeath the same to my said beloved wife," B., "for the term of her natural life, and upon the decease of my said wife, I do order and direct that all the said residue and remainder of my estate be sold by my executor and that after paying the aforementioned bequests, it is my will, and I do order, that the moneys arising therefrom, and so remaining, shall be divided between my children," C., D., E., F., G., H., and I., share and share alike, and if any of my said last-named children be deceased, leaving issue, then it is my will that the share the parent would have been entitled to, if living, shall go to such issue." *Held*, the interests of the children named in the residuary clause were vested.

Appeal from the decree of the court of common pleas, No. 2, of Philadelphia county.

William Richardson died in 1855, seized of certain realty, and leaving a will dated December 15, 1854, and proved January 25, 1855. He left surviving him a widow, Jane, and eight children, namely: John, Edward, Charles, William Carman, Benjamin, Elizabeth B., Emma and Jane. In addition to these legitimate children he left a reputed son, William.

The residuary clause of his will, which is the principal clause to be regarded, in considering the questions raised in the case, made the following dispositions, namely: "To my said beloved wife, Jane Richardson, for the term of her natural life, and upon the decease of my said wife, I do order and direct that the said remainder of my estate be sold by my executor, and after paying the aforementioned bequests it is my will and I do order that the moneys arising therefrom and so remaining shall be divided between my children, John, Elizabeth Berley, Edward, Charles, Emma, William Carman and Jane, share and share alike, and if any of my said last-named children be deceased, leaving issue, then it is my will that the share the parent would have been entitled to if living shall go to such issue."

The testator's widow died August 8, 1878. His daughter Jane, who had intermarried with Augustus W. Boener, died March 6, 1874, intestate and without issue, leaving her husband surviving. The testator's son, Edward, died June 2, 1877, intestate, leaving surviving him his widow, Elizabeth Richardson, and a son, William, who died during minority, unmarried, without issue, March 3, 1878. John, testator's son, died December 8, 1878 — after the death of the testator's widow — leaving a will proved December 12, 1878, by which he disposed of all his property.

Emma Walton died June 23, 1881, leaving a will, whereby she appointed William L. Dilkes her executor.

The open questions between the parties here [which was a proceeding

in equity] were those relating to the Boerner interest and the Edward Richardson charge, to-wit: whether they were vested or contingent?

The following is an extract from the report of Mr. George Tucker Bispham [Master].

"There are two general questions which are to be passed upon in deciding the rights of the parties to this controversy.

"*First*. Was the interest of the children of the testator a vested one during the life-time of the widow; and, *secondly*, . . .

"The first question, while not possibly free from difficulty, may nevertheless be, perhaps, properly decided in the light of one or two general and well-settled principles, and of a few authorities in this State.

"We start with the general rule that bequests are to be treated as vested, rather than contingent, if the language of the instrument is capable of admitting such a construction.

"It is also a well-established rule that where beneficiaries are mentioned by name, the doctrine of survivorship does not ordinarily apply, although it is true that the mere fact that the beneficiaries are named does not necessarily include that doctrine.

"It is further to be noted in the present case, that the residuary clause of the will is distinguished by the absence of certain phrases, the construction of which by the courts has not always been uniform, but which might indicate a contingent gift; thus, in the bequest to his children, William Richardson makes no use of any such expression as, 'all my children who shall be then living,' 'all the children that shall then be living, and the lawful issue of such as may then be deceased,' and the like. These forms of expression have often been held to signify contingencies, and perhaps just as often the contrary. See *McBride v. Smith*, 4 P. F. S. 245; *Buzby's Appeal*, 2 id. 3; *Dilbert's Appeal*, 2 Norr. 462; *Schuerberd's Estate*, 40 L. I. 194; *Appeal of Lumberman's Bank*, 13 W. N. C. 191; *Manderson v. Lukens*, 11 Har. 31; *Womrath v. McCormick*, 1 P. F. S. 507; *Crawford v. Ford*, 7 W. N. C. 532; *Laquerenne's Estate*, 12 id. 110.

"Their absence, however, is worthy of note as furnishing an argument in favor of the vested character of the interest.

"There is in other words in the will under consideration, no language which, on its face, suggests a gift to persons who shall be alive at a specified time.

"The case is in substance, so far as the first words in the residuary clause are concerned, the present gift to children with the time of distribution postponed. That such postponement will not interfere with the present vesting or the gift must now be considered as thoroughly settled. See *Womrath v. McCormick*, 4 P. F. S. 504; *Manderson v. Lukens*, 2 Har. 31; *Crawford v. Ford*, 7 W. N. C. 532; *Laquerenne's Estate*, 12 id. 110.

"The question then is, do the subsequent words modify the intention thus gathered from the first part of the sentence?

"The fact that there is no gift to the children, other than that found in the direction to the executors to distribute *in futuro*, will not prevent the immediate vesting when, as in this case, the gift is postponed

only to accommodate the estate by enabling it to meet the burden imposed by the gift to the first taker. See 2 Wms. Exrs. 1344; *McClure's Appeal*, 22 P. F. S. 414.

"Nor, in my judgment, does the added gift to any deceased donee leaving issue vary this construction; that only defines the quantity of estate and refers to the succession of the interest. *Wormroth v. McCormick*, 4 P. F. S. 504; *Crawford v. Ford*, 7 W. N. C. 532; *Laguerenne's Estate*, 12 id. 110; *Schweibert's Trust*, 40 L. Int. 194.

"I do not think, therefore, that either the postponement or the gift, nor the fact that there is no gift to children other than that found in the direction to the executor to distribute *in futuro*, nor the added gift to issue of any deceased donee, leaving issue, renders the estate contingent under the authorities above referred to.

"But it is to be seen whether from the entire language of the residuary bequest there can be gathered an intention on the part of the testator to limit the ultimate beneficiaries to such of his children as should be alive at a certain time, or should answer a certain description. because if no such intention can be gathered from the general scope of the residuary bequest, the will is to be construed as giving what the disposing words under the above authorities would seem to assert, namely, an absolute vested estate to the parties named in it.

"It was argued that the general intent of the testator was to benefit a class, the constituents of which were to be the survivors of certain named children, who shall be living at the death of the widow, but I do not think that the argument in this case, that the legacies are to be considered as given to the named children as a class, is a sound one. I do not see any thing to take this residuary gift out of the rule that children named, take as individuals and not as a class. See 2 Jarm. Wills, 701, and cases there cited.

"The only other question remaining to be considered under this branch of the case is, whether the dying without issue constitutes a condition subsequent, or a divesting contingency.

"It is to be noticed that whatever contingency existed in this respect is inferential, nothing of the kind being expressly stated in the will.

"It would have been very easy, as was done in *Paterson's Appeal*, 7 Norr. 397, for the testator, if he had wished to do so, to have indicated in his will that the death of any child without issue would have the effect of divesting the estate of the parent by casting it upon the survivors.

"In the absence of such express divesting contingency one ought not to be inferred. See *Gray v. Garman*, 2 Hare, 268; *Salisbury v. Petty*, 3 id. 86; cited in 2 Wms. Exrs. 1359; *Laguerenne's Estate*, 12 W. N. C. 110.

"I am, therefore, of the opinion that the interest of Jane Boener was vested during the life-time of the widow, and that the interest of Edward Richardson was likewise so vested."

The master further reported that a decree should be entered dismissing the bill. To this report exceptions were filed, whereupon the court entered the decree reported by the master.

Walter Murphy, Robert H. Hinckley and George Junkin, for appellants. *First.* The appellants contend that the gift is contingent, because there is really no substantive gift of the property to the children in positive words of gift, but merely a direction that it shall be paid to them at a certain time, thereby importing that if they are not alive to receive it at that time, it shall not be theirs. It is well settled that where there is no antecedent absolute gift of a future legacy, independent of a direction and time of payment, the legacy is contingent. *Moore v. Smith*, 9 Watts, 403; *Leake v. Robinson*, 2 Merivale, 363; *Appeal of The Lumbermen's Bank*, 13 W. N. C. 191.

This rule is suspended in cases where the interest of the fund bequeathed is in the meanwhile payable to the legatees; but such is not the case here.

Second. The gift was to the testator's children, not as individuals, but as a class; and not to the class as it existed at the time of his death, but to the class restrictively defined by survival of the life tenancy. The class from which this selection of survivors was to be made was the class of the testator's legitimate and otherwise unprovided for children. It is clearly the testator's intention to make his children objects of his regard, simply as his children, and not as so many individuals; and but for the peculiar circumstances of the case he would have in all probability made the gift simply "to my children," etc., without mentioning their names. The sole reason the testator had for mentioning his children by name was, that he might thereby exclude from his general provision for the children his illegitimate son, William, to whom, both for that reason and because he had already made special provision for him in his life-time, and by his will also, he did not wish to extend the same bounty as to the others, and his son Benjamin, for whom he also had made other provision. To these sons the testator gives specific legacies of \$500, in the third and fourth clauses of his will, explaining the apparent distinction against them which he thus makes by stating that to them he had advanced their shares during his life-time.

But it has been contended that the gift here cannot be considered a class gift because the beneficiaries are named. It is perfectly well settled, however, that the naming of some of a class of children — or others of a number of beneficiaries — does not by any means, of itself, render the gift any the less a gift to a class. Thus in *Porter v. Fox*, 6 Sim. 485, the gift was to the testator's grandchildren and to his nephew, T. O.; in *Clark v. Phillips*, 17 Jur. 886, to the children of A., the children of B., and to D.; in *re Stanhope's Trusts*, 27 Beav. 201, by name to four of the testator's five living daughters and their issue, with a subsequent provision that every daughter his wife might thereafter have should be admitted; in *Aspinall v. Duckworth*, 35 Beav. 307, to a nephew, A., and the children of a lately deceased sister. All of these gifts were held to be gifts to a class. *Hoppecock v. Tucker*, 59 N. Y. 202; *Bolles v. Smith*, 39 Conn. 217; *Page v. Gilbert*, 32 Hun, 301. Another argument strongly in favor of the position that the gift is to a class is found in the thoroughly-settled principle that the law always favors that construction of a will which would prevent

intestacy as to any part of the testator's property. *Stehman v. Stehman*, 1 Watts, 466; *Axford's Estate*, 2 W. N. C. 663; *Board of Missions' Appeal*, 91 Penn. St. 507. And in applying this principle it is immaterial that no alleged intestacy did, as a matter of fact, happen to occur, for as is said in *Jarm. Wills*, 469, "in construing wills we must look indifferently at actual and possible events." Now, nothing in the construction of wills is better established than that a gift to an individual lapses by the death of that individual before the testator's, while if the gift be to a class, the share of a member of that class pre-deceasing the testator does not lapse, but inures to the surviving members. *Jarm. Wills*, 623, and cases cited. It must be again called to the attention of the court at this point, that a class need not by any means embrace all of a natural class. The language of our courts in speaking of such gifts is frequently loose and inaccurate. *Clark's Estate*, 14 W. N. C. 94. Now, it is established beyond all dispute that "issue" in a limitation of personal property take as purchasers, the reason of the rule being that the operation of law, whenever possible, "makes real estate descendible and personal estate distributable." *Re Wynch's Trusts*, 17 Jur. 588; *Myer's Appeal*, 13 Wright, 111; *Sheet's Estate*, 2 Smith, 94; *Snyder's Appeal*, 14 Norr. 174; *Clark's Estate*, 14 W. N. C. 94.

Crawford & Dallas, for appellee Benjamin Richardson. The will works a conversion as to the realty by the direction to sell on the widow's death, and if the clause would give a vested estate, if the subject were realty, it would of course give a vested interest in personality. *McClure's Appeal*, 22 P. F. S. 421. The well-established principles that the substance and not the form of the gift is the material consideration to determine whether it is vested or contingent—that if there is a doubt upon the construction, the law vests the gift—that where futurity in a gift relates not to the substance of the gift, but to the time of its payment, and there is an antecedent absolute gift of a life estate and the gift in question is postponed for its benefit, to let it in, although there be no other gift than in the direction to pay or distribute *in futuro*, the gift is vested—determined in supreme court in *McClure's Appeal*, 22 P. F. S. 415, 418, 419, 20, to decide, in a precisely similar case to the present, that a gift of realty to a wife for life and on her death "to be sold and equally divided amongst my nephews and nieces, namely," and naming them, gave them a vested legacy on the testator's decease. This was affirmed in *Chess' Appeal*, 6 Norr. 364, Mr. Justice SHARSWOOD there stating that Mr. Justice WILLIAMS' opinion in *McClure's Appeal* was an elaborate and exhaustive opinion on the subject. This construction as to realty was assumed in *Cote's Appeal*, 29 P. F. S. 235. Nor does the added gift to issue of any deceased donee leaving issue, vary this construction. That only defines the quantity of estate, and refers to the succession of the interest. *Womrath v. McCormick*, 1 P. F. S. 504; *Crawford v. Ford*, 7 W. N. C. 532, and *Laguerenne's Estate*, 12 id. 110. The appellants are in error in stating that in each of these cases the subject was realty. On the contrary, in each of them the gifts in question were of a residue of both personalty and realty. And

the appellants are also in error in stating that *Womrath v. McCormick* was tacitly overruled in the *Appeal of the Lumbermen's Bank*, 13 W. N. C. 191, and *Barger's Appeal*, 4 Out. 239. In the *Lumbermen's Bank Appeal* the gift was to children then living, and decided expressly upon the authority of *McBride v. Smyth*, 4 P. F. S. 248, and previous cases; which last case and *Fairfax's Appeal*, 13 W. N. C. 274, decide that it is only where the gift is to such child or children or individuals, as shall attain a certain age, or sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class preceding such restrictive description, so that the uncertain event forms part of the description of the person to take, that a different construction obtains, following the established rule expressed in *Smith's Executory Interests*, page 281. The term "class," applied to a gift involving survivorship and upon the question of vesting, "is applicable only to the case of a plurality of persons comprised under one general description, indefinite in number and individually undistinguished by name or particular description." Lord LANGDALE, in *Burnett v. Baskerfield*, 11 Beav. 525. Therefore, if a testator, in a gift to children, or any plurality of persons comprised under one general description, names them — *Bain v. Lescher*, 11 Sim. 397; *Burnett v. Baskerfield*, 11 Beav. 525; *In re Hull's Estate*, 21 id. 314; *Creswell v. Cheslyn*, 2 Eden, 123; *In re Gibson*, 2 Johns. & Hem. 656; *McClure's Appeal*, 22 P. F. S. 421; *Williams v. Neff*, 2 id. 333 — or only specifies their number, as to the five children of A. — *Creswell v. Cheslyn*, 2 Eden, 123; *In re Smith's Trusts*, 9 Ch. D. 117; *In re Stanfield*, 15 id. 84 — this is a *designatio personarum*, and not a gift to a class, and of course without survivorship. Sir W. PAGE Wood, V. C., said, *In re Gibson*, that, with the exception of *Knight v. Gould*, 2 My. & K. 295, where the gift to three executors by name and office was held to be a gift to them as a class, passing to the two survivors, because given as a reward for performing their office, and the office being joint, their reward should be joint, he knew of no case of a gift to persons "hereinbefore" or "hereinafter" "named" or "mentioned" in which the gift was held to be to a class, involving survivorship. And in this will the words of distribution "share and share alike" also strengthen the intent. A gift of aliquot shares to several as tenants in common is not to a class. *Ramsey v. Shelmerdine*, L. R., 1 Eq. 129.

B. Sharkey, for Elizabeth A. Richardson, an appellee.

TRUNKEY, J. It is admitted that the sole question is, was the interest of the children of the testator a vested one, during the life of the widow? The opinion of the learned master well expresses all that need be said upon this question.

Decree affirmed and appeal dismissed at costs of appellants.

HECK v. BORDA.

October 4, 1886.

LEASE — TENANCY FROM YEAR TO YEAR — TENANCY AT WILL.

A., by a lease under sale, acknowledged and recorded, demised to B. an iron furnace; the writing, *inter alia*, contained the following: "The lease or grant to continue as long as the said party of the first part receives a revenue of no less than \$1,000 a year royalty on account of iron made or on account of iron to be made; and the said party of the first part further agrees that he will at any time within three years of this date sell and convey and the party of the first part further agrees that he will allow one-half of the expense of putting the furnace in working condition, provided, however, that his half shall not exceed \$1,250. In consideration whereof the said party of the second part promises, agrees and binds himself to pay to the party of the first part the sum of fifty cents per ton of two thousand two hundred and sixty-eight pounds for each and every ton he may make at said furnace. Payments to be made at the furnace office on or before the fifteenth day of each month. The amount to be expended in putting the furnace in working order, the half of which as heretofore stated is not to exceed \$1,250, is to be paid out of the first accruing rent. It is expressly understood that in case the party of the second part fail to pay to the party of the first part a royalty of at least \$1,000 a year, that this lease shall, at the option of the party of the first part, become null and void. Should this lease terminate from any cause, the said party of the second part agrees to leave the property in as good condition as when put in blast, wear and tear excepted. In case of destruction by fire or storm, necessitating the stoppage of the furnace, the repairs of the same will be a matter of mutual agreement. In case of stoppage, the party of the second part agrees to furnish a watchman, or protect the property by insurance." *Held* to be a lease from year to year.

Error to the court of common pleas, No. 3, of Philadelphia county.

This was an action of covenant brought by a lessor against a lessee for a loss by fire. The court below, concluding that the lease created an estate at will only, and an assignment by the defendant prior to the fire had put an absolute end to it, entered a nonsuit.

J. Howard Gendell, for plaintiff in error. It may be conceded that an estate at will is so infirm in its nature that it cannot be assigned, but an assignment with notice to the landlord puts an end to it. But this rule applies only to estates at will of the simplest kind, that is, to those which are absolutely terminable at any time, at the mere will or caprice of either party without prior notice, according to the definition in Co. Litt. 55a. Any strengthening whatever of the tenant's estate will give him an interest which can be assigned. No one, for instance, doubts the assignability of an estate from year to year. Taylor Landl. and Ten., § 58; 4 Kent Com. 114. There is nothing in the words of the lease or in the mode of creating the estate to prevent it. The words "lease," "lessor," "lessee," "demise," "grant," etc., etc., apply to estates for life as well as to those for years, etc. 2 Blackst. 317-318; Litt. 57; Co. Litt. 42b. Where no definite term is mentioned, the grant is construed to convey the largest estate possible, *i. e.*, where there are no words of inheritance, an estate for life. 2 Blackst. Com. 120-121; 4 Kent Com. 25; Taylor Landl. and Ten., § 52. This rule is of course subject to the qualifications that the statute of frauds is complied with, and that there is livery of seizin or its equivalent. Every indefinite estate is an estate for life, although it may terminate earlier, even if the termination is by the act or default of the lessee. This rule is quoted in all the text-

books from 2 Blackst. 121; Co. Litt. 42a. If a man make a lease of a manor that at the time of the lease is worth £20 per annum to another, till £100 be paid, in this case, because the annual profits of the land are uncertain, he hath an estate for life. This passage from Co. Litt. is cited as law in all the text-books. Woodfall Landl. and Ten. (5th Lond. ed., 1843) 70; Taylor Landl. and Ten., § 53; Wood Landl. and Ten., § 56; 4 Kent Com. 26; Bisset Estates for Life, 7; Cruise Real Prop. 106, §§ 6-8; 1 Washb. Real Prop. 88-9. The American decisions fully support the text.

A lease to a tenant as long as he may desire to use the house for a drug store creates an estate for life, determinable by failure to use it. *Thomas v. Thomas*, 2 C. E. Gr. (17 N. J. Eq.) 356. So, a lease during the time that salt works should be erected and used on the land, creates an estate for life, subject to be defeated. *Hurd v. Cushing*, 7 Pick. 169. The introduction of words of inheritance would make the estate a fee-simple determinable. A demise to A. B., his heirs and assigns, for such time as he pays rent, etc., is a perpetual lease. On default, the lessor only and not the lessee may elect to consider it forfeited. *Folts v. Huntley*, 7 Wend. 210. Lease for one hundred years, with provision that the lessee, his heirs and assigns, may hold the premises so long as he and they shall think proper after the expiration of the term, at the same rent, is not determinable by the lessor after the end of the term; at least not without making compensation for improvements. *Lewis v. Effinger*, 6 Cascy, 281. See p. 286. If we are wrong respecting the life interest, this is at least an estate from year to year, and therefore assignable. Taylor Landl. and Ten., § 58; 4 Kent Com. 114. "At this day a tenancy at will cannot arise without express grant or contract. All general tenancies . . . are by implication and constructively from year to year." 2 Preston Abstracts of Title, 25. What express words are in this lease reducing the term from such an estate to one at will only? "The presumption is that it is from year to year." Wood Landl. and Ten., § 22, p. 66. What is there to meet this presumption? The Pennsylvania cases are just as strong: "A tenancy at will exists only nominally and is in fact a tenancy from year to year." *Logan v. Herron*, 8 S. & R. 473; *Clark v. Smith*, 1 Casey, 137. In no authority is the rule stated weaker than in Taylor Landlord and Tenant, sections 55, 59 and 61, in which it is said in substance that if any circumstances, payment of rent or otherwise, appear referable to an annual holding, the term is from year to year, and not at will. It is admitted to be a breach of the covenant to restore in good condition, unless that covenant is affected by a subsequent clause. *Hoy v. Holt*, 10 Norr. 88. A covenant to repair is neither superseded, nor qualified, nor restricted as to amount by a covenant to insure for a specified amount. *Digby v. Atkinson*, 4 Campb. 275. Where a matter is peculiarly within the knowledge of the other party, he must prove it. Greenl. Ev., §§ 74 and 79.

Crawford & Dallas, for defendant in error. "Leases for an uncertain time are *prima facie* leases at will." Wood Landl. & Ten. (ed. 1881) 32. The reservation of a yearly rent is not inconsistent with a tenancy at will. PARKE, B., in *Davis v. Davis*, 7 Exch. Ch. 89, refer-

ring to Co. Litt. 556; *Walker v. Giles*, 6 C. B. 662; and *Pollock*, Ch. B., in *Dixie v. Davis*; *Murray v. Cherrington*, 99 Mass. 229; *Ashley v. Warner*, 11 Gray, 43; *Gardner v. Hazleton*, 121 Mass. 494; *Say v. Stoddard*, 27 Ohio, 478; *Effinger v. Lewis*, 8 C. 367. Notwithstanding the prevalent theory that the general rule is well expressed by saying that the burden of proof lies on the party who asserts the affirmative of the issue, yet the true view is that the burden is upon the party undertaking to prove a point. Whether the party desiring the judgment of the court asserts an affirmative or a negative proposition, on him lies the burden of proof. And such is the Roman law. *Whart. Ev.* (2d ed.), §§ 353-4-5. Whenever the plaintiff bases his action on a negative allegation, the burden is on him to prove such allegation. *Id.*, note 1, page 303, where see collection of cases to that effect. The burden is properly on the actor. If he undertake to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated as a test, admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain. *Id.*, § 357, and long list of cases referred to there; 1 *Phil. Ev.* *812, quoting *ALDERSON, B.*, as thus expressing the surest test in *Amos v. Hughes*, 1 M. & R. 464, or as he expressed it in *Mills v. Barber*, 1 M. & W. 427, examine whether if the particular allegation to be proved were struck out of the pleading there would or not be a defense to the action or opposite pleading. Thus a party alleging breach of warranty must prove the breach. *Peck v. Hough-taling*, 35 Mich. 127; *Soward v. Leggatt*, 7 C. & P. 615; *Belcher v. McIntosh*, 8 id. 720; *Osborne v. Thompson*, 9 id. 337; *Shilcock v. Passmore*, 7 id. 291; *Bell v. Reed*, 4 Binn. 127; *Chambers v. Jacques*, 4 B. 39; *Sartwell v. Wilcox*, 8 H. 117; *Hubbard v. Wheeler*, 5 id. 425; *Patterson v. Bank*, 4 W. & S. 42.

STERRETT, J. This action of covenant by lessor against lessee, for damages by fire, is based on the two following covenants in the lease, viz.: 1st. "Should this lease terminate from any cause the said party of the second part agrees to leave the property in as good condition as when put in blast, wear and tear excepted." 2d. "In case of stoppage the party of the second part agrees to furnish a watchman, or protect the property by insurance."

The lease under seal, dated January 17, 1882, was duly executed, acknowledged and recorded. After describing the demised premises, consisting of about fifteen acres of land, on which were erected a blast furnace and other buildings used in connection therewith, the lease provides as follows: "This lease or grant to continue as long as the said party of the first part receives a revenue of no less than \$1,000 a year royalty on account of iron made, or on account of iron to be made; and the said party of the first part further agrees that he will at any time within three years of this date, sell and convey by good and sufficient warranty deeds, all of the above-described property for the sum of twenty thousand dollars (\$20,000), payable, etc., . . . ; and the

party of the first part further agrees that he will allow one-half of the expense of putting the furnace in working condition, provided, however, that his half shall not exceed \$1,250.⁵ In consideration thereof the lessee agrees to pay "fifty cents per ton of twenty-two hundred and sixty-eight pounds for each and every ton he may make at said furnace. Payments to be made at the furnace office on or before the fifteenth day of each month."

"The amount to be expended in putting the furnace in working order (the half of which, as hereinbefore stated, is not to exceed \$1,250), is to be paid out of the first accruing rent."

"It is also expressly understood that in case the party of the second part fail to pay to the party of the first part a royalty of at least \$1,000 per year, this lease shall, at the option of the party of the first part, become null and void."

If the lease gave defendant no greater interest in the premises than a mere tenancy at will, it must be conceded the judgment of nonsuit was rightly entered; but, on the other hand, if it is vested in him at least a tenancy from year to year, as we think it did, the case should have been submitted to the jury on the evidence tending to prove the breaches of covenant declared on. It is unnecessary to refer to the evidence tending to sustain the breaches assigned. Suffice it to say, the testimony on that subject is quite sufficient to have warranted its submission to the jury.

The provisions of the lease, above quoted, clearly show it was intended to create at least a tenancy from year to year. It is to continue as long as the royalty of \$1,000 a year is paid. The express authority to terminate the lease in the event of non-payment of the minimum annual royalty tends also to exclude the inference of power to terminate it at will. It cannot be an estate at will unless terminable at the will of either party. The provision for expending twenty-five *per cent* more than the first year's minimum royalty in putting the furnace in working order, also shows conclusively that a tenancy at will was not contemplated by the parties. The lease given in evidence should have been construed to be a lease from year to year, and the case should have been submitted to the jury on the evidence tending to prove breaches of covenant on the part of the lessee.

Judgment reversed and a *procedendo* awarded.

APPEAL OF ROBERT CORSON, EXECUTOR, ETC.

October 4, 1886.

INSURANCE — INSURABLE INTEREST — DEBTOR AND CREDITOR — SPECULATIVE INSURANCE — WAGERING POLICY.

Although a policy of life insurance is not like a fire or marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death, yet the assured is not entitled to his action on the policy unless he had as the basis of his contract an interest in the subject-matter insured.

An insurable interest is not necessarily a definite pecuniary interest, such as is recognized and protected at law, it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life.

A wife has an insurable interest in the life of her husband and the husband in the life of his wife, a single woman under contract to marry in the life of her intended husband, a parent in the life of a child, and a child in the life of a parent, a brother in the life of a young unmarried sister whom he supports and stands in *loco parentis* to, a brother in the life of an unmarried sister whom he maintains in his family under circumstances tending to constitute the relation between them of debtor and creditor, and a creditor in the life of his debtor.

Where A. has an insurable interest at the time an insurance is effected upon the life of B. for his benefit, the fact that such interest ceases to exist at or prior to the death of B., will not, as against the personal representatives of B. deprive A. of the right to receive the insurance money.

If the amount of insurance placed upon the life of a debtor be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, the transaction is open to the imputation of being a speculation or wager upon the hazard of a life.

Error to the court of common pleas, No. 4, of Philadelphia county.

Ellen McLean, a widow, was in March, 1883, residing in Philadelphia, where she had been living for some few years. She kept a small grocery store, and a large part of her goods were purchased by her from James Garnier, a nephew of hers, who was also engaged in the grocery business on a larger scale. On March 7, 1883, the Provident Savings Life Assurance Society of New York, issued two policies upon the life of Mrs. McLean, one for \$1,000, in which she was named as beneficiary, and one for \$2,000, in which Garnier was named as beneficiary, both applications were signed by Mrs. McLean. At the time of the issuing of the policy Mrs. McLean was indebted to Garnier on a running account to the amount of about \$500. Mrs. McLean died within six months thereafter, and her executor received payment of the \$1,000 policy shortly after her death. He then alleged that but a few weeks before her death Garnier as her agent, had sold out her grocery store for \$750, and out of the proceeds reimbursed himself the amount due to him by her, and he claimed that the \$2,000 policy belonged to her estate upon the ground that if it had been taken out as collateral security for the indebtedness, which had since been fully paid, it belonged to her representatives, and if it had been taken without reference to any indebtedness, then Garnier had no insurable interest, and hence the proceeds belonged to her estate, and he filed a bill against Garnier and the company to require the former to surrender the policy to him as executor, and the latter to pay its value to him. The company disclaimed any interest in the controversy, and paid the money into court. There had been but one premium paid on the policy, and there was no evidence on the point as to who paid this, except the policy itself; but the master, to whom the cause was referred, found, as a fact, that the premium had been paid by Garnier. He also found "that neither it — the policy — nor the application for it, had any reference to any indebtedness from Mrs. McLean to Mr. Garnier, or that it was taken to secure any indebtedness." And further, that at the time of Mrs. McLean's death, under the laws of Pennsylvania, Garnier had no present insurable interest, he, therefore, awarded the fund, less the premium paid by Garnier, to the executor of Mrs. McLean. To this finding Garnier excepted, and in the court below his exceptions were sustained. From the decree of the court below this appeal was taken.

John Sparhawk, Jr., and N. DuBois Miller, for appellant. As to

insurable interest, *Rowbach v. Piedmont and Arlington Ins. Co.*, 13 Ins. L. J. 268; *Ins. Co. v. Kane*, 31 Sm. 154; *Lewis v. Phoenix Mut. Ins. Co.*, 39 Conn. 100; *Halford v. Kymer*, 10 B. & C. 724; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63; *Bliss Life Ins.* 33; *Crawley Life Ins.* 87.

J. H. Anders and *Wm. F. Johnson*, for appellee. An examination of the authorities touching the question of assignments of life policies to secure indebtedness, and the proper distribution of the proceeds on the happening of the event insured against, shows that there is no inflexible rule of construction, and that in each particular case it is a question of fact, to be determined by the evidence. *Cunningham v. Smith*, 40 P. F. S. 458; *Bruce v. Gordon*, L. R., 5 Ch. 31; *Knox v. Turner*, id. 575; *Ashley v. Ashley*, 3 Sim. 149; *Freone v. Borade*, 2 DeG. & J. 582; *Gottlieb v. Cranch*, 4 DeG., M. & G. 440; *Drysdale v. Piggott*, 8 id. 546; *Lake v. Burton*, id. 440; *Lea v. Hunton*, 5 id. 823; *Cammac v. Lewis*, 15 Wall. 643. Being a creditor at the time of the issuance of the policy, Garnier's right to the proceeds is incontestable. *Scott v. Dickson*, 16 W. N. C. 181; *Ashley v. Ashley*, *supra*; *St. John v. Ins. Co.*, 13 N. Y. 31; *Clark v. Allen*, 17 A. L. R. (N. S.) 83; *Dalby v. Ins. Co.*, 15 C. B. 365. The common law is, that mere wager policies, that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction, are void, as against public policy. *Ins. Co. v. Schaffer*, 4 Otto, 460. It must appear that the insurance was obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which he had no interest. *Scott v. Dickson*, *supra*; *Asso'n v. Beaver-son*, 16 W. N. C. 189. It is not to be overlooked that in all the decisions declaring policies void as wagers on the ground of public policy between certain relatives there is a constant qualification. In *Singleton v. Ins. Co.*, 66 Mo. 63, it is declared "mere relation of uncle and nephew do not constitute an insurable interest." In *Lewis v. Ins. Co.*, 39 Conn. 100, that a man has no insurable interest in his brother, *per se*; or, as Bliss says — p. 33 — merely as such. The "mere," "*per se*," "merely as such," is constant. Any interest added saves the policy; so the court, in *Ins. Co. v. France*, 4 Otto, 564, in saving an insurance to a sister on the life of her brother, where there was no aspect of dependence either way, says: "Where the relationship between the parties is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from the imputation of a wager policy." And in *Warnock v. Davis*, 14 Otto, 779, they qualify an insurable interest. "Such an interest arising . . . from the ties of blood or marriage as will justify a reasonable expectation of advantage or benefit from the continuance of life."

It is broadly declared in Massachusetts that "the force of natural affection between near kindred" will support a policy — 6 Gray, 399 — and the highest authority in the land has said: "There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend." *Ins. Co. v. Schaeffer*, 4 Otto, 460, per BRADLEY, J.

CLARK, J. Although a policy of life insurance is not, like a fire or

marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death—*Scott v. Dickinson*, 108 Penn. St. 6; S. C., 56 Am. Rep. 192—yet, the assured is not entitled to his action on the policy, unless he had as the basis of his contract, an interest in the subject-matter insured; this is a rule founded in public policy, and is of general application—*Ruse v. Mut. Benefit Co.*, 23 N. Y. 516—if it were not so, the whole system of life insurance would become the mere cover for wicked speculation by wager in human life, and thus prove the occasion for the commission of the grossest crimes.

An insurable interest, however, is not necessarily a definite pecuniary interest, such as is recognized and protected at law; it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance, may be to secure that advantage, and not merely to put a wager upon human life.

Therefore, a wife has an insurable interest in the life of her husband; or the husband in the life of his wife—*Baker v. Union Mut. Life*, 43 N. Y. 283—and a single woman, under contract to marry, in the life of her intended husband—*Chisholm v. Nat. Life Co.*, 52 Mo. 213. A parent has in like manner an insurable interest in the life of a child, and a child in the life of a parent. *Loomis v. Eagle Ins. Co.*, 6 Gray, 396; *Mitchell v. Union Life Co.*, 45 Me. 104; *Reserve Mut. Co. v. Kane*, 81 Penn. St. 154. In the case last cited this court says: "It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his life-time, and thus both father and mother be cast upon the son, or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time."

In *Lord v. Dall*, 12 Mass. 115, a young unmarried female, without property, who for several years had been supported and educated at the expense of her brother, who stood to her in *loco parentis*, was held to have an insurable interest in his life.

So also, a creditor has an insurable interest in the life of his debtor. *American Life Ins. Co. v. Robertshaw*, 2 Casey, 189; *Cunningham v. Smith's Ex'rs*, 70 Penn. St. 450. In *Keystone Mut. Association v. Beaverson*, 16 W. N. C. 188, the assured an unmarried lady, lived with her brother, who supported or maintained her in his family, under circumstances tending to constitute the relation of debtor and creditor between them, and it was held, that he had such an insurable interest in her life, as would support a policy of insurance taken out by him therein. "This case" says the court, "was not submitted to the jury under a ruling that the mere fact of a person on whose life the policy was taken being a sister of the defendant in error, gave to the latter an

insurable interest in her life, although reputable authorities have recognized such relationship to be sufficient. *Etna Life Ins. Co. v. France*, 94 U. S. 562. In the present case evidence was given that he was supporting and maintaining her in his family under circumstances tending to constitute the relation of debtor and creditor. It was under all the facts of the case that the court held he had an insurable interest in the life of his sister. It is very clear that the insurance was obtained in good faith and not for the purpose of speculating upon the hazard of a life in which he had no interest. *Scott v. Dickson*, ante. The policy in question shows the willingness of the company to take the risk on the ground of relationship alone."

The rule deducible from all the cases is thus stated in *Warnock v. Davis*, 104 U. S. 775, by Mr. Justice FIELD: It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.

It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful — as operating more efficaciously to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy.

It cannot be pretended that Garnier had an insurable interest in the life of his aunt by force of the mere relationship existing between them; no case has been brought to our notice which carries the rule to this extent. Between husband and wife, and parent and child, the relationship is so close and intimate and the mutual dependence and legal liability for support so manifest that nothing more is wanting to establish the insurable interest. Garnier, however, did not hold any such relation to Ellen McLean, either natural or assured; he was simply her "friend and adviser." He was doubtless a valuable friend; he had advanced money to bring her to Philadelphia; he fitted up, stocked and from time to time replenished the store at Tenth and Manilla; having disposed of this for her benefit, he purchased the establishment on Fitzwater and, selling this, he bought for her a third on Fifth below Christian. She repaid Garnier, however, for his outlays in her behalf, from time to time, from the ordinary receipts of the several stores, and from the proceeds of the sales.

The only relation existing between James Garnier and Ellen McLean which could give Garnier an insurable interest in her life was that of debtor and creditor, and upon this ground alone the case must be considered. It is not denied that at the date of the policy Mrs. McLean was indebted to Garnier for money advanced and expended in her behalf in some amount between \$500 and \$750. It is said, however, that Garnier in his answer disclaims as a creditor; that he places his right to the proceeds of the policy on other grounds, and makes no claim whatever by reason of any indebtedness. We do not understand either the answer or the evidence given by the defendant in the case. The bill charges in the first paragraph, in substance, that the policy was taken out and applied as a collateral security to the debt, which Mrs. McLean then owed Garnier, and in the subsequent paragraphs that the debt having been fully paid in the life-time of the assured the proceeds of the policy should pass into her estate. This fact is specifically denied; the defendant in his answer says it is "not true that the policy of insurance, referred to in paragraph one of the complainant's bill, was applied for and issued upon the life of Ellen McLean for any such reason or purpose as therein stated."

It is undisputed, however, that at the issuing of the policy the relation of debtor and creditor did exist, and to the extent stated; the defendant having denied that the policy was taken as collateral security for that debt, a question of fact is thus raised to be determined by the evidence. Upon examination of the proofs, we find no evidence from which the fact might be fairly inferred. The insurance was not effected at the instance of Mrs. McLean, but at the suggestion of her son, Samuel McClatchy, in whose name a second policy in \$1,000 was at the same time issued; the premiums were paid and the policy maintained by Garnier; indeed, there is not the slightest proof in support of the plaintiff's hypothesis that the policy was held in trust for the debtor, and in the absence of such proof the presumption is that the rights of the parties appear upon the face of the policy. *Cunningham v. Smith*, 70 Penn. St. 450.

It has been said, however, on the authority of *Goodsall v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt, and if the debt is paid, the insurance is at an end; but it is now settled that this case is not the law; it was directly drawn in question, and was expressly overruled in *Dalby v. India & London Life Ins. Co.*, decided in the exchequer chamber, 15 C. B. 365. The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception, and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. *Rawls v. Am. Mut. Ins. Co.*, 27 N. Y. 232; *Mowry v. Home Ins. Co.*, 9 R. I. 1; *Hoyt v. N. Y. Life Ins. Co.*, 3 Bosw. 440; *Phœnix Mut. Ins. Co. v. Bailey*, 13 Wall. 616.

The doctrine of all the cases to which our attention has been called, is that if the policy was originally valid, it does not cease to be so by cessation of interest in the subject of insurance, unless such be

the necessary effect of the provisions of the instrument itself. Therefore, where a husband insured his life for the benefit of his wife, and was subsequently divorced, it was held, that notwithstanding the relation of husband and wife no longer existed, and her insurable interest had thus ceased, yet she could recover the full amount of the policy. *Conn. Mut. Life v. Shaffer*, 94 U. S. 457. "Supposing a fair and proper insurable interest of whatever kind" says the court in the case last cited, "to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained, and there is then no good reason why the contract should not be carried out according to its terms." To the same effect in *McKee v. Phoenix Co.*, 28 Mo. 383; S. C., 75 Am. Dec. 129.

All the cases to which we have referred, it is true, arose from suits brought upon policies of insurance, but the same principles apply where the company admitting its liability has paid the money into court to abide the result, and the controversy is between the remaining parties.

In our own case case of *Scott v. Dickson*, 108 Penn. St. 46; S. C., 56 Am. Rep. 192, our brother PAXSON, upon a review of the cases concludes, that where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceases to exist, at or prior to the death of the insured will not, as against the personal representatives of the insured, deprive him of the right to receive the insurance money; therefore, it was held, that a surety on an official bond has an insurable interest in the life of the obligor, and that his right to recover upon the policy was not affected by the fact that no breach of the condition of the bond had ever occurred.

But a merely colorable, temporary, or disproportionate interest may present circumstances, from which want of good faith, and an intent to evade the rule may be inferred; therefore, although the relation of debtor and creditor may in general be said to establish an insurable interest, the amount of the insurance placed upon the life of the debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. *Wainwright v. Bland*, 1 M. & R. 481; *Miller v. Eagle Life Co.*, 16 N. Y. 268.

The case of *Cammack v. Lewis*, 15 Wall. 648, is exactly in point; the policy was taken out by Cammack, the creditor, upon the life of Lewis, his debtor, in the sum of \$3,000; \$2,000 for his own benefit, and \$1,000 for the benefit of Lewis. Lewis in fact only owed Cammack \$70, although he voluntarily and without consideration gave his obligation at the time for \$3,000. "If the transaction," says Mr. Justice MILLER, "as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him, deprives it of all pretense to be a *bona fide* effort to secure the debt, and the strength of

this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack, for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception, probably to impose on the insurance company." See, also, *Conn. Mut. Co. v. Lucks*, 108 U. S. 498.

In the case at bar the policy was \$2,000; the amount of the indebtedness was at the time undetermined, and, therefore, uncertain; it has since been ascertained to have been between \$500 and \$750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulation from interest, we could not say the transaction carries with it any inherent evidence of bad faith. The essential thing is as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for the purpose of speculation upon the hazard of a life in which the insured has no interest.

The case is materially different from *Gilbert v. Moose, Adm'rs*, 13 W. N. C. 439. The principles involved in that case are not drawn in question here.

We find no error in the decree of the court below, and it is, therefore, affirmed.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

PEPPER v. CITY OF PHILADELPHIA.*

October 4, 1886.

MUNICIPAL CLAIM — PAVING — RURAL PROPERTY — ESTOPPEL — VERDICT — MISTAKE — BILLS OF ASSESSMENT — CONTRACTOR — PROPERTY OWNER — DEFENSE.

A., who owned property in Philadelphia, fronting on Sixty-third street with other owners, signed a writing expressive of a desire to have the cart-way of the street in front of his property paved. After councils had commenced taking action, the property owners presented protests against any legislation authorizing the paving, on the ground that it was premature, inexpedient and unnecessary, and because they did not want the character of pavement it was proposed to put down. Later and after the legislation had been effected, the contract awarded, and the work of paving commenced, some of the owners warned the contractors that as protests had been presented, and as the roadway was private property, they would do the work at their own risk. After the paving had been completed the contractors endeavored to collect the cost of placing it in front of the property of A., by proceedings upon a municipal claim filed therefor. Upon the trial A. set up for the first time the defense that his property was rural and not subject to a *per foot* frontage assessment such as had been resorted to in order to establish the proportion due from it for the paving. *Held*, he was estopped from making the defense.

A contractor for paving a street, who receives from the municipality payment in the shape of bills or assessment against abutting properties, and who performs his work so defectively as to be worthless, has no right to recover in an action against the property owner, and the latter is not precluded from defending, because he is not a nominal party to the contract. If the work has been sub-

* See *Brown v. City of Philadelphia, etc., post*.

stantially done as contracted for answers the intended purpose, but in some minor particulars which do not materially affect its usefulness the contractor has failed, then the property owner may have deduction for such failure.

A mistake in the amount of a verdict may be corrected before the verdict is recorded and the jury discharged.

Error to the court of common pleas, No. 4, of Philadelphia county.

In April, 1874, one Wm. A. Frederick went to a number of the property owners along Sixty-third street in Philadelphia, among them Pepper, and asked them to sign an agreement whereby, when the street was paved, he would be selected as the paver. At that time the ordinance of councils gave the property owners the right of selecting the paver, and the kind of paving, and when it should be done. Pepper signed, the original of which the following is a copy: "We, the undersigned owners of property fronting on Sixty-third street, from Market street to Haverford avenue, do hereby covenant and agree to and with William A. Frederick to grade, curb and pave the said street within the points named. He, the said William A. Frederick, is to furnish all labor and material necessary thereto and therefor, and do the work in a satisfactory manner, and under the direction of the department of highways." A year later Frederick assigned the agreement to use plaintiffs. An ordinance was then framed and presented to councils. Some of the property owners learning of it went before the committee of councils and opposed the passage of the ordinance, upon the ground that the paving was not needed at that time, that rubble paving, such as it was proposed to put down, was a positive injury and could not benefit any one but the contractor, and would entail a heavy and needless expense upon them. They presented to councils themselves remonstrances signed by more than a majority of the owners, and those owning more than a majority of the feet front, but without effect. A contract was in course of time made with use plaintiffs. Before any work was done they were notified of the remonstrances to councils and warned not to proceed. They did proceed, and did the work the subsequent year. They filed claims and issued *scire facias* thereupon. In the trial of that against the property of Pepper, the verdict was for plaintiff.

Alex. Simpson, Jr., for plaintiff in error. The agreement being for personal services, there can be no estoppel, either as between the defendant and the city, or as between the defendant and the use plaintiffs, for it is *res inter alios acta*, and in such case there can then be no estoppel. *Eldred v. Hazlett*, 9 Casey, 316; *Bigelow Estoppel*, 442; *Railroad Co. v. Schuyler*, 38 Barb. (N. Y.) 534. As between the owners and Mr. Frederick the rights of the parties were fixed by the agreement. But use plaintiffs in this suit claim to give a greater effect to the agreement. For them it is to act as an estoppel upon defendant, in so far as to bar him of his defense; but as to their right of recovery they propose to base it upon the authority of the ordinance of councils, and claim summary rights and remedies given by the acts of assembly. There can be no estoppel unless both parties are equally bound. *Longwell v. Bentley*, 3 Grant, 177; *Schuhman v. Garratt*, 16 Cal. 100; *Lansing v. Montgomery*, 2 Johns (N. Y.) 382. If the truth be as averred in the replication that "by reason of said agreement the said

highway department did enter into a contract to pave as in said claim is set forth," then the highway department must have known that the property owners only agreed that William A. Frederick should do the work, under the direction of the department, and with that knowledge to have awarded the contract to the use plaintiffs, the department must have ignored the agreement. If they did so ignore it, they cannot now, for the purpose of estoppel, invoke its assistance, nor can the use plaintiffs. *Lansing v. Montgomery*, 2 Johns (N. Y.) 382; *Griffin v. Richardson*, 11 Iredell (N. C.), 439; *Worcester v. Green*, 2 Pick. (Mass.) 425; *Langer v. Filton*, 1 Rawle, 141. "Where a party claims to establish his right merely by estoppel, the instrument by which the estoppel is supported should be precise, clear and unequivocal, not depending upon doubtful inference." *Rich v. Hotchkiss*, 16 Conn. 409; *Lajoie v. Primm*, 3 Mo. 369; *Bolling v. The Mayor*, 3 Rand. (Va.) 563; Bigelow Estoppel, 441; *Wright's Appeal*, 3 Out. 425. The property-owners who are alleged to be estopped having protested strenuously before as well as after the ordinance was passed, before the contract was made and before the work was done, to councils and to the contractors, how can it be said that the plaintiffs were ignorant of the opposition of the owners? yet without that there could be no estoppel. Bigelow Estop. 437; *Patterson v. Lytle*, 11 Penn. St. 53; *Musser v. Oliver*, 21 id. 362; *Troxell v. Iron Co.*, 42 id. 513; *Ayres v. Watson*, 57 id. 360. The question raised here is, can the plaintiffs claim any benefit under the paper signed by the property-owners, never having been assigned to them with the knowledge or consent of defendant? If the agreement was a personal agreement, as the pleadings admit, then an assignment without the knowledge or consent of defendant is of no validity as against him. *Robson v. Drummond*, 4 B. & Ad. 303; *Stevens v. Benning*, 31 Eng. L. and Eq. 283; *Davenport v. Gentry*, 9 B. Monr. (Ky.) 427. Besides, if it were not, suit would have to be brought in Mr. Frederick's name, for there is no act of assembly authorizing an assignee to sue in his own name in cases like the present. See act 28th May, 1715, Purd. 161. Mr. Frederick's name does not appear in the record. It has been held that it is admissible to show a condition precedent to the signing a paper used in evidence by the other party, because it would be a fraud to permit the paper to be used without showing the condition upon which it was signed. *Hoopes v. Beale*, 9 Norr. 82; *Renshaw v. Gans*, 7 Barr, 117; *Rearick v. Swinshart*, 1 Jones, 233; *Lippincott v. Whiteman*, 2 Norr. 244.

David W. Sellers, for defendant in error.

TRUNKEY, J. In the city of Philadelphia the power to ordain the paving of the streets is vested in the councils. On December 23, 1874, the councils enacted an ordinance providing that persons desiring to have the streets through their property paved, may apply by petition, with a certificate of the district surveyor that the petitioners are a majority of the owners of property between the points named; and after the ordinance shall have been passed, it shall be the duty of the commissioner of highways to award a contract for the same to a practical paver or pavers regularly engaged in the business. The ordinance

providing for the paving of Sixty-third street between Market street and Haverford street was enacted April 3, 1875; and the contract was made on the sixth day of the next month.

Property-owners, including the plaintiff, signed a writing agreeing with William A. Frederick to grade, pave and curb said street, he to furnish the material and do the work under the direction of the department of highways. On April 27, 1874, the district surveyor certified that the signers were a majority of the owners of property between the points named. It cannot be pretended that there was a valid contract for paving the street between Frederick and the owners of property. Though the paper is not in the form of a petition, it is a clear expression of desire that the street should be paved—the parties knew that all the terms of a contract would be prescribed by the city, the contract made by the city, and the work supervised and accepted or rejected by the city authorities.

While the ordinance relative to paving the street was pending in the councils, some of the owners of property presented protests against its enactment on the ground that it was premature, inexpedient, unnecessary, needless expense to owners of property along the street, many of whom had built upon it, and they did not want rubble pavement. Some of the owners, September 4, 1875, warned the contractors that they would do the work at their own risk, "because a majority of the property-owners have protested against it, and because Blockley avenue is private property;" and again, May 20, 1876, they notified the contractors "that the whole bed of said street between Vine street and Haverford avenue is private property," and the work they were doing would be done at their risk and expense. In all their communications to the councils and contractors was no hint that the street was in a rural district. Frederick transferred by assignment, the paper he had received from the property-owners on January 13, 1875; the property-owners never retracted that paper. They never notified Frederick or his assignee that they would refuse payment of assessments because their property was rural.

It is not for mere silence that property-owners who signed the paper will not be heard now to say in defense that their lots fronting on the street are not urban. They were actors; they first moved for construction of the pavement; afterward when the councils began to act they protested giving reasons which failed to satisfy councils that action should be postponed; they ought to have said then that the lots were rural if they intended to rely on such objection. They did more than simply to protest they gave many reasons, and will not now be permitted to set up a thing which was not mentioned until after the work was done. They acted with knowledge of the law, that the cost of paving the streets should be assessed on the owners of abutting lots. The paper was silent as to the method by which they should be called upon to pay the amount properly chargeable to each for the paving, for the obvious reasons that the laws and ordinances operative in the city determined that matter. Under those enactments, applicable to urban property, were all their acts, protests and omissions to deny liability for frontage assessments.

As the paper in effect was no more than a request to provide for the pavement, conversation at and preceding the time of signing it, between the signers and Frederick, was properly excluded. It was not proposed to prove that then, or at any time prior to the completion of the work, any signer of the paper alleged non-liability for frontage assessment, for any cause other than that the street was private property, or that the property-owners had protested to councils against immediate paving.

The first sixteen assignments, and the nineteenth, twentieth and twenty-first assignments are not sustained.

Nor is the twenty-second assignment sustained. If for no other purpose, the ordinance of December 23, 1874, was pertinent to show the authority of the chief commissioner of highways to execute the contract for the city. But it was enacted more than three months before the councils provided for the paving of the street, and was evidence in connection with all the papers which were signed by the property-owners, and presented to the councils.

The contract, on its face, required completion of the work by the first day of December, 1875, and the time had been extended by the chief commissioner of highways. Therefore, the ordinance of December 3, 1875, was pertinent evidence. It showed a ratification of the contract for extension of time for performance of the work. In other respects it had no effect on Horter's contract.

Remark on the points raised in the last six assignments is unnecessary. It is well shown by the court below, that before the verdict is recorded and jury discharged, a mistake may be corrected. The record shows the jury had not been discharged before they corrected the mistake in the amount of the verdict, and when the true amount was rendered and recorded they were discharged. True, the sum first entered on the record ought to have been struck off, and the record may yet be amended by order of the court.

The remaining assignments are the seventeenth and eighteenth, which set forth the instructions that the plaintiff could recover the value of the work not done in substantial compliance with the ordinance of councils; and that the only defense that the owner or defendant may prove is that the property is rural, or that the work was not done at all or that it was of less value than the price charged.

As advised, the act of April 19, 1843, P. L. 242, which limits the defense to certain matters, does not apply in this case. It appears that the streets where the work was done is in West Philadelphia, a place not incorporated at the date of that act, and consequently not within its operation. *Craig v. City of Philadelphia*, 39 Penn. St. 269.

From the time the paper was given to Frederick it was contemplated by all parties that only the city could prescribe the terms and give the contract for paving, and that the property-owners should pay therefor in respective proportions to their frontage. The contractors covenanted to do the work in accordance with all the ordinances and resolutions relating to paving, and the city covenanted to pay therefor in assessment bills, except the intersections at cross streets, the city to pay for such intersections in money; said assessment bills to be taken without recourse to the city in the event of failure to collect any part or the

whole. The work was to be done under the direction and approval of the chief commissioner of highways. It was done by August 1, 1876, accepted, ever since possessed and enjoyed by the city, paid for according to the terms of the contract; and this action is to recover the tax on one of the property-owners for his share of the cost of the improvement. There is no evidence of fraud or collusion by contractor or city official. For eight years no defect was seen in the work, and none was discovered until the digging of holes in search for it.

Where a party has acted honestly, with intent to fulfill his contract, has performed it substantially, but has failed in some comparatively slight particulars, the other party cannot hold and enjoy the fruits of his labor without paying a fair compensation according to the contract, receiving credit for whatever loss or damage he suffered. *Preston v. Phinney*, 2 W. & S. 53. But a defective, negligent and worthless performance is the same as no performance at all. *Miller v. Phillips*, 31 Penn. St. 218. The doctrine seems to be this: "Where a thing is so far perfected as to answer the intended purpose, and it is taken possession of and turned to that purpose by the party for whom it was constructed, no mere imperfection or omission, which does not virtually affect its usefulness can be interposed to prevent a recovery, subject to a deduction for damages, consequent upon the imperfections complained of. Of course the indulgence is not to be so stretched as to cover fraud, gross negligence or obstinate and willful refusal to fulfill the whole engagement, or even a voluntary and causeless abandonment of it. *Danville Bridge Co. v. Pomroy & Colony*, 15 Penn. St. 157.

Municipal authorities, in the making of street improvements, authorized by law to be made at the expense of the owners of lands to be benefited thereby, are to a certain extent the agents of such owners. Contracts lawfully made at the discretion of the authorities are binding upon the land owners, though injudiciously made; but the owners are entitled to have such contracts performed substantially in all things according to their terms, and the authorities have no power to dispense with such performance to the gain of the contractor and the loss of the property-owners. If the authorities are about to accept and pay under a contract, for what in substantial and important respect has not been performed, the property-owners may have remedy to enjoin the wrongful payments. *Schumm v. Seymour*, 9 C. E. Green, 143. There it was held that the remedy is in equity. But in this State, where, by the laws and ordinances the contractor receives the assessment bills in payment from the city, and it turns out that his work was so defectively done as to be worthless, he has no just right to recover in an action against the property-owner, and the latter is not precluded from the defense because he is not a nominal party to the contract. If the work was substantially done, as contracted for, answers the intended purpose, but in some minor particulars, which do not materially affect its usefulness, the contractor failed, then the property-owner may have deduction for such failure. This is not the case of a municipality contracting for a public improvement, accepting it, and making payment therefor absolutely, and afterward itself collecting the assessments; and it is

unnecessary to consider whether, in that case, the property-owner could allege defective work as a matter of defense against the tax.

If it be true, as alleged by the defendant, that he cannot "be compelled to pay a fraction of a tax imposed on his property, because of a benefit specially conferred," then, if the work was substantially performed, he is entitled to no deduction for slight defects. He cannot complain that the instructions permitted such deduction. His sixteenth point, namely: "If the jury find that the pavement, as laid by the contractors, was not done in substantial compliance with the ordinances of councils, either as to depth of gravel, the quality of the gravel, or the size of the stone, their verdict should be for the defendant," ought to have been refused for the reason that evidence was wanting to warrant so finding. All he was entitled to, under the evidence, was a deduction from the contract price, if the jury found defects which lessened the value of the pavement. This, in case of such finding, they were explicitly instructed to make. The abstract proposition in answer to the sixteenth point, and the instruction as to the limit of defense against a municipal claim, were not in the least harmful to the defendant, for they limited recovery to the value of the work, and accorded with the instructions that if the jury were satisfied that the charge was greater than the value, they could allow only what the pavement was worth.

Judgment affirmed.

BROWN v. THE CITY OF PHILADELPHIA TO USE, ETC.*

October 4, 1886.

AGENCY—EXCEEDING AUTHORITY—MUNICIPAL CLAIM—PAVING—PETITION—PER FOOT FRONTAGE RULE—RURAL PROPERTY—ESTOPPEL.

If an agent exceeds his authority, and, as a result, a third person lays out his time and money, all of which the principal has knowledge of, yet keeps silent and does not promptly disavow the act of his agent, the principal is bound as having ratified the transaction.

A., an owner of real estate on Sixty-third street, Philadelphia, told B., his son, to sign for *macadamizing* the cart-way in front of his property; B. signed a paper in the nature of a petition for the *paving* of it, which paper was draughted in general terms and without specifying the character of paving. B. then told A. he had signed for *paving*. In course of time the cart-way mentioned was paved with rubble pavement. A. remained silent and suffered the work to go on; in proceedings to enforce a municipal paving claim, filed against the property of A. by the contractors who did the work, the defense was set up that the property being rural, the per foot frontage rule could not be resorted to as a means of measuring the liability of the abutting properties. *Held*, the action of B. in signing the petition had been ratified by the silence of A., and that having petitioned for the paving and remained silent he was estopped from raising the defense that the property was rural.

Error to the court of common pleas, No. 4, of Philadelphia county.

This was a *scire facias* upon a municipal claim. The following is from the charge of ARNOLD, J.:

"These two suits, as you have been informed, are suits brought for paving Sixty-third street, in West Philadelphia. The paving was done under an ordinance of councils, passed in the year

* See *ante*, page 738, *Pepper v. The City of Philadelphia to use, etc.*

1875, directing that that street be paved with rubble pavement, and directing the chief commissioner of highways to enter into a contract with a competent pavior to do the work. . . . In pursuance of that ordinance the contract was awarded to the use plaintiffs, that is, the contractors, Messrs. Horter, and under that contract they did the work, as has been testified before you, in the year 1876. The work was done under the supervision of the highway department. Under the ordinances which have been read to you, it has been shown that rubble pavement had been selected in West Philadelphia for general paving, and was also designated by the special ordinance in this case to be of this material. The work was done in pursuance of the contract and under the direction of the highway department. . . . The work appears to have been done in the year 1876, in pursuance of that contract. The assessment bills were thereafter made out and amongst them were bills made against both of the defendants, and they having refused to pay within the time fixed by law liens were filed, and these suits are now brought upon the liens for the purpose of recovering the amounts which the plaintiffs claimed to be due for the work.

"The defense is that the property is rural, that is, that Sixty-third street is in a rural locality, that the paving of the street is a public improvement, not a local improvement, but simply intended for the general welfare of the entire city, and which ought to be charged to the general taxation fund and paid out of the city treasury and not charged against the adjoining owners. Municipal assessments [that is the more proper term to use] or claims for paving streets are a species of taxation. Every property is liable in this city to be taxed once for paving in front of it, and once taxed for the paving it goes free afterward for all other expenses in the way of repaving. Keeping the streets in repair is a charge to the city generally, and after a man has once paid for having paving done, if the city repair the street, or if the city entirely repave it, she cannot charge it against the owner of the abutting property, but must charge it to the general fund. But every city lot is liable to be assessed once for paving done in front of it. This rule which authorizes the city to charge the assessment, or to assess the charge against the adjoining lot, does not, however, apply to rural or farm property, and therefore where the city projects an avenue through farm property which is not cut up into compact city lots, nor built upon as city lots, the property is not liable to be charged by the per foot front rule of assessment. City councils have power to enact that a street shall be paved. The power is vested in councils by law. They shall determine the time when it shall be paved; they have a right to determine what kind of a pavement, the material to be used, and they have a right to fix a uniform price to be paid by all the owners. These are powers vested in the city legislature or councils, and the property-owners may petition for paving or ask for another kind of pavement, but where the city authorities elect that a certain kind of pavement shall go down, all disputes as to the kind of pavement are at an end. . . . When councils say that a certain kind of pavement shall be put down, then the adjoining properties become liable, unless it is farm or rural property, and then it is not liable to be charged by the per front foot

rule of assessment, and the property-owner may prove that the property is rural and therefore not liable, or he may prove that the work was not done at all, or he may prove that the price charged for the paving is more than the value thereof. These are the only defenses to a municipal claim. Now, if this defendant set up as a defense and produced evidence that the property was rural or farm property, you might have some doubt upon that question to solve. However, that question is taken out of case by the pleadings of the parties. The city [the contractors] have for the sake of narrowing the issue down, admitted in the pleadings that the street is in a rural neighborhood, but they say the defendants are estopped from setting up that defense because they signed a petition for the paving of the street. If that answer is made out and proven to your satisfaction to be true, it is a legal answer to the objection that the street is rural. Pepper's signature to the petition of paving is admitted beyond any question whatever, and by all law and all justice he is estopped from setting up the defense that this street is a rural street, and that the paving was not a local benefit merely but a general one. A man cannot induce the city to have his street paved and have contractors take the contract and do the work, and all the time serve to himself the right to object to paying for the paving because the street is rural. Therefore, when Pepper signed that petition to have the street paved, he estopped himself from setting up the defense that this street was a rural one.

"In Brown's case the evidence shows you that the paper was signed by Brown's son for him. Brown testified that he told his son to sign for macadamizing; that the son signed the petition and informed his father that he had signed it. The petition was a general petition or agreement that the street should be paved, without saying whether it should be macadamized or paved with cobble, rubble or any thing else. . . . The paper which Brown's son signed for him did not say that the street was to be macadamized, it is not limited to any kind of pavement, but was a general request for paving without requiring a certain kind or character of pavement; but after the son signed the paper he told his father what he had done. A party who authorizes another to act for him, and the other does something more than he is authorized to do, when he finds out that his agent has exceeded his authority, is bound to disavow the unauthorized action the first moment it comes to his knowledge, otherwise he makes the act his own. If the principal keeps silent and sees a third person laying out his time and money and subjecting himself to a loss without disavowing the act of his agent, he is bound by the act of his agent. There is a time to speak and a time to keep silent, and the time for the defendant to disavow the act of his son was the very first time he heard of it. He must disavow the act promptly, otherwise he will be held to ratify the transaction. Therefore, if Brown was informed by his son that he had signed for the paving, and did not disavow when he heard of it, and made no objection on that score, he is held to the same responsibility as if he had authorized it. A subsequent ratification is equivalent in law to previous authority. If you shall believe that Brown was informed by his son, and he testifies that he was, that the son had signed the paper for paving, and did nothing to

disavow or recall the act, then he is equally bound with the other parties who signed that paper, and is estopped from setting up that the property is rural or farm property, and in that case Brown and Pepper are alike driven to the next defense set up by them, and that is whether the price charged for the paving is greater than the value thereof. . . .

"Pepper is estopped from setting up the claim that the property is rural. Brown is estopped, if his son told him he had signed the paper and he did not immediately disavow the act. On looking at the protest which was filed by the property-owners, I do not think you will find Brown's name upon it. Why it was not, I don't know, so we have no protest or writing served upon either the city or contractors, that the son had no authority to sign that paper. Therefore, if he did not disavow, he is just as much bound as if his son had authority to sign. . . . Gentlemen, in order to avoid all question, I will further say to you, that there is an act of assembly authorizing city councils, upon petition, to order that streets in Frankford, Germantown and West Philadelphia be macadamized; but when, as in this case, they order a street to be paved with rubble, it must be rubble. If parties petition councils to have a street macadamized, and councils so order, that would be all right and proper. But this special ordinance of 1875, provided that that street should be paved with rubble, and therefore, the act of assembly is entirely out of the case, and we come back to the place whence we started.

"Brown said, that he told his son to sign a paper for macadamizing, and he said further, that his son told him that he had signed a paper for paving—I wrote it down when Mr. Brown was testifying—"I told my son if any petition was presented for macadamizing the street to sign it, and he told me he signed it." He there admits that he knew the son signed the paper. He never complained that his son had signed it, and he is as much bound, as if he told the son to sign for him; and having never complained, he is just as much bound by his silence, as if he had given instructions to his son to sign for him."

Alex. Simpson, Jr., for plaintiff in error. He who accepts the act of an agent takes upon himself the risk of the agent's authority. If the agent had no authority, the loss will not fall upon the principal. *Strohecker v. Farmers' Bank*, 6 Watts, 96. A principal is not bound to disavow the act of the agent, if the disavowal will be of benefit to no one. It only becomes his duty to disavow if having full knowledge of the act of his agent, and knowing that he would not be bound without such ratification, he sees others acting in reliance upon the fact that the agent had authority. *Story Agency*, § 239; *R. R. Co. v. Gazzam*, 32 Penn. St. 340; *Schrack v. McKnight*, 84 id. 26; *Oil Co. v. R. R. Co.*, 12 Phila. 374; *Johann v. Inman*, 17 Leg. Int. 190.

David W. Sellers, for defendant in error.

TRUNKY, J. This case was tried in the court below and argued here, with *Pepper v. The City of Philadelphia*, for use of Horter. The only difference requiring note is that Brown's son signed the writing with Frederick, for his father. It is not pretended that the signing of the name of William Brown was a forgery. As to extent of author-

ity, and ratification of the signing by the son, nothing need be said in support of the rulings of the learned judge of the common pleas. For the reasons stated in *Pepper v. The City*.

Judgment affirmed.

NEW JERSEY COURT OF CHANCERY.

DAY v. GARDNER.

December, 1886.

A consideration, sufficient to support a contract, may be defined to be, either a benefit accruing to the promissor, or a loss or disadvantage sustained by the promisee.

A promise by a creditor to forgive or relinquish part of his debt, on the payment of the other part in money, is without consideration and void.

But if a creditor agrees to relinquish a part of his debt, on receiving a new or an additional security for the balance, or if he agrees to receive a chattel, of less value than his debt, in satisfaction of his debt, his promise will have the support of a good consideration, and will be held to be valid.

The payment of taxes which are a lien on mortgaged premises, by a mortgagor, may be a good consideration for a promise by a mortgagee holding a mortgage standing subsequent to the taxes, to relinquish part of his mortgage debt.

On final hearing on bill and answer and proofs taken before a master.

J. M. Bissell, for complainant. *J. H. Potts*, for defendant.

VAN FLEET, V. C. The bill in this case is filed to foreclose a mortgage made by the defendant to one Louisa L. Rollins, on the 23d of June, 1873, to secure the payment of \$150. The complainant obtained title to the mortgage, by assignment, on the 11th of December, 1883. The defense is, that the debt which the mortgage secures, has been extinguished or relinquished. The following are the material facts: In January, 1880, Louisa D. Rollins held two mortgages against the defendant; the one in suit, and a prior one executed to her by the defendant, on the same premises, bearing date December 2, 1872, and given to secure the payment of \$750; both mortgages bore interest at the rate of seven per cent per annum; the mortgaged premises are situate in Jersey City, and were, in January, 1880, subject in addition to the two mortgages, to five years' back taxes. The defendant swears, that at the date last mentioned, Miss Rollins made an agreement with her, by which it was stipulated that if she paid the taxes in arrear, the mortgage debt should be reduced from \$900 to \$500, and the rate of interest from seven to six per cent per annum. The defendant performed her part of the contract. She paid the taxes in arrear, and after January, 1880, Miss Rollins accepted semi-annual payments of interest, at the rate of six per cent on \$500, up to October, 1881. Just subsequent to the date last mentioned, the defendant paid \$100 of the principal of the debt, and after that, and up to the time the mortgages were assigned to the complainant, Miss Rollins accepted semi-annual payment of interest on \$400. The complainants hold both mortgages. They were both assigned to him at the same time and by a single instrument.

The proofs make it entirely clear that the contract testified to by the defendant was made, and that both parties abided by it and acted on it for nearly four years. The question in dispute is whether the contract has the support of a sufficient consideration to give it legal efficacy?

The case, it will be observed, stands on an entirely different foundation from that on which the right to relief, in *Irwin v. Johnson*, 9 Stew. 347, stood. There, as well as in the preceding cases, it was admitted that no contract existed, at least none having the support of a valuable consideration, but the right to relief or the ground of defense in each consisted simply in the fact that the creditor had made a declaration that he forgave, or intended to forgive, his debt, while here a valid contract, founded on a good consideration, has been shown. Nor is the case at all akin to those in which a debtor, having paid part of his debt under a promise from his creditor that he would forgive the balance, has, nevertheless, been held liable for the balance. It is agreed on all hands that such promises are void for want of consideration. The debtor in paying simply does what he ought to do, and the creditor in receiving gets nothing but what he is justly entitled to. The one suffers no detriment, and the other receives no benefit, and, therefore, there is nothing in the transaction which the law can recognize as a consideration for the creditor's promise.

Now, while it is true that the payment of a part of a debt in money will not operate as a satisfaction of the whole debt, even when the creditor has agreed that a payment of part shall have that effect, yet the rule seems to be entirely different where the debtor gives something else than money in payment, with the understanding that such thing shall be accepted in full satisfaction. In *Coke on Littleton* it is said: "In the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing, in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or other thing were not of the twentieth part of the value of the sum of money, because the other had accepted it in full satisfaction." 2 Co. Litt., Tit. Est. on Con. 53, 344, 212a. And so, too, "if the obligor pay a lesser sum, either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." Id. 212b. And the reason why the acceptance of a horse, or of a less sum of money than the whole debt, before the whole is due, is held to be a good discharge of the debt in cases where the creditor has agreed that such should be its effect, is that it must be assumed that the creditor took the horse rather than the money, because he thought the horse would be more beneficial to him than the money, and so, too, that he accepted part of his debt before the whole was due, because he thought part then would be more beneficial to him than the whole when the whole fell due. *Brooks v. White*, 2 Metc. 283.

A consideration sufficient to support a contract may be defined to be either a benefit accruing to the promissor, or a loss or disadvantage sustained by the promisee. A consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other, is a valuable consideration. *Conover v. Stillwell*, 5 Vr. 54.

The doctrine is settled that a promise by a creditor to forgive or relinquish a part of his debt, provided a new or additional security is given for the balance is valid. As, for example, if a creditor accept

the note of his debtor, indorsed by a third person for a less sum than his debt, with the understanding that the original debt shall thereby be discharged, the contract will be held to be valid and the original debt discharged. And so, too, if a creditor accept the note of a third person for a less sum than his whole debt, under a promise to the debtor to forgive or relinquish the balance, his promise will bind him, and his original debt will be treated as satisfied. *Boyd v. Hitchcock*, 20 Johns. 76; *Le Page v. McCrea*, 1 Wend. 164; *Booth v. Smith*, 3 id. 66; *Kellogg v. Richards*, 14 id. 116; *Perkins v. Lockwood*, 100 Mass. 250.

The consideration in such cases, it will be observed, is duplicate in its character, in other words, it covers both branches of the definition of consideration — there is both inconvenience or loss to the debtor and benefit to the creditor. The debtor is put to the inconvenience of becoming a surety, or suffers the loss of a note which he holds against his debtors, and the creditor gets the benefit of the promise of a third person.

Nothing remains to be done except to apply the principle just stated to the case in hand. The taxes which the defendant paid in pursuance of her contract, constituted liens against the mortgaged premises, and, although levied subsequent to the registration of the mortgages now held by the complainant, were prior in rank. They are made so by express provision of the charter of Jersey city. P. L. 1871, p. 1155, § 151; *Hardenburgh v. Converse*, 4 Stew. 500; *Hand v. Startup*, 11 id. 115. The payment of the taxes, therefore, removed liens standing prior to the mortgages, and this gave the mortgagee an additional or better security. Her debt was made more secure. A substantial benefit accrued to her from the payment of the taxes. But the complainant says, the defendant, in paying the taxes, did nothing more than her duty — she was bound, as every other citizen is, to contribute her fair share toward the support of the government which protects her and her property, and so, in paying the taxes, she simply did that which her duty, as a good citizen, required her to do, and consequently suffered no loss, injury or disadvantage. But this argument assumes a fact which does not exist, namely, that it was the duty of the defendant to pay the taxes in question. They were not assessed against her, nor was she under the least personal liability for them. They were assessed against the mortgaged premises, in the name of her husband as owner. He died in 1878, but whether he or she was in fact the owner, does not appear. The mortgaged premises were liable for the taxes but the defendant was not. But if a personal liability had existed, the duty which such liability would have imposed, would have been a duty to the government which was entitled to the taxes, and not to the mortgagee, and I am not prepared to say, that in such a condition of affairs, the collateral benefit resulting to a mortgagee from the payment of taxes which were entitled to priority in payment over his mortgage, would not constitute a perfectly valid consideration for such a contract as that on which the defense in this case rests.

In a case of this kind, any collateral benefit received by the creditor, which is entitled to be regarded as a technical legal consideration, will

be held to be sufficient to support the contract. *Booth v. White*, 2 Metc. 283. In my judgment, the contract on which the defense rests, has the support of a valuable consideration.

The parties do not seem to have made any agreement as to the particular method in which the mortgage debt should be reduced—whether the whole of \$400 which was to be relinquished, was to be deducted from the \$750 mortgage, or the \$150 mortgage was to be considered satisfied and the other \$250 of the \$400, deducted from the \$750 mortgage—but they simply agreed that the debt should be reduced from \$900 to \$500. This omission, however, creates no difficulty. The fact that an agreement was made is clear. It is also entirely plain that one of the most material provisions of the agreement was, that the debt should be reduced from \$900 to \$500. There is no difficulty in giving effect to this part of the agreement. The proper and reasonable method to carry it into effect, is, to consider the \$150 mortgage extinguished and \$250 of the \$750 mortgage satisfied. This course gives the defendant the full benefit of her contract and preserves to the complainant his first and strongest security.

The complainant stands before the court in the same position exactly that his assignor would have stood if she had brought this suit. He took the mortgage in suit subject to all the defenses which the defendant could have made against it in the hands of his assignor. *Woodruff v. Depue*, 1 McCar. 168.

MANDEVILLE v. HARMAN.

Contracts in restraint of trade are invalid; and this is so even when the restraint imposed is partial, unless the restraint be reasonable.

And the test to be applied, in determining whether a restraint is reasonable or not, is to consider whether the restraint is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public.

The question whether a restraint which is to endure during the life of the promisor or covenantor, is reasonable or not, is an undecided question in this State, and such a restraint is not, therefore, enforceable by injunction.

A complainant is not entitled to a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled.

On application for an injunction, heard on bill and affidavit and answer and affidavit, and order to show cause.

Joseph Coult, for complainant. *John R. Emery*, for defendant.

VAN FLEET, V. C. This is an application for an injunction to restrain the defendant from violating his covenant. The litigants are physicians. The bill says that the complainant, by many years practice and diligent attention to business, has succeeded in acquiring a large and profitable practice, and that in the early part of 1885 his practice became so large as to render it necessary for him to employ an assistant, and that the defendant became his assistant under a written contract, executed under seal, on the 22d day of April, 1885. By the contract the defendant bound himself to devote his time and attention to the business of the complainant, and to give thereto all his skill and ability, for the period of three months, at a compensation of \$125 and

the one-fourth of such sum as the complainant's income from his practice for the three months that the defendant was to serve him, should exceed his average income for the months of July, August and September in the three preceding years. The contract gave the complainant the option, on the expiration of the first three months, to extend the defendant's term of service, at the same rate of compensation, to the 22d of April, 1886.

The complainant exercised this option, and the defendant continued to serve under the agreement until the 22d of April, 1886. On that day a further written agreement was made, and indorsed on the original agreement, by which the defendant's term of service was extended until October 1, 1886, and his compensation was raised to \$300, and it was also agreed that he should receive the fees for examining applicants for insurance in a certain life insurance company, provided they did not exceed \$50. By the last clause of the original agreement, the defendant made the following covenant: "In consideration of this contract made with him by the said Mandeville, the said Harman hereby covenants and agrees not to engage in the practice of medicine or surgery in the city of Newark at any time hereafter." The defendant has recently, and since the 1st of October, 1886, rented an office in the city of Newark and put out a sign as a physician. By his answer he admits that he intends to establish himself in practice there. The complainant asks that an injunction issue restraining him from doing so. The defendant resists the application on two grounds: first, that the covenant is unreasonable, and, therefore, void; and second, that it is unenforceable in equity, because it is not supported by an adequate consideration.

The covenant under consideration is a contract in restraint of trade. Such is the designation universally applied to such engagements. And no principle of law is more generally recognized than that a contract which precludes a person from the right to employ his talents, his industry, or his capital, in any useful undertaking, is void, whether the restraint be general or partial. Mr. Justice BRONSON says: "The law starts out with the presumption that a contract in restraint of trade is void, and it is only by showing that the contract is good that this presumption will be rebutted. The rule is, not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackle upon the one party which is not beneficial to the other." *Ross v. Ladbeer*, 21 Wend. 168. The authorities are uniform that such contracts are valid when the restraint they impose is reasonable, and the test to be applied in determining whether the restraint is reasonable or not, prescribed by Chief Justice TINDAL in *Horner v. Graves*, 7 Bing. 733, and uniformly adopted in subsequent cases, is this: "To consider whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy, as

being injurious to the interests of the public." The rule, as thus stated, is the law of this State. Chief Justice BEASLEY, in pronouncing the judgment of the court of errors and appeals in *Brewer v. Marshall*, 4 C. E. G. 547, said: "And so far has this principle — that contracts in restraint of trade are void — been carried, that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly held that such agreement will be void, unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is necessary for the protection of the other." This is the rule by which the validity of the covenant, on which the complainant relies, must be tried.

The fault imputed to the covenant is, that the restriction which it imposes is to endure for an unreasonable period of time — for a much longer period than will be necessary for the protection of the complainant. It interdicts the defendant, it will be observed, from practicing medicine or surgery, at any time hereafter. The restraint covers the whole period of the defendant's life, and if an injunction is awarded, enforcing the covenant according to the court the defendant can never, at any time hereafter, practice his profession in the city of Newark, though the complainant may the next year, or even the next month, after the injunction issues lose his life or his reason, or remove to another field of practice.

Under such circumstances, the injunction would give no protection to the complainant — he would need none, and the only purpose the injunction could serve would be to causelessly oppress the defendant. The court of king's bench in *Hitchcock v. Cohen*, 6 Ad. & El. 438, held a similar contract void. The defendant there had entered the service of the plaintiff, who was a druggist carrying on his business in the town of Taunton, as the plaintiff's assistant, under a written contract, whereby he agreed, in consideration of the salary to be paid to him by the plaintiff, that he would not, at any time after leaving the plaintiff's service, engage, either directly or indirectly, in the business of a chemist and druggist, within the town of Taunton. After leaving the plaintiff's service, the defendant violated his contract; the plaintiff sued him and had a recovery. The court, in pronouncing judgment on a motion in arrest of judgment, by Lord DENMAN, Ch. J., said: "The agreement as to time is indefinite; it is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, not even to the life of the plaintiff; but it attaches to the defendant as long as he lives, although the defendant may have left Taunton, or parted with his business or be dead. . . In the absence of any authority establishing the validity of an agreement thus indefinite in point of time, and trying the reasonableness of it by the test given in *Horner v. Graves*, we think that the restraint is larger than the necessary protection of the party in favor of whom it is given requires, and that it is, therefore, unreasonable and oppressive." Judgment was given for the defendant.

The case was then taken by the court of error to the exchequer chamber, and there the judgment of the king's bench was reversed. The reversal was put distinctly on the ground that a restriction, so

extensive in point of time, was necessary for the protection of the promisee or covenantor in the enjoyment of the good will of his trade, and should, therefore, be held to be reasonable. Chief Justice TINDAL, in delivering the opinion of the court, said: "The good will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade, in the same town, in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative." 6 Ad. & El. 453. This doctrine has been adhered to in subsequent cases, and is now the established law of Great Britain. *Pemberton v. Vaughn*, 10 C. B. 287; *Elves v. Crafts*, id. 241; *Attkyns v. Kinnier*, 4 Exch. (W. H. & G.) 782.

The legality of restrictions of this kind is put, it will be observed, exclusively on the ground that they must be upheld, as valid, to prevent the destruction of a property right or interest, called the good will of a trade or business. This right or interest, in this country, is without a well defined legal character. It would seem that it is scarcely possible for it to exist, even in England where it has received repeated judicial recognition, except in connection with a store or shop, or some other permanent place of business, for Lord ELDON defined it, as nothing more than the probability that the old customers will resort to the old place—*Cruthnell v. Lye*, 17 Ves. 346—and Lord CHELMSFORD has said concerning it, that when a trade is established in a particular place, the good will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to help the trade connected with the place where it has been carried on. *Austen v. Boys*, 2 De G. & J. 626. Its existence, as property, in this country has received more decided recognition, in cases involving the disposition and distribution of partnership assets, than in any other class of cases, but even in such cases, it can only exist, says Mr. Justice STORY, where the partnership conducts a commercial business or trade, and that it does not exist where a professional business is carried on by copartners, for in such cases the amount of business done by each member of the firm depends almost entirely in the confidence reposed in him personally as a professional man. Story Part., § 99. Sir John LEACH, V. C., in *Farr v. Pearce*, 3 Madd. 73, held, that on the death of one of two surgeons, who were conducting business as copartners, the survivor was not obliged, in the absence of a contract requiring him to do so, to give up the business and sell the practice, but that he had the right to continue the practice and take all the emoluments arising therefrom.

Professional skill, experience and reputation are things which can not be bought or sold. They constitute part of the individuality of

the particular person and die with him. There can be no doubt, I think, that if the complainant was the most distinguished physician of the city of Newark, and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month, or next year, it would be impossible for his personal representative to sell his good will or practice, as a thing of property, distinct from the office which he had occupied prior to his death, for any price; and, I think, it is equally obvious, that if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there for the next occupant of the office.

The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value. And if the complainant should make sale of his practice in his life-time, it is manifest, all the purchaser could possibly get would be immunity from competition with him, and perhaps his implied approval that the purchaser was fit to be his successor, but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had.

These considerations make it apparent, I think, that the reason which induced the court of exchequer chamber to hold a like restraint valid in *Hitchcock v. Cohen*, does not exist in this case. There, a right or interest existed, which, according to the law of Great Britain, would, on the death of its possessor, pass to his personal representative. No such right or interest exists here; at least, its existence is, as yet, unrecognized in this State by law. No court of law of this State has, as yet, decided that a covenant between professional gentlemen, so extensive in duration as the one under consideration, is valid. There is strong reason to doubt its validity. It is one of the natural rights of every citizen of this State to use his skill and labor in any useful employment, not only to get food, raiment and shelter, but to acquire property, and I think it may be regarded as very certain that the courts will never deprive any one of this right, or even abridge it, except in obedience to the sternest demands of justice. Chief Justice BRASLEY, in speaking of the covenant on trial in *Brewer v. Marshall*, *supra*, said that the restraint which it imposed was general, both as to time, place and person, and it therefore transcended by far the limits of utility to the covenantee, and must, for that reason, be declared void. And Chief Justice WOODWARD, in *Keeler v. Taylor*, 53 Penn. St. 469, declared that such contracts, if they were not limited to a reasonable time, as well as confined to reasonable space, were void at law. He said, also, that if the terms they imposed were at all hard, equity would not enforce them. Vice-Chancellor SHADWELL had previously given expression to the same view in *Kimberly v. Jennings*, 6 Sim. 352. Besides, no one can fail to see that if this covenant is valid and enforceable in equity, then it is competent for every merchant and trader, when he employs a clerk or shop girl, to require them, although the

compensation he agrees to pay is no greater than that which is customarily paid for such service, to enter into a covenant that on quitting his service they will not, at any time afterward, accept like employment from any other merchant or trader in the same town or city, and that if such covenants are made and are subsequently broken, it will be the duty of this court to enforce them, though the consequence may be that a citizen will thereby be deprived of his only means of supporting himself and his family. It may well be doubted, I think, whether legal rules, producing such consequences, will ever be established merely by force of judicial action.

The conspicuous defect of the complainant's case is, that the legal right on which he founds his claim to an injunction is not clear. No court of this State has ever declared, that a covenant, like that on which the complainant rests his claim is valid; on the contrary, it appears that the general legal presumption is against the validity of such covenants in this posture of affairs; the duty of the court is plain, for, in the language of Chief Justice BEASLEY, no rule of equity is better settled than the doctrine, that the complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 2 Stew. 304.

My judgment being for the defendant on the first ground taken by him, it is not necessary to express an opinion on the second.

An injunction must be denied.

TROTTER v. HECKSCHER AND LEHIGH ZINC AND IRON CO., LIMITED.

T. held a lease of a mine for a term of thirty years; he agreed with H. and his assigns to furnish ore therefrom, to him or them in certain quantities monthly, and in case of his *failure* so to do, he or they might enter and secure the ore, charging T. with all costs, until T.'s *inability or failure* should be satisfactorily removed. T. failed to deliver ore; H. and his assigns threatened to enter; T. filed a bill to enjoin them, and for an account; the court let H. and his assigns into possession; now T. files supplemental bill, and asks to be restored to possession, alleging that he can now furnish ore under the contract; he also asks for an account for waste, and for a manager; defendants insist that T. forfeited his right to re-enter by his misconduct and bad faith; also insists that this court has not jurisdiction; *held*, that T. is entitled to the possession, no bad faith appearing; *held*, also, that he is not entitled to an account for waste, nor to a manager; and *held*, that this court has jurisdiction.

C. & V. Wayne Parker, for complainant. *C. D. Thompson, H. C. Pitney* and *George Northrop*, for defendants.

BIRD, V. C. The question now presented for consideration arises upon a bill supplemental to one filed in May, 1882. That bill was filed, amongst other things, to restrain the defendants from taking possession of a certain mine named in the pleadings. On appeal, the court of last resort decided that the defendants were entitled to possession of the mine. The right to such possession, and the ground upon which it was given was a clause in a contract between the parties to the effect that, if Trotter should *fail* for thirty days at any time during the continuance of said contract, to deliver ore from said mine,

according to the quantity agreed upon, the said Heckscher might, at his option, after thirty days' notice, take possession of the mine and all machinery, and should have the uninterrupted right of entering upon the said premises and taking therefrom the amount of ore which Trotter agreed to deliver, charging Trotter with the cost of mining and delivering. The decree of the court of errors, besides providing that the defendants were entitled to possession of said mine, declared that their decree should be "without prejudice to an inquiry after the said Lehigh Zinc and Iron Company, limited, should have taken such possession into any change of the right of possession from matters arising after the bill was filed." May 6, 1886, the defendants took possession of the mine, as they had a right to, under said decree. The complainant immediately demanded possession to be redelivered to him.

This claim for the present right of possession of the mine by Trotter arises, not only under said decree, but also under the contract between the parties which, among other things, provides, in addition to the provision that the defendants may take possession in case Trotter shall fail to deliver ore, and that "the said Charles W. Trotter, for himself, his heirs, executors, administrators and assigns, guarantees that the said Charles A. Heckscher, his associates, executors, administrators and assigns, shall have peaceable and uninterrupted possession of said mine, vein, lode or bed of Franklinite ore until the inability or failure of the said Charles W. Trotter to supply said ore as agreed upon shall be satisfactorily removed."

The supplemental bill alleges that said inability of Trotter has been removed, and that he is now able to supply said ore according to the stipulations of his contract. It also presents a claim against the defendants for waste committed by them in the management of said mine since they have had the possession.

The answer denies that the defendants are entitled to the possession of the mine only so long as the complainant may, or might, be unable to fulfil his contract; or that defendants are under any obligation to return and give up possession to the complainant as soon as the complainant's so-called inability or failure to supply said ore, as agreed upon, shall be removed. As a question of fact, and independent of every other consideration, the defendants admit that the inability of Trotter to furnish the ores has been removed; and further say: "That the complainant has lost his right of possession and working said mine under said contract, not by reason of any actual physical inability on the part of the complainant to furnish the quantity and quality of ore required by the contract, but from a willful and deliberate failure and refusal to deliver any ore at a time when there was no physical disability whatever existing to prevent it;" and insists that the decree of the court awarding the possession to the defendants was founded upon such deliberate refusal, and not upon mere inability. The charge of waste is denied, and, on the contrary, it is insisted that the method of mining has been materially improved, and the expenses thereof greatly reduced. Besides the claim for possession, and the charge of waste, the complainant asks for the appointment of a manager.

First, is the complainant entitled to the possession of the mine? or

has he forfeited all right thereto by some inequitable or unconscionable act? Trotter ceased to deliver ore in May, 1882, not because he had not the means, or was in any sense physically unable, but because the defendants refused to pay him over \$30,000 which he insisted was then due upon the contract, for ores already delivered. The original bill, besides asking for an injunction against the defendants, prayed for an accounting. There was an account taken, but instead of Trotter recovering over \$30,000 there was found to be due to him only \$5,793.71 at the time he refused to deliver ore. Was it inequitable for him to refuse to deliver ore under the contract so long as defendants refused to pay under the contract? There was no offer to pay the \$5,793.71, found to be due by the court, until after the decree.

In determining whether or not Trotter has forfeited his right to manage the mine himself, under the contract, a few of the principal facts must be kept before the mind. Trotter was a resident of New York; he was the owner of a lease of this mine, embracing a term of thirty years. He was under obligations to his lessors and accountable to them for the profits of the mine, by way of rental. It was most natural for him to insist upon just compensation according to the contract; presumably that had been provided for, and equitably it might be insisted upon.

The defendants resided in Pennsylvania; they were without the jurisdiction of the State of New York, where Trotter resided, and of the State of New Jersey, the place where the mine is located, and where all the mining operations were carried on by Trotter. The consideration money was to be paid on the fifteenth day of each month for all the ores delivered during the month immediately preceding; so that the refusal to pay, on the part of the defendants, did not arise from any surprise, for by the contract they had ample time therefor. Their refusal to pay was as deliberate as the refusal of Trotter to deliver ore. While at first the defendants only made the assays upon the basis of which the payments were made, after a short time the complainant, becoming dissatisfied with the results of defendants' work, began to take samples and to make assays; the result of which tended to show that the ore was vastly richer than the assays of the defendants proved it to be. The difference in value of a given quantity then unpaid for was as the difference between \$5,000 and \$30,000.

This resulted in the disagreement respecting the amount due. Trotter insisted that the defendants made erroneous assays. She claimed, as stated, that there were over \$30,000 due him, which the defendants absolutely refused to acknowledge. The one refused to pay and the other to deliver.

There was no inability upon the part of Trotter either to produce or to deliver the ore. The contract provides that if Trotter shall *fail*, then Heckscher may take possession. In the same paragraph, but in a different sentence, Trotter guarantees that Heckscher shall have peaceable and uninterrupted possession until the *inability* or *failure* of Trotter to supply ore shall be satisfactorily removed. It will be perceived that Trotter's failure to deliver ore arose not from inability but from a mere naked refusal. Did this work a forfeiture of Trotter's right to

conduct these mining operations? In other words should a court of equity say that it was his duty to deliver ores according to the contract, notwithstanding the defendants refused to pay according thereto, and that he must rely upon his action at law for the amount due, or for damages for any breach? I think the general rule at law goes to this length. See *Blackburn v. Reilly*, 18 Vr. 290, in which case the court of errors and appeals declares that "in contracts for sales of goods, to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarily discharge the other party from his obligation, unless the conduct of the party in the fault be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms." A forfeiture often results in case of a breach of contract, from the enforcement of the strict rules of law. There may be forfeitures in equity, or what is equivalent thereto, in many cases a party may be estopped by his conduct from setting up a claim or a right which otherwise would be regarded as highly equitable.

I do not think that either a forfeiture or an estoppel has arisen. It seems to me that Trotter has not been guilty of any breach either at law or in equity. He failed to deliver ore, and the contract provided for such failure. Nothing whatever is said or intimated, in the first provision of the paragraph referred to about causes for such failure. Being under only such obligations, Trotter said to the defendants, in effect, I am ready and willing to perform this contract if you are. It is true, Trotter demanded more than was due, but it is equally true that the defendants neither paid nor tendered the amount that was due; so that the responsibility for the first refusal did not rest entirely with Trotter. Trotter did not abandon the contract; nor is there any evidence of any purpose on his part to rid himself of its obligations except by honestly discharging them. On the contrary, I find that he immediately filed the original bill in this cause and sought the aid of this court in his endeavors to comply with his legal obligations, submitting himself to the directions of the court in that behalf. His bill shows that there were, indeed, serious disagreements between the contracting parties, and this will more satisfactorily appear by an examination of the opinion of the court of errors and appeals, *supra*. The answer and cross-bill show that the differences between the parties had become so many and so aggravated by repeated alterations that a mutual settlement seemed impossible. Amongst other things, the complainant asked for the money due to him on his contract; the defendants asked, amongst other things, for the possession of the mine; the court awarded Trotter over \$5,000, but gave the possession of the mine to the defendants.

But supposing Trotter to have been guilty of a breach, it by no means follows that because the court gave him the consideration for his ore, and the defendants possession that it intended to apply the doctrine of forfeiture; nor did it declare that either party was estopped.

It is my judgment that when a contract expressly provides, that in case one party fails to perform such contract the other party may perform it for him and charge him with the cost, also provides that he

may continue such performance until the failure or inability of the other contracting party shall be satisfactorily removed, such failure does not amount to a forfeiture, nor work an estoppel, unless bad faith be clearly shown.

There was no intention when the contract was entered into that Trotter's failure to mine and deliver ores should terminate his right to mine; indeed, the contrary is to be inferred most plainly from the contract. This view of the case seems to me conclusively against the contention of the defendants. Beyond doubt, the defendants understood this contract as the court now does; for what is now urged with the greatest amount of learning and elaboration was not heard of until the filing of the answer to this supplemental bill; although the original answer and cross-bill had been filed four years before.

Secondly. As to the claim for waste, is there any substantial merit in it. I think not. When all the facts are considered, I cannot conclude that Trotter has been at all injured, in the sense of injury arising from a breach of contract. Trotter says that he has suffered loss in that. Defendants mined and shipped ore, although too far below in value that contemplated by the contract, thereby greatly diminishing his receipts; since he is entitled to \$3.75 per ton for all ores yielding twenty-six per cent of the oxide of zinc, and fifty cents for every additional per cent or fractional part thereof, above twenty-six.

The testimony shows that such ore as the complainant condemns, was shipped by the defendants. And I think that the contract does not, in any sense, contemplate that the traffic between the parties shall be carried on in such ores. The contract expressly provides that it shall be at the option of defendants to accept of ore assaying less than twenty-six per cent. Hence to deliberately take some ore very rich, say containing thirty-five per cent of zinc, and a like quantity of material containing only twenty per cent or less, in order by mixing to bring down the price of the good ore from \$8.75 to \$3.75, would be a palpable violation of the plain spirit and meaning of the contract, and a very gross fraud on the complainant. But nevertheless, the contract itself makes it very clear that the parties considered the possibility of Trotter shipping ores containing less than twenty-six per cent of zinc; and, certainly, if he might perchance, do so, it is not unlikely the defendants might do likewise. Therefore, unless it appears that the defendants intended to violate the spirit and meaning of the contract, either by direct proof or a course of practice in mining leading to that end, they cannot be charged with waste. Whilst there has been some such ore shipped by the defendants since they have had possession, neither of the conditions, which I think requisite to hold them, have been established.

Again, it is claimed that great waste has been committed in the general management of the mine by the defendants; that is, in abandoning one or more shafts which had been sunk and used by Trotter; in sinking one of them several feet deeper than it was, or then was, necessary for proper development, and then allowing it to fill with water; in weakening pillars necessary for the support of overhanging walls; in not making necessary developments to insure successful min-

ing; and in robbing stops of rich ore which had been reserved for unexpected emergencies.

The affidavits submitted on either side cannot be read without observing that the method pursued by the defendant is in many particulars quite different from the one pursued by Trotter. Which method is the better is earnestly disputed. Experts of the highest character have been sworn on both sides. I find no reason whatever to question either their ability or their integrity, or that each one had a full opportunity to know all that was necessary of this mine to speak intelligently. There is no decided preponderance of testimony on either side. I certainly cannot make up my mind that such preponderance is with the complainant, on whom rests the burden. Like so many of the affairs of the business world, the better way to manage this mine seems to be open to dispute; and, as is often the case, in other pursuits, different methods produce equally favorable results. I think the charge of waste has not been sustained.

The complainant asks for the appointment of a manager with power to superintend and control all these mining operations under the directions of the court. I am not disposed to look upon this prayer with favor. Above all, it seems to me that in the attitude which the decree already foreshadowed will leave the complainant, he will be in no position to insist on this prayer. Indeed, I think he ought not to ask it. It strikes me with no little force that it is a confession of unfortunate weakness and of inability to carry out the contract, on his part, which he has made. Why should he come in and ask the interference of this court, from day to day, in these mining operations under his contract? He has contracted to do the work, and the contract provides that, if he fails, the other party may take possession and do the work, charging all costs to Trotter, without any change in the consideration paid for the ore. Just the condition expressed in the contract and provided for has already arisen and is now before us. The defendant has been trying its hand at mining, and the complainant is very much dissatisfied with the experiment. Now, it is proposed to let the complainant try again. Why not let him try fully and without interruption in the spirit of the contract? Why should the court doubt his ability? Why should he suggest so grave a doubt of his own ability, when with the same breath he asks that the defendant may be turned out? Let him try again and, until the other side comes and shows injury to itself by the complainant's inability or failure, the court will hesitate long and be sure of an extraordinary case before it interferes.

The defendants' counsel raised a question of jurisdiction, insisting that this court had no power to turn one citizen out of possession and to put another in, claiming that the issues in such cases can only be tried by actions of ejectment before a jury. No doubt has crossed my mind as to the power of this court to *proceed* with the case. It is not a *new* suit by way of ejectment. The suit was instituted for other and for different purposes. It was instituted to *retain* the possession by the complainant as against the defendants, and for an account. With those ends in view, it has been progressing for more than four years. The defendants came in by answer and by cross-bill. The court has made

many orders, and one or more I think at the instance of the defendants. At length came the final decree, after a hearing and great consideration in the court of errors and appeals, under which the defendant went into possession. And now comes the supplemental bill, by which is raised the issue whether the complainant is not at this time entitled to the possession.

It is quite plain that this court has jurisdiction ; it is quite plain that for it to proceed, is no assumption. It is according to the practice of the court in making effectual its final decrees. Such practice in this case would be not unlike the practice of awarding writs of assistance in many foreclosure cases, or like enforcing its decrees in cases of specific performance. In this case the court of errors and appeals said that the decree, awarding to the defendants possession, should not prejudice the right of Trotter to make inquiry as to his rights to be let in. I can conceive of no grounds for thinking that that tribunal intended to turn these parties over to another tribunal, that all of the questions involved in this branch of the controversy should be heard anew.

I think the complainant is entitled to the possession of the mine ; but not to an account for waste, nor to a manager ; he is entitled to costs.

*SUPREME COURT OF PENNSYLVANIA.****WARD v. CITY OF PHILADELPHIA.**

October 4, 1886.

LANDLORD AND TENANT — LEASE — TITLE — ONUS.

A lessee as a general rule cannot impeach or in any way call into question the title of his landlord, except he has been guilty of fraud, misrepresentation or unfair dealing, and the exception is more stringently applicable where a tenant in possession takes the lease.†

If one in possession takes a lease for the occupied premises from one having no title or right of possession, he may resist proceedings to turn him out, but it rests upon him to show that he accepted the lease in mistake, or was induced to accept it by some fraud or misrepresentation.

Error to the court of common pleas, No. 4, of Philadelphia county.

This was an action of replevin brought by Ward against the city of Philadelphia for goods belonging to Ward distrained by the city for rent claimed to be due.

The city of Philadelphia was authorized by act of assembly, to take actual possession of any land or property at or near South street which it might deem necessary for the site of the South street bridge. Under authority of this act, the bridge was erected, and from a piece of ground owned by one Rubicam a strip of ground five feet wide was taken to widen the approach, and also a piece the width of the bridge, crossing diagonally at an elevation of about twenty-five feet the lot of Rubicam. The result was to cut off from Rubicam's lot a triangular piece with a frontage of about eighty feet; and by reason of the mode in which the bridge was constructed to entirely destroy the whole wharf front of his lot for shipping purposes. No use of the triangular lot was, or could have been, made by the city for the purpose of maintaining this bridge. The jury awarded Rubicam, as damages \$14,500. Rubicam subsequently about time of the completion of the bridge sold to Ward the lot as originally owned by him with the following reservation, "subject to the rights of the city of Philadelphia to the use of that portion of the hereby-granted premises taken and necessary for the construction of the bridge crossing the river Schuylkill at South street." Ward held possession of the whole lot including the triangular space and the spaces under the arches of the bridge, using the property as a coal and wood yard, unloading his supplies from tow-boats under the bridge or on the triangular piece. His possession was undisputed until sometime in the year 1880, when, having previously rented out the triangular space, he was summoned by the commissioner of city property and commanded to deliver over to him the rents received from it, on the ground that the city was the owner of that tract. This he refused to do, and his possession was not again threatened until early in the year 1881, when, having been informed by bills posted on the premises that the city was about to sell immediately to the highest bidder a lease of the triangular space and the spaces under the arches of the bridge,

* Reported by Ovid F. Johnson, Esq., of the Philadelphia bar.

† See Moak's Underhill Torts, 402.

he took a lease of the property from the city for the term of three years, commencing March 1, 1881, at an annual rental of \$310.

Before signing another lease for it, he had occasion to examine his title papers and consult his attorney with reference to the question of damages arising from the construction of the Schuylkill River East Side railroad across a portion of the lot. It was then discovered that the city had not taken the triangular lot, and that the title thereto was in himself and not in the city, and that he had a right to use the ground spanned by the arches of the bridge in such a way as not to interfere with the city's use of it for the purpose of perpetually maintaining the bridge, and could not be compelled to pay rent therefor. He therefore refused to pay rent to the city, whereupon it distrained and an action of replevin was the result. Upon the trial, after the defendant had proved the lease, the plaintiff, having put in evidence the facts — as just recited — under which he was compelled to sign the lease, offered the deed from Rubicam to himself, in order to show superior title. The offer was disallowed, on the ground that no fraud had been shown on the part of the city. The verdict was for defendant.

Ellis Ames Ballard and *Rufus E. Shapley*, for plaintiff in error. In *Hamilton v. Marsden*, 6 Bin. 45, it is laid down that the doctrine of estoppel, as applied between lessee and lessor, does not hold where the lease has been taken under fraud, force or illegal behavior on the part of the lessor. This case was followed by *Brown v. Dysinger*, 1 R. 408, 415. In the course of its opinion, the court said: "Where one in possession of property is induced to take a lease, the circumstances being such that he could not, at the time, refuse to sign it, he may, nevertheless, impeach his landlord's title. And it is for the jury to say whether, under the circumstances, his acceptance of the lease was a waiver or abandonment of his title." *Robins v. Kitchen*, 8 W. 390; *Baskin v. Seechrist*, 6 B. 154. As to the city's title, Mr. Mills, in his book on Eminent Domain, section 48, says: "The act authorizing condemnation must be express and clear; but if there are doubts as to the extent of the power, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of power." *Washington Cemetery v. Prospect Park R. R.*, 68 N. Y. 591. The general course of decision in this country coincides with the English common-law rule in regard to the title obtained by eminent domain; that is, that no more of the title is divested from the former owner than what is necessary for the public use. *Redfield Railways*, 156. "No more is to be taken than is necessary for the accomplishment of the public object, and if the language of the act admits of a construction which will leave a fee in the owner, subject to the public easement, it will be so construed." Mills, § 49. The fact that the word "taken" is used either in the act of assembly or in the award of the jury does not raise a presumption that a fee was intended. The prevailing doctrine in such cases is that the title vests only to the extent necessary for the purposes of the incorporation. *People v. Blake*, 19 Cal. 579; *Mills Eminent Domain*, § 30.

In *Overman v. May*, 35 Iowa, 89, it was decided that stone could

not be taken by the municipality from the bed of the river over which there had been a bridge, to use in building a new bridge, although the municipality claimed a fee in the land by prescription, an old bridge having occupied the same position for many years previously; and the reason given was that the municipality could only obtain such a right as was necessary for the maintenance of the highway.

In *Railroad v. Allen*, 22 Kans. 285, it is expressly ruled that the owner of property along which a road has been built at an elevation, can use the spaces under the trestle or arches, provided such use does not interfere with the use of the road. The working of the act of assembly in the present case is not so strong as that before the court in two other instances, in which it was held that the estate—or its representative—took but an easement. The first was a case arising under the general railroad act of 1849, which provides that the railroad may “enter upon and into and occupy all necessary lands.” *Western Penn. R. R. v. Johnson*, 59 Penn. St. 29. And in *Pittsburgh R. R. v. Bruce*, 102 id. 23, the words were “to enter upon, take possession of, and use all such lands,” etc. There is a line of cases which may be cited against this position, which has arisen in this State under the canal act, and in which it held generally that the State took a fee, but in *Wyoming Coal Co. v. Price*, 81 id. 175, it is said that taking land for a public road differs from taking land under the canal acts, in that in the former case only an easement is taken, and in *Haldeman v. Railroad*, 50 id. 436, it is said that the road laws generally contemplate only the fastening of a servitude upon the land.

Frank M. Riter, Robert Alexander, and Charles F. Warwick for defendant in error. It is confidently submitted that there is no decision in this State which sustains the contention of the counsel for the plaintiff in error upon facts like those in the present suit. That the exception extends only to cases of fraud and misrepresentation, and illegal behavior on the part of the landlord, is shown by the following authorities: *Lessee of Hamilton v. Marsden*, 6 Bin. 45; *Miller v. McBrier*, 14 Serg. & Rawle, 382; *Hockenbury v. Snyder*, 2 Watts & Serg. 240; *Brown v. Dysinger*, 1 Rawle, 408; *Robins v. Kitchen*, 8 Watts, 390; *Thayer v. Soc. of United Brethren*, 20 Penn. St. 60; *Mays v. Dwight*, 82 id. 462; *Smith v. Crossland*, 106 id. 413. So much of the argument of the plaintiff in error as is embraced under the head of city's title needs no reply. Whether the city has or has not a good title, is not the question before this court. The title of the city was not inquired into in the court below.

TRUNKEY, J. Ward's deed is dated June 1, 1874, and is, on its face, subject to the rights of the city to the use of that portion of the premises taken and necessary for the bridge. He has been in possession of the premises since the execution of his deed. In 1881 he became a party to the lease, in which he covenanted to pay rent and to deliver up the premises to the city at the end of the term. Before he accepted the lease he knew all the facts, saw an advertisement for a public sale, attended the sale and became the highest bidder for the lease. Prior to the advertisement the commissioner of city property had demanded

rent from Ward, on the ground that the city owned the land ; the commissioner claimed that the city was the owner.

The assertion at the argument that the city threatened Ward that unless he should accept a lease a powerful corporation would be put into possession, is a mistake. Ward testifies that the commissioner told him the city had received an offer from such corporation for the use of the premises. But the offer was not accepted ; on the contrary, the lease was sold at auction to Ward himself. There is no evidence that the city officer made false statements respecting the title, or that he made threats or menaces, or that he threatened to convey or lease to another person before Ward could consult or advise with others, or that Ward was imbecile. The testimony discloses no sign of coercion. In fact, Ward knew what the title was, and preferred taking a lease to resisting the adverse claim. He does not say that it was told him, or that he believed that a lessee under the city would have a better right to possession than the city, or could take it by force. Nor is there anything to show a mistake, that is, "some unintentional act or omission, or error, arising from ignorance, surprise, imposition or misplaced confidence."

Where an ignorant, imbecile and timid old man has been induced to take a lease of his own land, by misrepresentation and threats, the proof of such misrepresentation and threats need not be very strong. *Robins v. Kitchen*, 8 Watts, 390. If one who has no right induces the owner who is in possession to become his tenant, it will require little proof of fraud or threats, or imbecility, or some undue influence, to dissolve the relation of landlord and tenant, and put the tenant into the situation in which he was before he was induced to sign the lease. *Hookenbury v. Snyder*, 2 W. & S. 240. As a general rule it is incontrovertible that a lease is not permitted to impeach or in any way to call into question the title of his landlord, except he has been guilty of fraud, misrepresentation or unfair dealing in the transaction. And the exception is more stringently applicable where the owner or tenant in possession takes the lease. It matters not whether the deception practiced originated in voluntary falsehood or in simple mistake, for the immunity it confers, springs not so much from the fraud of the lessor as from the wrong which the deception would work upon the rights of the lessee. *Buskin v. Seachrist*, 6 Penn. St. 154.

But deception is not to be inferred without any evidence, neither is mistake. If the lessee was in possession at the time the lease was executed, and the lessor had no title or right of possession, the lessee may resist proceedings to turn him out, because the landlord, if he fails, is in no worse condition than he was before the lease. In order, however, to give the tenant this right it is necessary to prove that he accepted the lease in mistake, or was induced to accept it by some fraud or misrepresentation. A lease given in good faith by one party and accepted by another with his eyes open, is valid and binding on both. The mere fact that the tenant had a better title than his landlord, does not of itself raise the presumption that the lease was a fraud or accepted by mistake. *Thayer v. Society of United Brethren*, 20 Penn. St. 60. That case was for recovery of possession ; its doctrine could not apply with less force in a proceeding to collect rent.

The same rule extends to a tenant holding over as to a tenant within the stipulated term. Taylor Landl. and Ten., par. 705.

Judgment affirmed.

NESLIE ET UX. V. SECOND AND THIRD STREETS PASSENGER RAILWAY COMPANY.

October 4, 1886.

NEGLIGENCE — DAMAGES — RAILWAY COMPANY — NONSUIT — LAW AND FACT.

B., a female passenger, was being transported in a car of C., a street railway company; in attempting to get out of the car, and whilst carrying upon one arm a sleeping child, she slipped upon some ice that had formed upon the step, and falling received serious injuries. In an action against the company for damages it was shown that the quantity of ice upon the step was "more than would be caused by persons getting in and out," and further, that it had not stormed upon the day of the accident, but on the immediately preceding one it had; further, that whilst there was ample seating room in the car for more passengers, yet two were allowed to stand upon the rear platform beside the conductor, the presence of one of whom prevented B. from taking hold of the handle to be used as an assistance for persons getting on and off. The common pleas entered a nonsuit, and refused to take it off. *Held*, this was error, as the evidence of negligence was sufficient to send the case to the jury.

Error, to the court of common pleas, No. 4, of Philadelphia county.

This was an action of trespass on the case to recover damages for personal injuries. The facts as developed by the testimony were these: Margaret Neslie, with her child, about two years old, and accompanied by her mother, was a passenger on one of the cars of the Second and Third Street Passenger Railway Company, in the city of Philadelphia, on the evening of February 3, 1885. When the car reached Second and Market streets, she started to leave it, carrying her sleeping child on her left arm. The car was heading down Second street, and she attempted to get off on the west side, as she wished to go up Market street. Her right arm, being the free one, was therefore near the car-dasher, and she reached it out for the purpose of grasping the handle on the end of the dasher to assist her in alighting. She was unable to reach the handle, owing to the presence of a passenger on the platform, who was standing against the dasher, and who thus barred her from it. She then stepped down, not having hold of either the handle on the dasher or the handle on the rear end of the car, slipped on some ice on the car-step and fell, and was injured. The presence of the ice was proved "more than would be caused by persons getting in and out," and it was also proved that on the day of the accident it had not stormed, while on the day previous it had. She testified that when she first stepped on the car her foot slipped on the ice. She also testified that at the time of the accident there were but four or five persons inside the car.

The trial judge, on motion of the counsel for the defendant, entered a nonsuit, which the court in *banc* subsequently refused to take off.

John P. Dolman and John Dolman, for plaintiffs in error. The plaintiff being a passenger, the defendant was bound to transport safely. By showing a failure to do this the plaintiff established a *prima facie* case, without affirmative proof of any negligence on the

part of the defendant. The burden was upon the latter of showing a state of facts which relieved it from liability. *R. R. Co. v. Goodman*, 62 Penn. St. 329; *Meier v. R. R. Co.*, 64 id. 225; *Laing v. Colder*, 8 id. 482; *Sullivan v. R. R. Co.*, 6 Casey, 234; *Sherm. & Redf. Neg.*, § 280; *Redf. Railw.*, § 1760 and notes. The testimony on the part of the plaintiff, however, contained sufficient evidence of negligence in the defendant to send the case to a jury. The duty of a carrier of passengers is to exercise the highest possible degree of care, diligence and foresight. *Meier v. R. R. Co.*, 64 Penn. St. 225; 2 *Redf. Railw.* 170-190; *Laing v. Colder*, 8 Penn. St. 482; *Gillis v. R. R. Co.*, 59 id. 129; *Sullivan v. R. R. Co.*, 6 Casey, 234; *R. R. Co. v. Boyer*, 47 Penn. St. 91. It has been laid down in many cases that the obligation of a common carrier of passengers extends to furnishing a safe and convenient means of exit. See *R. R. Co. v. White*, 6 W. N. C. 516. "When the standard is fixed, when the measure of duty is defined by the law, and is the same under all circumstances." *R. R. Co. v. McIlwee*, 67 Penn. St. 311. "Where the precise measure of duty is determinate, the same under all circumstances." *McCully v. Clark*, 40 Penn. St. 406. "A fixed rule, the same under all circumstances." *R. W. Co. v. Henrice*, 92 Penn. St. 431. Where pressure of circumstances requires an act to be done in a way, which does not permit of much time for deliberation, the law will not presume that a previously acquired knowledge of a fact, which rendered the act more or less dangerous was present to the mind at the time. *Whart. Neg.*, § 219; *Lee v. Woolsey*, 16 W. N. C. 337. But above all the defendant by leaving both sides of its car platform open and allowing and inviting their use by its passengers, impliedly represented them to be in a safe condition. Plaintiff had a right to rely upon the assumption that the defendant would perform its clear duty of keeping its steps in a fit condition for use or of restraining passengers from using them. *Erie City v. Schwingle*, 22 Penn. St. 384; *Humphreys v. Armstrong Co.*, 56 id. 204.

Plaintiff having been without her own fault unexpectedly placed in a position which required her to act promptly, her conduct is not to be scrutinized from the standpoint of one who can coolly look back upon the occurrence and think of various things in which the result indicates it might have been more prudent to have done. *R. R. Co. v. Kilgore*, 8 Casey, 292; *R. R. Co. v. Ogier*, 11 id. 60; *R. R. Co. v. Aspell*, 23 Penn. St. 147; *R. R. Co. v. Hummell*, 44 id. 375; *R. R. Co. v. Werner*, 89 id. 59. Plaintiff's duty was to exercise ordinary and reasonable care, and there is a long and unbroken line of authorities in this State, that in such a case the question is always for the jury. *Payne v. Reese*, 100 Penn. St. 301; *Johnson v. Bruner*, 61 id. 58; *Railway Co. v. Walling*, 9 W. N. C. 467; *R. R. Co. v. McIlwee*, 67 Penn. St. 311; *R. R. Co. v. White*, 6 W. N. C. 516; *McKee v. Bidwell*, 74 Penn. St. 218; *Johnson v. R. R. Co.*, 70 id. 357; *Crissey v. R. R. Co.*, 75 id. 83; *McCully v. Clark*, 40 id. 406; *Born v. Plankroad Co.*, 101 id. 334; *Railway Co. v. Henrice*, 92 id. 431; *Railway Co. v. Whipple*, 5 W. N. C. 68; *R. R. Co. Findley*, 4 id. 438; *Borough v. Warne*, 16 id. 44; *Schum v. R. R. Co.*, id. 305.

Geo. Thorn, for defendants in error. When in the opinion of the

court the uncontradicted evidence does not warrant the jury in inferring negligence by the defendant as the proximate cause of an injury, the court should direct a verdict for him. *Goshorn v. Smith*, 92 Penn. St. 435; *Phila. and Reading R. R. v. Yerger*, 73 id. 121. When there is no evidence from which negligence could reasonably be inferred, it is settled law that the jury shall not be permitted arbitrarily and without evidence to infer that there was negligence. *Baker v. Fher*, 97 Penn. St. 70; *Phila. and Reading R. R. v. Schertle*, id. 450. A municipality is not liable for injuries which are the result of nothing more than the ordinary slipperiness caused by recent snow and ice. *Mauch Chunk v. Kline*, 100 Penn. St. 119; *City of Erie v. Magill*, 101 id. 616; *Denhart v. City of Phila.*, 15 W. N. C. 214; *Fleming v. City of Lock Haven*, id. 216.

MERCUR, Ch. J. This was an action on the case to recover damages for an injury to the person of the plaintiff. When her evidence was closed the learned judge ordered a nonsuit which the court refused to take off. The question, therefore, now is, should the case have been submitted to the jury?

The plaintiff was a passenger in a car of the defendant. In alighting therefrom she fell and received an injury. Her complaint is, that the defendant did not furnish her safe and convenient means of exit as it was bound to provide. If there was no doubt of the existence of the facts complained of, yet if there be substantial doubts as to the reasonable and natural inferences to be drawn from those facts, they should be submitted to the jury. *McKee v. Bidwell*, 74 Penn. St. 218; *Crissy v. Passenger Railway Company*, 75 id. 83. What is, or is not, negligence in a particular case is generally a question for the jury. *Fritsch v. City of Allegheny*, 91 Penn. St. 226.

The defendant is a carrier of passengers for hire. As such it was its duty not only to transport them safely, but also to provide reasonably safe means for their getting on and off the car. Did it do so in the case? Under all the evidence was that a question of fact for the jury to find or was it to be determined by the court as matter of law?

This accident occurred on an evening in the month of February. The plaintiff testified substantially, that when she got out of the car she was carrying her child on her left arm; she tried to get hold of the dasher with the other hand; she could not do so as a passenger standing on the platform, was leaning against it. There were two passengers on the platform, one on each side of the conductor, and some four or five passengers in the inside of the car. In getting down her foot slipped on the step by reason of ice thereon, and she fell and was injured.

It appears there had been a storm on the previous day, but none on this day. It is alleged that this ice had been suffered to remain on the step from the previous day. It was there when she got on the car and she slipped in getting in.

Thus there are two specific causes of complaint. The first is, that when there was ample room for all the passengers to ride in the car, the defendant permitted one to stand on the platform in such a position that she could not avail herself of the security and protection which she

otherwise would have enjoyed. The other, the omission to remove from the step, the ice formed during the storm of the previous day.

Under the evidence we do not think the plaintiff was so clearly guilty of contributory negligence in the manner she got down from the platform, as to authorize the court to declare it to be such as matter of law. Her previous knowledge of the condition of the step, and whether it was reasonably prudent for her to attempt to alight in the way and manner she did, are questions of fact for the jury.

The other contention relates to the alleged negligence of the defendant.

It may not be negligence *per se* to permit passengers to stand on the platform, yet it is frequently very annoying to all persons in getting in and out of the cars, and to ladies especially offensive. If, in this case, the defendant permitted a passenger to remain standing on the platform in such a position as to deprive the plaintiff of that reasonable support which would have protected her from injury, and did not furnish other suitable protection we think the jury is the proper tribunal to find whether the defendant was thereby guilty of negligence.

If the ice on the step caused the plaintiff to fall, or contributed thereto, it is proper for the jury to consider whether under all the circumstances proved, it was suffered to remain thereon for an unreasonable length of time. It may be impossible in the winter, to prevent deposits on the step by falling snow, or from the feet of persons entering the car, and which in either case may result in the formation of ice. The main question in regard to this is whether it remained there for such time and in such form, as to establish the negligence of the defendant, and that this negligence contributed to the injury of the plaintiff.

The evidence is sufficient to send the case to a jury with proper instructions and the court erred in not taking off the nonsuit.

Judgment reversed and a *procedendo* awarded.

REED ET AL. v. FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT CO.

October 4, 1886.

PARTITION — TENANT IN COMMON — LIEN.

It is the duty of a tenant in common who in partition proceedings in the common pleas takes the land divested of a lien against his co-tenant, either to make application to pay the money into court because of the lien or pay the lien itself; he holds the money subject to the lien.

Error to the court of common pleas, No. 4, of Philadelphia county.

By virtue of the will of Charles Egner, dated May 27, 1850, Charles H. Egner, the mortgagor hereafter named, became seized of an undivided one-seventh part of, *inter alia* two certain messuages and lots of ground in Philadelphia.

On April 10, 1876, Egner, being so seized, executed and duly acknowledged at the Fidelity Insurance, Trust and Safe Deposit Company's office, a mortgage of said one-seventh interest to Annie C. Blackwell, guardian of Jane Elizabeth, Matilda K., Howard W., and Mary A. Blackwell, for the sum of \$800, payable in one year after date. Said mortgage was recorded same day.

On November 2, 1876, a bill in equity was filed in court of common pleas No. 1, by Charles Egner against Emma C. Egner, guardian of Harold Godwin, a minor, and the Fidelity Insurance, Trust and Safe Deposit Company, trustee under the will of Charles Egner, deceased, of William Egner, Louisa Janney, Mary Ann Murden, Eliza H. Cattell and Emma C. Egner, asking for partition of said real estate.

On January 25, 1877, a decree was made that the premises in said bill described—the same as described in said mortgage—were allotted to the said Fidelity Insurance, Trust and Safe Deposit Company in trust for William Egner, Louisa Janney, Mary Ann Janney, Mary Ann Murden, Eliza H. Cattell and Emma C. Egner in equal parts.

That the said premises be charged with the sum of \$9,592.04 for owelty in partition, of which the sum of \$4,796.02 is due and payable to Charles Egner for his share and interest in said premises and the residue thereof to Harold Godwin, a party to said proceedings.

The Fidelity Insurance, Trust and Safe Deposit Company, trustee as aforesaid, afterward paid to Charles H. Egner the above-mentioned sum charged as his share of the owelty in partition without regard to the mortgage. Annie C. Blackwell, guardian aforesaid, died in the year 1881, and the mortgage became the property of Jane Elizabeth Reed, wife of Augustus Reed, Matilda Apgar, wife of John G. Apgar, Howard W. Blackwell, who each since became of age, and of Mary A. Blackwell, a minor, of whom P. P. Dunn was guardian. Suit was then brought against the Fidelity company to recover the amount of the mortgage.

B. G. Harris, for plaintiff in error. There appears to be no case of very recent date in which the facts are precisely analogous to these in the present case. Perhaps this is because the principles governing them are so well laid down that no trustee or administrator has been so careless as the defendant in error, or if so, has not had the temerity to ask relief from this court. These principles are applied to an almost identical case in *Lucas' Appeal*, 53 Penn. St. 404-408, to which reference will be made. That the liens against shares of co-tenants in real estate are by proceedings in partition, discharged from the *corpus* of the estate inherited or devised, and attach to the individual shares, is well settled. See *Bavington v. Clark*, 2 Penn. 115; *Wright v. Vickers' Adm'rs*, 31 P. F. S. 124-130; *Stewart v. Allegheny Bank*, 5 Out. 343. In *Diermond v. Robinson*, 2 Yeates, 329, the court say: "The liens of the respective judgment creditors against the different children must be deducted from their purparts. Under these circumstances none of the children would be entitled to their shares of the valuation unless they give refunding bonds." And see *Lucas' Appeal*, 53 Penn. St. 404.

J. Cooke Longstreth, for defendant in error. The only question in the case is, whether a trust estate in lands, once charged with owelty, which has been paid off and discharged and the land released, can be called upon by the mortgagee of a former tenant in common of an undivided interest in those lands to pay off that mortgage. For though in the last two counts of the *narr.*, negligence is charged against the trustee, he is not sought to be made personally liable, the suit being in effect

against the estate of the *cestuis qui trustent*. The necessary effect of the decree in partition, of January 25, 1877, was under the third section of the Act of March 14, 1857, B. P., 595, par. 32, to vest in the allottees, the estate of Charles Egner, the elder, in the lands, subject matter of the partition, bound only by incumbrances paramount to or suffered by him. An estate granted or incumbrances suffered, by his grandson on an undivided interest, could not affect the title of his other children. And this doctrine that a decree awarding the premises to one of the heirs, at the appraisement, divests the title of the other heirs, and of all claiming under them, is settled by *Merklein v. Trapnell*; 34 Penn. St. 42. That case was of a contest between the grantee of an allottee in partition, and parties claiming under a mortgage made by owner of five-sixths undivided shares in the lands, and was decided in favor of the allottee. The result of any claim on the mortgage being admitted or established, would be to lessen the shares of the *cestuis qui trustent*, which passed to their trustee under the will of their ancestor for the benefit of a creditor of their former co-tenant, after he had received his share in full in money. The title of the Fidelity company does not come through Charles Egner, 3d, the mortgagor, but is paramount to any estate he ever had in the land. He got his share in money, and the Fidelity Company were not charged with any duty to his creditors, and it was no concern of theirs whether he applied the money to the payment of his debts or not.

TRUNKY, J. Charles H. Egner being the owner of the undivided one-seventh part of certain real estate, mortgaged the same to the plaintiffs. Afterward he filed a bill in equity against his co-tenants for partition, in which proceeding, on January 25, 1877, a decree was made allotting the whole of the real estate to the defendant, charged with owelty, of which charge the sum of \$4,796.02 became payable to said Egner for his interest, "and by said decree the said trustees were authorized to raise for the sale of personal securities sufficient money to pay off said charges, and upon payment of the same to the said Charles Egner for owelty of partition, it was ordered that the said Charles Egner should execute a full release of said premises of and from said charge for owelty of partition, and of all estate, right, title, and interest therein." In pursuance of said decree the defendant afterward paid to Egner the whole of the charge, and Egner gave a release and conveyance of all his interest in the premises.

The right of tenants in common to make partition and enjoy all its incidents, is paramount to the right of the lien-creditor against any one of the tenants. If necessary to effect the legitimate purpose of the partition, the lien must be shifted to the part allotted to the debtor or of none be allotted to him the lien against the land becomes divested. If the whole or part of the land be allotted to the debtor and charged with owelty in a prior lien to the lien he had given for his undivided interest. *McCandless' Appeal*, 98 Penn. St. 489. Where a proceeding for partition results in a judicial sale of the land, the lien which had been created by one of the tenants is divested from the land, but continues on the money raised by the sale; "money raised, incidentally by process of partition is land in another form, and attended

with inheritable qualities." *Wright v. Vicker's Adm'r*, 81 Penn. St. 124.

Section 49 of the act of March 29, 1832, provides that in partition in the orphans' court, where the share of an heir shall be converted into money, either by owelty due him, or by virtue of a sale, before confirmation of the partition, or sale, the court may appoint an auditor to ascertain whether there are any liens or other incumbrances on such real estate, and if liens appear, the court may order the amount of money which is payable to the party against whom the lien exists, to be paid into court to be distributed among creditors or others entitled. That act applied in *Lucas' Appeal*, 53 Penn. St. 404. There the sale was by administrators, under an order of court, and they neglected to move for the appointment of an auditor to ascertain liens. They were compelled to pay the money to judgment-creditors according to priority. It was said that they were simply officers of the court to make sale and receive the proceeds, with no power to pay part of the fund to whom it did not belong. The share of the tenant belonged to his judgment-creditors, and neither he nor the administrators could divert it from them.

This case is in the common pleas, and not within the act of 1832. The money does not arise from sale. The court decreed that it should be paid to Charles Egner. Owelty is somewhat in the nature of purchase-money for land, and the party who pays it the purchaser. The paramount rights of tenants in common may compel conversion, and then the mortgage becomes a lien on the proceeds of sale; or on the owelty, if no sale. While it is true that the tenants in common derived title from Charles Egner, each knew that his co-tenants could create liens on their respective interests. Where one acquired title to all the land, he acquired the titles that had been vested in his co-tenants. The decree determined the value of their respective shares, and the sum to be paid for owelty; and it deprives the mortgagee of all remedy on his mortgage, if the lien on the money is discharged. Without a similar statute to the act of 1832, courts of equity are not prone to despoil persons who have had no opportunity to be heard, nor will such effect be given to their decrees, unless in obedience to plain rules of law.

The mortgagee was not a party; notice was not given to him of the proceeding for partition. He was resting on his recorded security, and no person could acquire the title of Charles H. Egner without notice of that security. It is the duty of a tenant who takes the land divested of a lien against his co-tenant, either to make application to pay the money into court because of the lien, or pay the lien itself. He holds the money subject to the lien. It is not a good answer to the lien creditor to say, "I paid the money to your debtor, on a decree in a suit where he and I were parties, without notice to you, and without advising the court of your lien."

It is alleged that the partition was at the instance of Charles Egner, that the mortgage was by Charles H. Egner, and therefore, the record of the mortgage is not notice to purchasers. But it is not alleged that in fact Charles H. Egner was the plaintiff in the partition. His name appears in the plea, as printed, the person to whom the money was

owing for his interest in the premises. A search for liens against Charles H. Egner, devisee of Charles Egner, deceased, was all that was necessary. The omission of a letter from his name, by mistake, or design, in the partition proceeding, did not change his name as devisee or heir, in the line of title. Judgment reversed, and new judgment for the plaintiff for \$1,304.50.

Judgment reversed.

HULETT ET AL. v. MUTUAL LIFE INSURANCE COMPANY.

[October 4, 1880.

TERRE TENANT — DEED — MORTGAGE — NOTICE — RECORD — TITLE — DEFENSE — EVIDENCE — MORTGAGEE — NOTICE.

A terre tenant in a general sense is one who is seized or actually possessed of lands as the owner thereof. In a *scire facias* sur mortgage or judgment, a terre tenant is in a more restricted sense one other than the debtor who becomes seized or possessed of the debtor's lands, subject to the lien thereof. Those only are terre tenants therefore in a technical sense, whose title is subsequent to the incumbrance.

A. conveyed on February 12, 1878, to E. who conveyed to B., the wife of A., certain real estate, but the deeds were not recorded until April 4, 1881, the possession remaining unchanged; on January 21, 1881, A. gave a mortgage upon the so conveyed premises to C., who, without notice of the deed from A. and the deed to B., had the mortgage upon the day of its delivery recorded. *Held*, as to C., the deed to B. was fraudulent and void under the act of March 18, 1775.

A. and B. on May 22, 1883, by a deed which upon its face purported to convey the title of B., conveyed the premises to D. *Held*, D. took title subject to the mortgage, and further the deed carried all the title of A. in the premises.

In a *scire facias* upon the mortgage, *held*, that it was proper to name D. as a terre tenant. *Held*, also, that under the plea that the mortgage was not then and never was a lien upon his land; it was competent for him to show that although the deed to B. was not recorded, the mortgagee either had actual notice or was somehow affected with notice of it.

Error to the court of common pleas of Bradford county.

September 4, 1854, Rufus K. Hulett became the owner of a tract of land of one hundred and eight acres, and January 9, 1865, of another tract of seventy-eight acres and sixty perches. He and his wife, Effie C. Hulett first lived on the first mentioned farm until the second one was purchased, when they moved on the latter one and there lived. They had possession of both farms until 1882, when their son, Gilbert E. Hulett, took possession of the one hundred and eight-acre one and remained in possession.

February 12, 1878, Rufus K. Hulett conveyed both farms to Horace A. Kiff, by deed acknowledged same day, who the same day conveyed them with other property to Effie C. Hulett, by deed acknowledged same day. Both conveyances were recorded April 4, 1881.

January 21, 1881, Rufus K. Hulett borrowed from the Mutual Life Insurance Company of New York, the sum of \$3,500, and without his wife joining gave as security a bond and mortgage upon the above-mentioned real estate, the title to which had been previously placed in his wife.

May 22, 1883, Effie C. Hulett and her husband, conveyed the one hundred and eight-acre farm to their son, Gilbert E. Hulett, by deed acknowledged same day, which recited the conveyance from Horace A.

Kiff to Effie C. Hulett, of February 12, 1878; and May 7, 1883, they conveyed the seventy-eight-acre one to their daughter, Alice J. Hulett, afterward intermarried with Walter G. Patterson, now deceased.

June 21, 1884, a *scire facias sur* mortgage was issued against Rufus K. Hulett with notice to Effie C. Hulett and Rufus K. Hulett, her husband, Alice J. Patterson and Walter G. Patterson, her husband, and Gilbert E. Hulett, terre tenants, and all other terre tenants. Judgment was taken by default against Rufus K. Hulett and Effie C. Hulett, which was afterward taken off as to Effie C. Hulett. The case came on for trial, when by direction of the court below the jury gave a verdict against all of the defendants, terre tenants, for the amount of plaintiff's claim. Upon their application a new trial was granted, when, by direction of the court, the jury was discharged as to Effie C. Hulett without a verdict or nonsuit in her favor, and gave a verdict against the other defendants for the amount of plaintiff's claim.

J. F. Shoemaker and Rodney A. Mercur, for plaintiffs in error. The act of 1705, section 6, 1 Sm. 59; 1 Purd. 596, pl. 149, does not even require that terre tenants or purchasers under the mortgage should be made parties to the *scire facias* on the mortgage, but the better and general practice is to make them parties. *Mather v. Clark*, 1 Watts, 491; *Mevey's Appeal*, 4 Barr, 80; *Tryon v. Munson*, 27 P. F. S. 260. If, however, the terre tenant be admitted to take defense to the *sci. fa.*, he is concluded by the judgment. *Schnep's Appeal*, 11 Wr. 37. Those only are terre tenants who claim by a conveyance subsequent to a judgment. *Chahoon v. Hollenback*, 16 Serg. & Rawle, 425. Strictly speaking, only the debtor's subsequent grantee of the fee simple is a terre tenant. *Mitchell v. Hamilton*, 8 Barr, 491. Who is a terre tenant? Not every one who happens to be in possession of the land. There can be no terre tenant who is not a purchaser of the estate, mediately or immediately from the debtor, while it was bound by the judgment. *Dengler v. Kiehner*, 1 Harr. 41. Terre tenants are those who have seisin of the land, those who are owners, or claim to be owners, by title derived from the defendant in the judgment. *Fox v. Hempfield Railroad Co.*, reported in note to *Tyrone & Clearfield Railway Co. v. Jones*, 29 P. F. S. 66. Those only who claim by a conveyance subsequent to a judgment can come under a *scire facias* as terre tenants. *Chahoon v. Hollenback*, *supra*. One claiming by a title paramount cannot be brought in as terre tenant on a *scire facias* to have execution. *Jarrett v. Tomlinson*, 3 Watts & Serg. 114. He who may come in as terre tenant must have an estate from the incumbrancer, which might be bound by the incumbrance, whether judgment, mortgage or recognizance. *Catlin v. Robinson*, 7 Watts, 379. A writ of *scire facias quar executio non* is not a writ for the trial of titles; nor was it intended that a judgment creditor should not be bound by the act of 1807, which declares that two verdicts and judgments in ejectment alone shall conclude the right, or that he should be allowed to settle at a dash, not only the question of lien between himself and the debtor, but also a question of title between the purchaser and an adverse occupant. *Mitchell v. Hamilton*, *supra*.

The defendants in error obtained a judgment by default against Rufus K. Hulett, the mortgagor, for the full amount of their claim. They went to trial with the defendants, alleged to be terre tenants on the plea of they held no lands bound by the lien of the mortgage by Gilbert E. Hulett, Walter G. Patterson and Alice J. Patterson, and *non est factum* and coverture by Effie C. Hulett. Such pleas are good and the plaintiffs in error summoned as terre tenants showed, as they were entitled to do, that Rufus K. Hulett, the mortgagor, had parted with his title before the mortgage was recorded. *Mitchell v. Hamilton, supra*; *Colwell v. Easley*, 2 Norr. 33. They therefore had no connection with the mortgagor's title, and the court should have directed a nonsuit or a verdict in their favor. *Colwell v. Easley, supra*.

B. M. Peck, D' A. Overton, D. C. Robinson, for defendant in error. We readily concede that not every adverse title could be tried in a *sci fa. sur* mortgage or judgment, but we think the distinction in the cases where title can be inquired into and where not has been settled beyond controversy both by long practice and direct authority. *Mather v. Clark*, 1 Watts, 491; *Meevey's Appeal*, 4 Barr, 80; *Evans v. Meylert*, 7 Harr. 411; *Wallace v. Blair et al.*, 1 Grant, 81; *Schnepf's Appeal*, 11 Wr. 37; *Speer v. Evans*, id. 141.

CLARK, J. A terre tenant, in a general sense, is one who is seized or actually possessed of lands as the owner thereof. In a *scire facias sur* mortgage or judgment a terre tenant is, in a more restricted sense, one other than the debtor who becomes seized or possessed of the debtor's lands, subject to the lien thereof. Those only are terre tenants, therefore, in a technical sense, whose title is subsequent to the incumbrance. *Chahoon v. Hollenback*, 16 S. & R. 425.

"Strictly speaking," says Chief Justice GIBSON, in *Mitchell v. Hamilton*, 8 Barr, 491, "only the debtor's subsequent grantee of the fee-simple is a terre tenant." So in *Dengler v. Kiehner*, 1 Harr. 41, says the same learned judge: "Who is a terre tenant? Not every one who happens to be in possession of the land; there can be no terre tennant who is not a purchaser of the estate, mediately or immediately from the debtor, while it is bound by the judgment." To the same effect is *Fox v. Railroad Co.*, 29 P. F. S. 66, and many other cases.

In this case the title of Rufus K. Hulett was conveyed to his wife on the 12th February, 1878, but the deed was not recorded until 4th April, 1881; the possession of the land was unchanged; it was continued, after the execution of the deed, just as it had been before. The mortgage was executed on the 21st January, 1881, and was recorded on the same day, and there is no evidence whatever of any notice of the conveyance, either actual or constructive, on part of the mortgagee.

As to the mortgagee, therefore, the deed was fraudulent and void, by the express terms of the act of 18th March, 1775; as to him the deed was as if it had never been made.

On the 22d May, 1883, Rufus K. Hulett and his wife joined in a conveyance of the land to their son, Gilbert E. Hulett; the mortgage was then a valid and subsisting lien on the land, and Gilbert Hulett took title under this deed subject to the incumbrance.

It is true that the conveyance, upon its face, was of the title of Effie C. Hulett, but as the husband joined in the assertion and conveyance of the wife's title, the deed would be effective as a conveyance of his own.

Prima facie, at least, Gilbert E. Hulett was a terre tenant, and the mortgagee had a right to name him as such in the *scire facias*. It was competent, of course, for him to defend under the plea that the mortgage was not then and never was a lien upon his land. *Colwell v. Early*, 2 Norr. 3. Under that plea he might have shown that although the deed to his mother was not recorded, the mortgagee either had actual notice or was somehow affected with notice of it. But there is no such evidence in the case, nor was any offered.

Under the pleadings the question was whether or not the mortgage was, or ever had been, a lien upon the lands of Gilbert E. Hulett and Alice J. Patterson as terre tenants. *Prima facie*, we say, they were terre tenants, but it was competent for them to show that they were not. The judgment on the *scire facias* is against them; as to the effect of this judgment in a subsequent ejectment for the land we are now called upon to decide; by all the cases the defendants are certainly concluded as to all matters, which as terre tenants, they might have made matters of defense on the *scire facias*, such as payment, release, or efflux of time. *Schnepf's Appeal*, 11 Wr. 37; *Dengler v. Kiehner*, 1 Harr. 37; but whether the judgment is conclusive, that they are terre tenants, is a question not raised upon the record, and it will be time enough to decide it when it arises.

The judgment is affirmed.

APPEAL OF THE RIDDLESBURG COAL AND IRON CO.

October 4, 1886.

RENT — WAGES — PREFERENCE — NOTICE — LANDLORD — SHERIFF.

Under the act of April 9, 1872, and the supplement of June 12, 1878, wages have a preference of payment over the claim of the landlord for rent, provided notice is given of the nature and amount of the claim before actual sale of the property levied upon. Such notice to be given to the landlord in case he has proceeded by distress and made a levy; or to the sheriff when he has levied by virtue of a writ directed to him.

Appeal from the decree of the court of common pleas of Bedford county.

The facts are stated in the opinion.

On the 8th day of August, A. D. 1884, Nimick & Co. obtained judgment against the Kemble Coal and Iron Company for \$132,734.84 in the court of common pleas of Bedford county. Upon that judgment a writ of *fieri facias* was issued to No. 121 of September term, 1884, by virtue of which the sheriff levied upon the personal property of the company, and sold it for \$41,162.05. On the 9th of September, 1884, upon the petition of the sheriff, an auditor was appointed to distribute this money. By consent of the parties interested a considerable portion of the fund was paid out to laborers for their wages and to other parties, and the amount for distribution, after deducting the sheriff's

costs and the expenses of the audit, was reduced to \$7,548.90. For that sum there are several claimants, viz.: 1st. The Union Bank of Huntingdon and the Bedford County Bank. 2d. The landlords who claimed for rents. The banks claimed the entire sum. The landlords claimed \$6,129.48. The amount of rent claimed by the Riddlesburg Coal and Iron Company was \$2,129.38.

Wight and Landor, the former the secretary and treasurer, and the latter the general manager of the Kemble Coal and Iron Company, had a store at Riddlesburg. They paid in goods and money a large sum to the laborers for their wages, who assigned their claims to Wight and Landor, who assigned them to the two banks, and under these assignments the banks claimed the \$7,548.90 upon the ground that the wages of laborers are preferred under the acts of assembly to the landlord's claims for rent, and the question for the determination of the court was: "Are the wages of laborers to be preferred to the rents?" The auditor appropriated the whole sum to the banks, the assignees of the labor claims, to the exclusion of the claim of the Riddleburg Coal and Iron Company for rent. Exceptions were filed to the auditor's report, which were overruled by the court below and the report confirmed, from which action of the court this appeal was taken.

Russell & Longenecker, for appellants. The assignments through which the appellees claimed unquestionably gave them preference over ordinary creditors. But rent is also a preferred claim, and under the eighty-fourth section of the act of 1836, "shall be first paid out of the proceeds of such sale," etc. The act of 1872 provides that wages "shall be preferred and first paid out of the proceeds of the sale," etc. The passage of the act of 1872 was followed by conflicting decisions in the common pleas courts of the State. It had been decided in *Wood's Appeal*, 6 Casey, 280, that the miners' act of 1849 did not give laborers priority over landlords, and so while in *O'Brien v. Hamilton*, 12 Phila. Rep. 387, FINLETTER, J., on the 9th of February, 1878, before the act of 1878 was passed, held that wages had priority over rent, yet in the assigned estate of Thos. and Elizabeth Maloy, 1 Del. Co. Rep. 331, the auditor appointed to distribute the fund in the hands of the assignee awarded the balance after necessary expenses to the landlord, it being less than the rent due. To that award the employees excepted, claiming priority under the act of 1872. CLAYTON, P. J., sustained the auditor in an elaborate opinion, in the course of which he refers to the construction put by this court upon the act of 1849, in *Wood's Appeal*, and adds: "The meaning of the act — of 1872 — is, that no matter by what process the employee's goods may be sold, whether by landlord's warrant, or ordinary execution, attachment, etc., the officer making the sale shall pay the wages, if money enough is realized after the payment of costs, expenses, rent and other preferred claims, without the necessity for the employee to first sue and get judgment, as required in ordinary cases. The landlord's lien is a statutory one and is not repealed or postponed by implication. The common-law lien of an ordinary execution must give way to the statutory one for wages, but not so the landlord's which is a

creature of a prior statute. To repeal such a statute the courts require express evidence of legislative intention. *Vanstine's Appeal*, 2 Wr. 165-166. This disposes of the first question in favor of the landlord." And so, to settle the law between claimants for wages and rent, and to secure to laborers the opportunity of obtaining a preference over landlords, the legislature passed the act of June 12, 1878 — Pub. Laws, 207. The legal profession and the common pleas courts have, since the passage of the act of 1878, regarded notice to the landlord as a prerequisite to the preference of wages over rent. We refer to the case of *Nogle, Trustee, v. Cumberland Ore Bank Co.*, 1 Del. Co. Rep. 335, decided September 6, 1880.

John Cessna, R. M. Speer and J. M. Reynolds, for appellees. It is not material in this case what the rulings of the courts had been prior to the passage of the act of 1878 — except so far as the Riddlesburg company's rent is concerned. If it was ruled by Judge CLAYTON, in *Thomas and Elizabeth Maloy's Estate*, 1 Del. Co. Rep. 331, that rent had preference over wages, it was ruled so because of the peculiar agreement made in that case. But when Judge CLAYTON put his ruling as to the preference on the second section of the act of 1872, he overlooked the fact that the first section contained the clause that wages were to be preferred and first paid out of the proceeds, and that the act of 1849 contained no provision concerning the order of payment, as ruled in *Woods' Appeal*, 6 Cas. 280. It has been ruled in *O'Brien v. Hamilton*, 12 Phila. Rep. 387, by Judge FINLETTER, that wages were preferred to rent, and so the weight of authority appears to be. The act of 1872 contained an express provision repealing "all laws or parts of laws inconsistent therewith," and no one has scarcely doubted that wages have the preference under the act of 1872. In the case of *Livengood's Appeal*, 17 W. N. C. 420, recently decided by the courts, it seems to have been mutually acquiesced and conceded in the court below and in this court that wages were preferred to rent, and no question is raised because the notices were given to the officer executing the writ and not to the landlord.

STERRETT, J. The fund in controversy, part proceeds of execution against the Kemble Coal and Iron Company, was claimed on the one hand by the Union bank of Huntingdon and the Bedford County Bank, assignees, respectively, of certain labor claims, and, on the other hand, by the respective landlords of premises on which portions of the property sold was located. It is virtually conceded that the company appellant is entitled to its demand, \$2,129.38, unless its claim is postponed to the assigned labor claims held by the two banks.

The firm of Wight & Lauder, merchants at Riddlesburg, where the Kemble Coal and Iron Company was located, paid in cash and merchandize a large sum to laborers, employed by that company, and took assignments of their respective claims. Some of these were subsequently assigned by Wight & Lauder to each of the banks above named. Upon the facts found by the learned auditor and approved by the court, the two banks respectively stand in the shoes of the laborers, whose claims they thus acquired by assignment, and are clearly entitled to the

sums awarded to them, unless the claim of appellant for rent is superior to theirs. It is conceded that the assignments, through which the banks claim, gave them a preference over ordinary execution creditors, but it is contended by appellant that under the eighty-fourth section of the act of 1836, rent is a preferred claim and must be first paid out of the proceeds of such sale, etc. This was formerly the case, but it was competent for the legislature to give wages a preference over rent, and this we think was accomplished by the act of April 9, 1872; *Purd.* 1461, pl. 1, and the supplement of June 12, 1878. The former declares that claims for wages, therein specified, "shall be preferred and first paid out of the proceeds of the sale of such mine, manufactory, business, or other property as aforesaid;" and the latter, for the purpose of removing all doubt as to the intention of the legislature, and more fully protecting labor claims, declares "it is the true intent and meaning of the provisions of the act of assembly entitled 'An act for the better protection of the wages of mechanics, laborers and others,' passed the 9th day of June, 1872, that the several classes of laborers in said act mentioned shall have a preference over landlords in all claims for rent of any mines, manufactories or other real estate held under lease, where the lessee or lessees are the parties employing the miners, mechanics, laborers or clerks; provided that any person or persons claiming a preference, as above provided, shall give notice of the nature and amount of his claims to the landlord or his bailiff before the actual sale of the property levied upon." P. L. 207.

It is conceded that notice in due form of the labor claims in question was given to the sheriff before the sale; but it is contended by appellant that it should have been given to the landlord and not to the sheriff, and hence there was a failure to comply with the provisions of the supplement. This would doubtless be correct if the landlord had been proceeding by warrant of distress for the collection of rent; but such was not the case. The sheriff as an officer of the court of common pleas, was executing a writ directed to him by that court. Construing the acts together, we have no doubt the notice in such cases is properly given to the sheriff. In some cases, indeed, it would be impossible to notify the landlord before sale of the property. The conclusions reached by the learned auditor and court below, as to the sufficiency of the notice are correct.

It follows from what has been said that neither of the specifications is sustained.

Decree affirmed and appeal dismissed at the costs of appellant.

APPEAL OF CAMBRIA IRON COMPANY.

October 4, 1886.

LANDLORD AND TENANT — DISTRESS — CLAIM.

A landlord accepted drafts on his tenant in satisfaction of rent due; the accounts between them were closed and receipts given. *Held*, the right to distrain no longer existing the landlord could not successfully claim rent out of the proceeds of a judicial sale of the tenant's property.

Appeal from the decree of the court of common pleas of Bedford county.

This was an appeal, on the part of the Cambria Iron Company, from the decree of the court of common pleas of Bedford county, confirming the report of Mr. Frank Fletcher, the auditor appointed to make distribution of the money arising from the sale by the sheriff by virtue of a writ of *feri facias* of the personal property of the Kemble Coal and Iron Company. The auditor awarded the fund to assignees of labor claims, to the exclusion of the Cambria Iron Company, landlord, claiming rent due.

The following is an extract from the report of the auditor:

"All the rent of the Cambria Iron Company except for the eight days of August, amounting to \$111.11, has been paid by accepted drafts on the Kemble Coal and Iron Company. When the accepted drafts were received by the Cambria Iron Company, the account was marked settled and paid on the books of the company, and receipts were sent to the Kemble Coal and Iron Company for the rent represented by each of the said drafts when it was received. The right to claim rent out of the proceeds of a judicial sale depends on the landlord's right to distrain. It is true that the landlord may distrain, even if he has taken a note for the rent, as decided in *Snyder v. Kunkleman*, 3 P. & W. 487. In this case, however, it does not appear that any receipt was taken. In the case on hand the evidence shows that the accepted drafts were received in satisfaction of the rent. The drafts were payable four months after date. They contained interest for four months. The accounts were closed and receipts given. This clearly establishes to the satisfaction of your auditor, that the drafts were accepted as payment, and the right of distress as to the rent settled and paid by these accepted drafts is taken away, and it cannot participate in this distribution."

Russell & Longenecker, for appellant. We deny, as matter of fact, that the drafts were accepted as payment or in satisfaction of the rents covered by them; and if they were not so taken the legal effect would not be to take away the right to distrain, and hence to claim payment out of the fund, in accordance with the acts of March 21, 1772, and June 16, 1836. Though a judgment be obtained and special bail entered for stay of execution, the landlord may legally distrain upon the tenant for the same rent for which the judgment was entered. *Shetsline v. Keemle*, 2 Ash. 29. The recovery of judgment on a covenant for the payment of rent is not, without actual satisfaction, an extinguishment of the rent; and the lessor may, notwithstanding such recovery, distrain for the rent in arrear. The judgment can only be considered as additional security and not as satisfaction for the rent. Nor does it alter the case that the plaintiff has issued a *fi. fa.* or *ca. sa.* Still the landlord has not received satisfaction. *Snyder v. Kunkleman*, 3 Pen. and Watts, 487; *Bentleon v. Smith*, 2 Bin. 146; Jackson and Gross' "Landlord and Tenant," 127. If obtaining so high a security as a judgment with a *fi. fa.* thereon does not operate as a satisfaction of the rent, much less does the draft of the lessee, especially when it is given only to procure a few months' indulgence. "Taking the note of a third person, when it was not to be taken in satisfaction of the rent"

will not estop the landlord from distraining. *Kreiter v. Hammer*, 1 Pears. 559.

John Cessna, R. M. Speer and J. M. Reynolds, for appellees.

STERRETT, J. The subject of complaint in the first specification is the approval by the court of the learned auditor's finding that the drafts received by appellant from the Kemble Coal and Iron Company were accepted as payment of the rent owing by the latter, and that by so taking said drafts appellant lost its right to distrain. If this finding is correct, and presumptively it is so until the contrary clearly appears, it is conclusive of appellant's right to participate in the fund for distribution; and, hence the subordinate questions involved in the remaining specifications become immaterial. An examination of the testimony satisfies us that the learned auditor was fully warranted in finding as he did; indeed, it is difficult to see how, with due regard to the evidence, he could have found otherwise. There was no error, therefore, in rejecting appellant's claim for rent on the ground that it had been paid. But, if the fact had been found otherwise, still appellant would not have been entitled to participate in the distribution, for the reason that the labor claims represented by the appellees, were preferred claims and as such entitled to the whole fund, as has been determined in *Riddlesburg Coal and Iron Company's Appeal*, from same decree, at No. 23 of July Term, 1886.

Decree affirmed and appeal dismissed at costs of appellant.

APPEAL OF HUNTINGDON AND BROAD TOP RAILROAD CO.

October 4, 1886.

WAGE CLAIM — ASSIGNMENT OF — REFERRED CLAIM — PAYMENT.

Certain employees of C., a bankrupt coal and iron company, received from D. goods and money, and, in return, assigned to D. their claims for wages against C., who assigned the claims to E. *Held*, the assignment of the claims for valuable consideration was not such a payment of them as would prevent E. from successfully claiming statutory priority of payment out of a fund raised by a sale under execution of personal property of C.

Appeal from the decree of the court of common pleas of Bedford county. The facts are sufficiently stated in the syllabus.

Samuel T. Brown, for appellant. The first exception raises the question whether W. A. Lauder, superintendent, and R. A. Wight, secretary and treasurer, of the defendant company, could buy up claims against their employers for wages, have them assigned to them, and then transfer them to third parties. The auditor states, in substance, that though W. A. Lauder was the business manager, and R. A. Wight secretary and treasurer of the Kemble Coal and Iron Company, yet they were at the same time in business as merchants, and brought up the labor claims in the latter capacity. The wages which now come in conflict with the claims for rent were really paid, and paid, too, by the officers of the company employing them. Although the laborers had signed a paper by which they understood they had agreed to have their store bills paid out of their wages, they never

dreamed that they were assigning them to persons who might transfer them again, and bring them in against their own unpaid wages. Whether they could do this or not as against the laborers, we submit they could not do it as against other creditors, and particularly against rent, which has always occupied a higher place than a common debt in the legislation of this State. A director, officer, or confidential agent, cannot create relations which place him in hostility to his principal. A purchase of such a debt is an extinguishment of it as against the corporation. *Hill v. Frazier*, 10 Harr. 320. An act, innocent in itself, becomes a fraud in law on the part of one holding a confidential relation. *Kisterbock's Appeal*, 1 P. F. S. 483.

John Cessna, R. M. Speer and J. M. Reynolds, for appellees.

STERRETT, J. There was no error in refusing to hold, as complained of in the first specification, that payment of wages by Wight & Lauder, and by W. A. Lauder, to the employees of the Kemble Coal and Iron Company was, in fact, under the evidence, payment by that company, and an extinguishment of the labor claims so paid. On the contrary, as has been held in other appeals from same decree, the court below rightly held that the assignment of the labor claims, first to Wight & Lauder, and subsequently by them to the two banks, appellees, invested the latter, respectively, with all the rights the labor claimants themselves would have had if their respective claims had not been so sold and assigned.

The questions intended to be raised by the remaining specifications have been passed upon adversely to appellant, in the appeals above referred to, and, therefore, do not require further comment.

Decree affirmed and appeal dismissed at the costs of appellant.

APPEAL OF EXECUTORS OF BRADLEY.

October 4, 1886.

WILL—MASSES FOR THE DEAD—PAYMENT—TRUSTEE—COLLATERAL INHERITANCE TAX.

A bequest to purchase masses for the dead is valid in Pennsylvania, and must be interpreted and may be enforced in such a manner as may best accord with the will of the testator.

C., a testator, bequeathed as follows: "I also give and bequeath the sum of \$1,000, which my executor shall pay to the pastor at Newry, Blair county, for masses for the repose of my soul, and for the repose of the souls of my relatives, and the repose of the souls of the faithful of my parish." *Held*, the entire \$1,000 became at one time payable by the executor of C. to the incumbent pastor at Newry. *Held*, also, the bequest was subject to collateral inheritance tax.

Appeal from the decree of the orphans' court of Blair county.

Rev. James Bradley had been priest of the Catholic church at Newry and died in April, 1884. Amongst other bequests, he by his last will bequeathed as follows: "I also give and bequeath the sum of \$1,000, which my executors shall pay to the pastor at Newry, Blair county, for masses for the repose of my soul, and for the repose of the souls of my relatives, and the repose of the souls of the faithful of my parish." Rev. Richard Brown, acted as pastor of Newry for about ten months after the death of testator, and refused to celebrate the masses unless

the executors would pay him the whole sum of \$1,000. This they declined to do, but offered to pay him \$1 for each mass, that being the stipend for masses payable by the customs of the church and rules long established in the diocese. Four months after Rev. Brown had ceased to be pastor at Newry, and when Rev. Kittell was pastor, he presented his petition for a citation to the executors to file an account, claiming as a creditor. A subsequent petition was filed in which he claimed as a legatee, and in which he prayed for alternative relief either that a rule be made on the executors to show cause why his legacy should not be paid, or that a citation be awarded commanding them to file an account in the register's office. The court awarded the citation and depositions were taken. The court decreed that the executors should pay the legacy of \$1,000 to the petitioner, hence this appeal.

Samuel S. Blair, for appellants. The testator bequeathed \$5,000 to St. Joseph's Apostolic School, "to be kept on interest" for ten years, the interest to be used "to pay or defray the expenses of masses" for the repose of his soul and souls of his relatives and parishioners. He attaches like conditions to the bequests to the colleges of St. Mary's and St. Francis. This created a trust to secure the performance of the religious services mentioned. In *Rhymer's Appeal*, 93 Penn. St. 142; S. C., 39 Am. Rep. 736, note, the bequest was to St. Michael's Church, to be expended in masses for the repose of the soul of the testator, and it is treated as a trust. Whilst it is intimated in the opinion in that case that the bequest might not be regarded as a charitable one, as technically used, it was doubtless for the reason that the bequest was for the sole benefit of the testator. The objects of the testator's bounty in our case were the souls of all his relatives and parishioners, thus disclosing a motive which takes from the bequest the sting of selfishness, or self-interest, and would seem to bring it within the meaning of a charity as understood in courts of equity. But whether it was a charity or not, it was a trust, and a trustee will be always raised for the administration of either. In the case cited St. Michael's Church was the trustee. The church was to use the fund in defraying the expenses of the masses. In our case it seems clear that the executors are the trustees of the three legacies above named. They are to "pay or defray the expenses" of the masses during the period of ten years and then give the principal to the schools. Though the testator does not designate the places where, or the priest by whom, these masses are to be celebrated, he doubtless expected the schools to have the perquisites incident to the services.

Greevy & Doyle and *Aug. S. Landis*, for appellee. But it is submitted that the executors of James Bradley have no right to take this appeal, and this court is asked to dismiss the appeal. If it were a claim against the estate which in their judgment ought not to be paid at all, it might be their duty to resist payment, and their right to appeal to this court. But it is not that kind of a case. They admit their liability to pay the amount of this legacy, but after the orphans' court has directed to whom they shall pay, they undertake to appeal.

The act of assembly passed 22d May, 1722—section 9—allows the right to a writ of error to “any person or persons who shall find him or themselves aggrieved with the judgment of any of the said courts,” etc. These executors are in no sense aggrieved. If anybody was aggrieved it might have been Rev. Mr. Kittell, but he withdrew his claim, and at all events does not appear, and does not in any way resist the claim of Mr. Brown. The decree of the court below afforded full protection to the executors—*Jordan's Appeal*, 11 Out. 82—and they had no right to drag this petitioner into this court. This it is submitted is not only the law, but is consistent with reason. If an executor could appeal every case involving questions of distribution, in no wise affecting the estate, but only the distributees, the grossest injustice would be done such distributees, by bringing them to this court and tying up the moneys appropriated to them by the court below. This is too obvious for argument, and courts have so judiciously guarded this principle that executors and trustees are not allowed their costs and expenses in unnecessary and imprudent litigation. *Shaw v. Conway*, 7 Barr, 136; *Pennypacker's Appeal*, 7 Smith, 119, and numerous other cases. It was the rule at common law. In 2 Saund. Rep. 46, note 6, it is said: “The rule upon this subject being that a writ of error can only be brought by him who would have had the thing if the erroneous judgment had not been given.” See, also, Cro. Char. 481. This principle has been recognized and followed in our own State. *Steel v. Bridenbaugh*, 7 W. & S. 150; *Verner's Estate*, 6 Watts, 253; *Mellon's Appeal*, 8 Cas. 130; *Stineman's Appeal*, 10 id. 394; *Craig's Appeal*, 2 Wr. 330; *Fulton's Estate*, 1 Smith, 211; *Cadmus v. Jackson*, 2 id. 295; *Singmaster's Appeal*, 5 Norr. 169; *Jordan's Appeal*, 11 Out. 82.

GORDON, J. As in this country, from the very nature of its institutions, what was at one time known in England as superstitious uses, have no recognition in our laws, and as all the various dogmas of the several Christian sects are to be treated with equal reverence and respect, a religious or charitable bequest, whether for the founding of a church or to purchase masses for the dead, must be regarded as valid, and is to be interpreted and enforced in such a manner as may best accord with the will of the testator. In the case in hand the Rev. James Bradley, by a codicil to his will, bearing date February 17, 1882, made, *inter alia*, the following bequest: “I also give and bequeath the sum of one thousand dollars, which my executor shall pay to the pastor at Newry, Blair county, for masses for the repose of my soul, and for the repose of the souls of my relatives, and the repose of the souls of the faithful of my parish.” Now, as this will, which was before ambulatory, became fixed and absolute on the death of the testator, it would seem to be an easy matter to determine the person to whom at that time this bequest of the sum of \$1,000 belonged, since all we have to do is to ascertain the name of the person who was then the Roman Catholic pastor at Newry. The duty of the executor was imperatively fixed; he was required to pay “to the pastor at Newry,” not one dollar, or ten, or five hundred, but the entire legacy, \$1,000. As the learned judge of

the court below has well said: "If he," the testator, "had intended that the sum of \$1,000 should be doled out by his executors at a \$1 a mass, in their discretion, to whomsoever might in the years thereafter be pastor at Newry, it might be presumed he would have said so." It will be observed that the gift is not to pastors as many, or as to a succession of such, but to one, the incumbent at Newry, so that the donee was as readily ascertained as though he had been designated by name. Nor is it at all unreasonable to suppose that for the administration of this religious trust, the testator would select a fellow priest with whom he was acquainted and in whom, doubtless, he had every confidence, rather than his executors, who were but laymen. At all events, to them he did not confide his trust, but, as we have seen, limited their duty to the paying over the bequest to the person indicated as his legatee. The collateral inheritance tax question can in no way impede the execution of the decree of the orphans' court, for the bequest must, of course, bear its own tax, and the executors, as agents for the Commonwealth, are entitled to retain this tax and pay it over to the proper officer. The decree is affirmed at the costs of the appellants.

NOTE.—See *Gilman v. McArdle*, 99 N. Y. 451; s. c., 2 East. Rep'r, 451, 52 Am. Rep. 41.

In *Holland v. Smyth*, 40 Hun, 372 the testator gave and bequeathed all the rest, residue and remainder of his estate "to his executors to be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." *Held*, that the devise was valid.

The court said: "We do not pass on the question whether the gift could be sustained as one to a charitable use. We rest our decision on the doctrine enunciated by Judge CULLEN 'that there is a certain class of testamentary dispositions, the object of which is solely the benefit, real or supposed, of the testator, or the gratification of his desires, which, if trusts are not charities, nor do they have any beneficiary, yet nevertheless, are unquestionably valid. The precise legal doctrine on which they rest, the cases do not state. I think a provision for masses for the benefit of the testator's soul is exactly akin to a provision for his funeral or monument. While decent burial is given by the law out of even an insolvent's estate, I think the monument is no more an adjunct or concomitant of burial than the masses. I think all the directions are of the same general character, and equally good in law.' There is nothing contrary to this doctrine in the cases to which the respondent refers."

"The *O'Hara* case, 95 N. Y. 418, was decided on the theory that the testatrix attempted to create a perpetuity. In *Prichard v. Thompson*, 95 N. Y. 76, the fund was to be divided among charities of all denominations within two States. If this case were of the same class, it would rather fall within the rule of *Power v. Cassidy*, 79 N. Y. 602, upholding a gift to all schools, etc., of the Roman Catholic faith."

DIFFENBAUGH ET AL. v. HARRIS ET AL.

October 4, 1886.

WILL—POWER TO APPOINT—SALE—CONVEYANCE—PARTY—HUSBAND AND WIFE—FEE SIMPLE TITLE.

A testator by his will disposed as follows:

"ITEM. I give and bequeath to my daughter Mary, intermarried with Joseph S. P. Harris [describing the premises] and I do hereby authorize and empower my said daughter Mary to sell and dispose of the same as she may think proper, but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided amongst her children, share and share alike, as they arrive at the age of twenty-one."

Held, the intention of the testator was to give Mrs. Harris a life estate in the premises with remainder in fee to her children, subject, however, to divestment by the execution of the power of sale given in express terms to the life tenant.

Mrs. Harris conveyed the premises to one Stevens, her husband not joining in the deed. *Held*, Stevens took a title in fee.

Error to the court of common pleas of Blair county.

Aaron Burns died in 1842 seized of certain lots having first devised them to his daughter Mary Harris, wife of Joseph S. P. Harris, with a power to "sell and dispose of the same as she may think proper," but in case of her death without having sold under the power, then they were to be "equally divided amongst her children, as they arrive at the age of twenty-one." Mary Harris died in 1860 leaving four children and her husband surviving, and ejectment was brought in 1873 by three of her children, and Joseph S. P. Harris in right of George W. Harris, a deceased son. This was the title of the plaintiffs below. The defendants claim under a sale made by Anna Mary Harris to the Rev. James Stevens on the 25th of March, 1851, and offered in evidence a deed from her to him of that date for the lots in consideration of \$1,400 paid. The same being made in execution of the power of sale contained in her father's will to be followed by evidence of possession under it for more than twenty-one years. The court rejected the evidence because Joseph S. P. Harris, the husband, did not join with his wife in the execution of the deed and directed a verdict for the plaintiffs.

Samuel S. Blair, for plaintiffs in error. Here is a clear estate for life. At her death he limits the estate over to her children. The estate to the children is a vested remainder, in fee, yet subject to divestiture, by a power of sale expressly given the life-tenant. The learned judge says, if the power of sale were not given the estate would be clearly an estate for life to Mrs. Harris with remainder in fee to the children, but its position in the clause preceding the devise over, changes the estate of the children from a vested to a contingent interest. But the devise to Mrs. Harris "and in case of her death" — which is a certain event — to her children, admitted to be an express estate for life to her with a vested remainder over, is in no wise affected by the interposition of a power of sale. It cannot possibly affect the remainder, for a power has no effect on the limitation over until it is executed. Until then it is as if it had no existence, but, if it carries the fee, when executed it will operate as a divestiture. *Ferne Cont. Rem.* 226; *Physick's Est.*, 11 Wr. 136. Whether the limitation precedes or follows the power, it makes no difference. *Id.* 227. "Sometimes the testator gives such a power in his will — a power of disposition — and then devises over the estate to take effect if and in case the power shall not be exercised. Limitations of the latter kind are regarded as remainders, and as vested, although liable to be defeated if the appointment shall 'be made to another.'" 2 Wash. on Real Prop. 536. No inference in this case of an intention to give a fee can be drawn from the devise, being general or indefinite, as our act of 1833 provides that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there are no words of inheritance or perpetuity, unless it appears by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less

estate." A devise of an estate, generally or indefinitely, with a power of disposition over it, carries the fee, but where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed. *Morris v. Phaler*, 1 Wr. 390; 4 Kent Com. 319; *Fisher v. Herbell*, 7 W. & S. 73; *Second Ref. Pres. Church v. Disbrow*, 2 P. F. S. 223; in *Flintham's Appeal*, 11 S. & R. 16, where the power was to dispose of at death Judge DUNCAN says: "All the authorities from Leonard to *Jackson v. Robinson*, 16 Johns. 537, agree in this, that a devise for life, with a power to dispose of the thing at his death, is but an estate for life, and if the devisee or legatee does not dispose of it, it goes — when there is no devisee over — to the heir or next of kin of the testator, according to the nature of the property." The power to sell given to Mrs. Harris, is a power to appoint to other uses by way of sale. Sugd. Powers; 4 Kent, 319. The execution of the power to sell by Mrs. Harris did not require the concurrence of her husband. It was not her estate that was sold. Stevens derived his title to the estate of Aaron Burns under the power and by virtue of it, and not by virtue of any estate in Mrs. Harris. The only estate she had was for life, but the power carried the fee. "A *feme covert* may execute any kind of power, whether simply collateral, appendant or in gross, and it is immaterial whether it was given to her when sole or married. The concurrence of the husband is in no case necessary." 4 Kent, 324; Sugd. Powers, 148.

To require the husband's concurrence is to add a collateral circumstance not required by the power itself, so that its execution might be defeated by his refusal, and the will of the testator frustrated. The intent of the testator to exclude the husband from every possible interest in his wife's property is obvious from the whole will and the execution of the power by her was for her benefit. The will gave her but a life estate, while through the power she obtained the value of the fee. A cautious conveyancer might, of course, join the husband in executing the power, as has often been done, but as said by Sugden, vol. 1, 249, if the husband joins, as it makes the case no better so it makes it no worse. The mode of executing the power of sale given to Mrs. Harris is not specified in the will. It was a power to sell. She did sell, and received the purchase-money. The power would have been well executed by a parole sale. *Silverthorn v. McKinster*, 2 Jones, 67; 2 Sugd. 303. While it is true that a general indefinite devise, accompanied with a power of disposal — where there is no devise over — carries a fee, yet when a testator devises such estate to a married woman, why should she not be capable of passing the estate by virtue of her power, especially when it is for her benefit, and when, as here, the testator intends the estate in his married daughter to be as separate from the control of her husband as though it had been given to trustees for her separate use. Ordinarily a power of disposal annexed to a fee is merged in the estate, but where a married woman is the devisee in fee and the donee of a disposing power, the power, the execution of which may be necessary to pass her estate should not be regarded as merged. Sugden says, vol. 2, 107: "Lord Chief Justice

TREVOR, in delivering the judgment of the court in the famous case of *Abbott v. Burton*, 11 Mod. 181, treated it as clear that a remainder to a married woman in fee with a power to her during coverture, to dispose of it as she should think fit, was a valid limitation, and that the power subsisted and might be legally exercised." In the case of *Downs v. Tippetton*, 4 Russ. 334, the testator devised to his married daughter, her heirs and assigns, and by a codicil declared that "if the said A. D. should depart this life without disposing by deed or will of such estate or interest as she should take under the will, then said estate should go and be divided between and amongst her children, share and share alike." After the death of the testator she settled by deed an estate for life on her husband, and it was sustained as a valid execution of the power.

Aug. S. Landis, for defendants in error. The gift of the proceeds of a thing is the gift of the thing itself, and it is the settled law of the State that a devise with the power to sell vests in the devisee an estate in fee simple. *Morris v. Phaler*, 1 Watts, 389; *Culbertson v. Duly*, 7 W. & S. 195; 4 Kent Com. 319; *Caldwell v. Fulton*, 7 Casey, 479; *Church v. Disbrow*, 2 Smith, 219.

If there was no life estate, there was no remainder. Every remainder requires a particular estate to support it. That particular estate may be for years or for life — not for more. If Mrs. Harris' estate then was a fee, which it certainly was, there could be no remainder limited after it, for no remainder is limited after a fee. But a fee may be limited after a fee. When the testator directed that in case she died without having sold the land it was to be divided amongst her children, share and share alike, as they came of age, it was the grant to them of a fee after her fee, by executory devise. The contingency which in such cases renders the devise executory, is one that must happen in a reasonable time, as within the life or lives of one or more persons in being. Here it was to happen during her life. It did not happen, for she did not sell the land in her life-time, and it passed at her death to her children in fee, but subject to the curtesy of the father. Thus a fee may be mounted upon a fee, but only by executory devise. This is the settled law of England and Pennsylvania. *Pells v. Brown*, Cro. Jac. 590; *Hynd v. Lyons*, Bac. Abr. 777; 2 Blk. Com. 173-174; *Hauer v. Sheets*, 3 Yeates, 221; *Langley v. Heald*, 7 W. & S. 96; *Evans v. Evans*, 9 Barr. 192.

It is argued by the plaintiffs in error, that Mrs. Harris took only a life estate, and as the depositary of a power to convey was removed above all rules and law regulating the conveyance of land, and by the authority granted in her father's will, possessed a mysterious power to alien lands in a manner hitherto unknown. At common law she had no such power. Until the statutes of 3d and 4th William, 74, 1833, she could only convey by the fictitious method of fine and recovery, but under that act her husband was compelled to join. Hill Trustee, 287-288, 299. That act authorized her "to release or extinguish any power vested in or reserved to her in regard to lands of any tenure, as effectually as if she were a *feme sole*, but her husband must concur in the deed,

and the deed must be acknowledged as required by the act." 2 Sugd. Vend. 90. The only modification of this was in 1874, by the act of 37 and 38 Vict. 78, when she was authorized to execute a deed as a *feme sole* when she was a bare trustee.

We have no statutes on this subject in Pennsylvania, but the decisions recognize a *feme covert* as a trustee; but like an infant trustee, "subject to legal incapacity to deal with the estate vested in her." *Still v. Ruby*, 11 Casey, 374. The courts will compel a *feme covert* trustee to acknowledge she executes a deed voluntarily, and comply with the forms. *Dundas v. Biddle*, 2 Barr, 160. Even if Mrs. Harris had a power to sell, she was not empowered to convey. It is a rule in regard to powers that a strict compliance with the language of the grant is absolutely necessary. What is not there cannot be supplied. Sugd. Pow.; 2 Wash. Real Estate, 316. Here nothing was said as to how she should convey, and with that omitted, the law would supply the usual method — with her husband. In this connection it is remarkable that in the devise to Rebecca, her sister, the testator authorizes her "to sign, seal, execute and acknowledge all such deeds of conveyance as may be requisite and necessary." Whatever that may avail with her, he studiously avoids going so far with Mrs. Harris.

But the case is controlled and decided by our statute regulating the conveyance of the estates in land of married women. Mrs. Harris had an estate in this land, and unless she conveyed it as the law required, her conveyance was void. The 2d section of the act of 24th February, 1770, 1 Purd. Dig. 460, requires the husband to join in the deed. He did not do so in this case, and hence the deed was void; and whenever and wherever this has not been done in Pennsylvania since the passage of this act, a married woman's deeds have been declared void. The act of 11th April, 1848, made no change in this respect. It may be supererogation to cite authorities on this point, but a few of the many are given: *Peck v. Ward*, 6 Harr. 506; *Thorndale v. Morrison*, 1 Cas. 326; *Glidden v. Strupler*, 2 Smith, 400; *Ulp v. Campbell*, 7 Harr. 361; *Richards v. McClellan*, 5 Cas. 385; *Buchanan v. Hazzard*, 14 Nor. 240.

STERRETT, J. In 1842 Aaron Burns died seized of the lots in controversy, having first devised the same, *inter alia*, as follows: "I give and bequeath to my daughter Mary, intermarried with Joseph S. P. Harris, the house and lot," etc.—describing the property—"and I hereby authorize and empower my said daughter Mary to sell and dispose of the same as she may think proper, but in case of her death, and the property as aforesaid remaining unsold, then it is to be equally divided among her children share and share alike, as they may arrive at the age of twenty-one."

In 1860, the devisee, Mrs. Harris died, leaving her husband and four children surviving her. In 1873, this action of ejectment was brought by three of the children, and the husband who had acquired the interest of the fourth child, then deceased. They contended that the property had not been sold or disposed of by Mrs. Harris in her life-time, and hence, according to the terms of the will, the title or remainder was vested in her children. The defendants, on the other hand, claiming

under the deed of Mrs. Harris, March 25, 1851, to Rev. James Stevens, contended that the lots in controversy were conveyed to him in fee for the consideration of \$1,400; that this was due in execution of the power of sale contained in the will. In support of this position the deed was offered in evidence, but the court rejected it because the grantor's husband was not a party thereto; and thereupon a verdict was directed for plaintiffs.

If the deed had been received and full effect given to it as a conveyance, the defendants would have been clearly entitled to a verdict. It will thus be seen that the controlling question presented by the record is whether the deed of March 25, 1851, operated as a conveyance of the lots to Stevens under whom defendants claim. The solution of that question depends on the construction given to the devising clause above quoted. It was contended by plaintiffs in error that Mrs. Harris took merely as an estate for life, with power independently of her husband, to sell or otherwise dispose of the devised property as she might think proper; and, in the event of her dying without having executed the power of sale, an indefeasible estate in remainder was given to her children; that the deed above mentioned was a good execution of the power, and, therefore, operated as a conveyance of the title in fee to her vendee, James Stevens. An examination of the will has satisfied us that the construction thus contended for is correct, and in with the general scheme of the testator as evidenced by other clauses of his will. Construing the devising clause in question according to the plain import of the language employed, and in the light of other provisions of the will, we think the testator intended to give Mrs. Harris a life estate in the lots with remainder in fee to her children, subject, however, to divestiture by the execution of the power of sale given in express terms to the life-tenant.

The power thus given to Mrs. Harris by her father is a power to appoint, by way of sale or otherwise, to other uses than those specified in the will, and was, therefore, well executed by herself alone without her husband joining in the deed of conveyance to Stevens. Nothing is better settled than that a *feme covert* may, without the concurrence of her husband, execute any kind of power, whether given to her when single or married. 4 Kent, 324; Snyder Powers, 148. To require his concurrence might not only embarrass the decree of the power in its execution, but in case of his refusal to concur would prevent its execution altogether and thus defeat the testator's intention. It is obvious for a consideration of the entire will in this case that the intention of the testator was to exclude the husband from all interest in or control over the property to which the power of sale relates. Stevens, the vendee of Mrs. Harris, denied title to the lots in question, as part of the estate of Aaron Burns, under and by virtue of the power of sale, and not by virtue of any estate in Mrs. Harris herself. The only estate she had was for life, but the power of sale when executed, as it was by a regular deed of conveyance, vested in him the fee to the lots in controversy; and the plaintiffs in error claiming under him should have been permitted to show their title.

Judgment reversed and a *venire facias de novo* awarded.

ORNE ET AL. v. KITTANNING COAL COMPANY.

EQUITY — EJECTMENT — TITLE — PURCHASE-MONEY — TENDER — FRAUD — VENUE — CONTRACT.

In an ejectment founded on an equity only, the plaintiff to be entitled to recover must not only tender the money before action is instituted, but must have it in court to be paid in the event of a verdict in his favor; this rule, however, does not apply, when the equitable owner by the terms of his contract is entitled to, or by consent is once fairly put into, the possession under his title, and by force, fraud or other illegal means is ousted therefrom.

A. and C. agreed in writing, to purchase together certain lands, the legal title to be vested in A., one-half for his own use and the other half for the use of C., A. to convey the one-half in trust to each person as C. might designate, provided the purchase-money for the interest of C. be paid to A., his heirs and assigns before the execution of a deed. D., a coal company, became invested with the absolute title to A.'s half and the legal title to C.'s half according to the terms and conditions of the contract; later E., who as a purchaser claimed title to the undivided interest of C., brought an action of ejectment against D. to recover that interest. On the trial the plaintiff contended that the purchase-money had been paid over by C. to A. in the shape of notes, which had been paid, and that therefore the plaintiff was entitled to a conveyance and to possession. On the part of the defendant it was contended C. had in the making of the settlement, upon which the notes were founded, been guilty of a gross fraud. *Held*, that D. stood in the place of A. invested with his rights. *Held*, also, that if the fraud of C. had entered into the contract itself at its execution by A. and C., a court of equity would not afford a remedy for its enforcement in favor of E., if it affected only the performance D. could not be compelled to yield the possession until the purchase-money had been paid.

Error to the court of common pleas of Blair county.

The facts are set forth in the following copy of the charge of ORVIS, A. L. J., twenty-fifth district.

"This is an action of ejectment brought to No. 32, July term, 1864, by Benjamin Orne against the Kittanning Coal Company and the Blair Iron and Coal Company to recover two tracts of land situated mostly in Allegheny township, in this county, the one in the warranted name of John Gray, and the other in that of William McDougal, containing together about eight hundred and thirty acres. Some portions of each of these tracts is situated in Dean township, in Cambria county, but not included in this ejectment, as the courts of this county have only jurisdiction of the land in its own boundaries.

"It is a simple principle, applicable to all cases, that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. It matters not whether the defendant has any title to the land or not; the law permits him to remain in the possession in which it finds him, unless the plaintiff shows a good title and a right to turn him out. If it should appear to the jury from the evidence that neither party had the title, the verdict should be for the defendant, until the rightful owner appears and makes good his claim.

"But a title of the plaintiff, which will enable him to recover, may be either of two kinds; either a perfect legal title, or an equitable title, not complete in itself, but which would entitle him in a court of equity to the conveyance of the legal title. If one man enters into an agreement to sell another a tract of land, and the purchaser pays the purchase-money, but does not get a deed, he may bring an action of ejectment to get possession of the land, and the court and jury will give it

to him, because he has done every thing which in law he is bound to do, and is entitled to have the land. This is called the equitable title, and is sufficient to support an action of ejectment if it is full and complete; but in order to entitle the plaintiff to recover, he must either have a good legal title, or such equitable title as would authorize him to demand that the land be transferred and conveyed to him.

"The plaintiffs in this case claim they have shown an equitable title to seven-sixteenths of these two tracts of land, and they ask to recover in this proceeding these seven-sixteenths. It appears from the evidence in the case that in 1806 these tracts were sold by the sheriff for taxes, under the laws as they then stood, and were purchased at that sale by John Blair. He subsequently died, and his title descended to his heirs, and seven-eighths of that title was purchased by Theodore G. Pomeroy; and it is one-half of that title which these plaintiffs now seek to recover under an arrangement alleged to have been made in 1856 between Theodore G. Pomeroy and John C. Heylman. It appears from the evidence in the case that some bargain or arrangement had been entered into, or some understanding had between these two gentlemen prior to the 9th of October, 1856, when a written agreement was made between them by which they were to purchase the outstanding titles of these tracts of land, each one to be the owner of the half of such titles upon paying one-half of the purchase-money. The agreement appears not to have been reduced to writing until the 9th of October, 1856, when they executed it, and it was subsequently acknowledged, but was not recorded in this county.

"By this agreement they agreed between themselves to purchase what was then called the Proctor title—and any other titles that might be necessary—to these two tracts of land, describing them, situated in Blair and Cambria counties. It was stipulated in that agreement that each one should pay one-half of the cost of purchasing these titles; and, if either one advanced more than the other, he should hold the other for his half, and the title should be made to Pomeroy, who would convey to Heylman the half, or to any one Heylman might direct, and Heylman to pay one-half of the purchase-money. It appears from the evidence that early in the year 1856, as early as January, they commenced buying up these outstanding titles; and we infer from all the evidence that Mr. Heylman at the time advanced no money; it appears that Pomeroy furnished all the money with which the outstanding titles were purchased, and at the end of these purchases, Heylman was indebted to him the entire half of the costs of these titles. It appears also from the evidence, that Heylman conducted the negotiations for the purchase of these Proctor titles. The first item of these titles that appears in the case, is a deed from Mr. Heylman himself as attorney in fact for Z. P. Lay and wife. The deed, I believe, is dated the 2d of January, 1856, some months before this written agreement was entered into, by which he purports to convey all the estate of Lay and wife in these and other tracts of land for the nominal consideration of \$1; but from the accounts given in evidence between these parties, it appears that he actually paid \$2,000 for that Lay title, and that Mr. Pomeroy furnished the money. Subsequently, the titles of Mrs. Batchelor, Mrs.

Miller, Mrs. Myers, and some others, were acquired before the making of this agreement, the cost of all of which entered into the accounts afterward settled, and for which the three judgment notes were given, making the whole sum expended for the Proctor title, the Blair tax title, and to pay traveling expenses about \$5,000, which it appears Pomeroy advanced; but he afterward took notes of Heylman for his half. These notes, it appears from the exemplification of the records given in evidence, were all collected by legal process; so that if that sum of \$5,000 was actually expended in the purchase of these outstanding titles, he repaid to Pomeroy, or those who became the owners of these notes, one-half of that amount. The records show these judgments were all paid. It is alleged, however, on the part of these defendants, that Heylman did not pay the various sums that he represented to Mr. Pomeroy that he paid, and that the amount of which Pomeroy advanced; that the entire amount purporting to have been paid to Lay, the cost of that title, \$2,000, was a fraud; that no part of it was ever paid to Lay; that the power of attorney under which Heylman was acting was a forgery; that it was no power of attorney from Lay or his wife, and that no part of the alleged consideration of \$2,000 was ever paid to Lay in his lifetime, or to his administrator after his death. You have heard the evidence on that subject, and you must ascertain from the evidence the facts whether or not that power of attorney was a forgery, and whether or not Heylman did, in good faith, pay Lay, or anybody acting for him, this sum. If he received that amount from Pomeroy pretending that that title had cost that amount when it did not, and afterward gave his note to him for one-half, it would be a fraud on Pomeroy which would vitiate the contract entered into between them about the purchase of this title. So in reference to the Batchelor, the Miller, and the Myers title. If Heylman represented to Pomeroy that they cost \$500 or \$600 each, when he paid but \$200 or \$300 each for them, it would be a fraud on his partner in the transaction which would deprive him of the right to come into a court of equity and ask specific performance of the contract, and to have one-half of this land conveyed to him.

The amount which the defendants allege that Heylman defrauded Mr. Pomeroy of, is, I believe, \$2,850; \$2,000 on the Lay purchase, \$250 on the Batchelor purchase, \$200 on the Miller purchase, and \$400 on the Myers purchase, independent of the interest. It is alleged that he represented that these titles cost him \$2,850 more than he actually expended, and that the whole amount of the notes that he gave for his half of the supposed purchase-money did not exceed the amount of money he had taken. If this is true, then, as a matter of course, he has not paid any thing for his title, and would not have any interest in it, nor be entitled to the conveyance of any portion of it, if he were a suitor here. This case, in our view of the law on this point, stands the same as if Heylman were living and in court now asking a conveyance from Pomeroy for the half of this land under the agreement. If the conduct of Heylman was such that a court of equity would not permit him to have the half of the lands because of frauds on Pomeroy, then we instruct you that the present plaintiffs, claiming under Heylman by the sheriff's sale of his interest, stand in no better relation to the parties

defending here than he would have done ; and, if you find that his conduct in reference to these purchases was fraudulent toward Pomeroy as to the amounts he alleged that these titles cost ; if he made this deed as attorney in fact of Lay, knowing that the power of attorney under which he pretended to act was a forgery ; if he didn't have a power of attorney ; or if in any respect he acted in bad faith and fraudulently toward his partner, Pomeroy, then he could not have a court of equity decree him a conveyance of the half of these lands ; and in that event your verdict should be for the defendants generally. But if the defendants have failed to satisfy you that the conduct of Heylman was fraudulent in these respects, then the plaintiffs, having shown that their purchase-money was paid in the collection of these notes, would be entitled to recover seven-sixteenths of the land described in the writ, subject to the opinion of the court on the several questions of law which have been submitted by the counsel on the one side or the other. As you find this one fact, so your verdict will be, either for the defendants or for the plaintiffs for the seven-sixteenths of the land described in the writ."

H. M. Baldridge, George L. Crawford, and Benjamin Harris Brewster, for plaintiffs in error. Fraud to vitiate a contract must be *dans locum contractui*, or *dans causam contractui*, that is, such a fraud as occasioned the contract, not collateral to it, as in a security accompanying a debt. *Smith v. Kay*, 7 H. L. C. 750-758-775. The misrepresentation must have been made in reference to the contract in question, and with a view to induce the other party to enter into it. It must be *dolus dans locum contractui*. Hence, unless under very special circumstances, it must have been made at the very time of the treaty, and not have relation to some collateral matter or other dealing or relation between the parties. Fry Spec. Perf., § 434. This point was much discussed in the *Nat. Ex. Co. v. Drew*, 2 MacQueen, 103. On a suit for specific performance of a written contract for the sale of a mine, it is no defense that there was at the time a parol agreement by the plaintiff to relieve the mine from flooding, as that was a separate contract ; nor that, on an account taken, something would be due to the defendant which ought to be set off. *Phipps v. Child*, 3 Drewry, 714. Nor is a breach by the plaintiff of an independent agreement, or—which is the same thing—of some independent stipulation in the agreement, any defense to a suit for specific performance. Dart Vend. and Purch. (5th ed) 1042 ; *Green v. Law*, 22 Beav., 625. Fraud, to invalidate an assignment, must be at the time of making it, so as to have attached to it, and not in a prior transaction affecting the property passing under it. *Wilson v. Berg*, 7 Norr., 167. An unsuccessful effort at fraud will not avoid a title. *Abbey v. Dewey*, 1 Cas. 416.

The analogous rule that he who comes into equity must do equity, has the same limitation. The principle applies only to equities arising out of the same transaction ; the same contract. *Whittaker v. Hall*, 1 Glyn. & J. (Btcy), 215-216. The rule is well established, and properly understood, should bind. It is only—I may observe as a general rule—to the one matter, which is the subject of a given suit, that the rule applies—*Whittaker v. Hall*—and not to distinct matters pending

between the same parties. So in case of a bill for specific performance, the court will give the purchaser his conveyance, provided he will fulfill his part of the contract by paying the purchase-money. Sir JAMES WIGRAM in *Hanson v. Keating*, 4 Hare, 4, 5. KNIGHT BRUCE, L. J. *Gibson v. Goldsmid*, 5 De Gex, M. & G. 763. Though the cases often say fraud makes a contract absolutely void, yet it does not of itself, but only voidable at the option of the defrauded party, and the evidence must show he has rescinded; and there could be no rescission so long as he retains any thing under the contract which he ought to have returned, the withholding of which might be injurious to the other party. 2 Pars. Cont. 680, n. To retain is incompatible with rescission, and he must return or offer to return. The other party is bound to put the fraud doer in *statu quo*, so far as can be done, as soon as practicable after the fraud is discovered. It is not sufficient to offer to do so at the trial. *Pearsoll v. Chapin*, 8 Wr. 9; *Byard v. Holmes*, 4 Ver. 125-127. When it is once settled that a contract induced by fraud is not void, but voidable only at the option of the party defrauded, it follows that when that party exercises his right to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract, otherwise he is not without remedy, as he is entitled to an action on the fraud in which he could recover the amount of damage which he had sustained. *Clarke v. Dickson, Ellis, Blackburn and Ellis*, 96 E. C. L. R. 148-154; *Urquhart v. Macpherson*, L. R., 3 App. Cas. 831, 838. So much so that on a plea of fraud, as fraud does not *per se* avoid a contract, but only gives an option to the defrauded party to disaffirm, and till disaffirmed the contract remains good; the plea includes an allegation of disaffirmance, which is traversed by traverse of the plea, and must be proved. *Daves v. Harness*, L. R., 10 C. P. 166. And if any innocent third party has acquired an interest in the property, or, if by delay the position even of the wrong-doer is affected, it will preclude a party defrauded from exercising his right to rescind. *Momson v. Universal, etc., Co.*, L. R., 8 Exch. 197-204. The assignee of a chose in action takes it subject to equities, but the person entitled to their benefit may release them expressly, or by a course of conduct. Debentures of a company liable to it for calls, with lien and power of enforcing it by sale, would sell clear of equities, where they were registered in name of mortgagees as holders and sold under the mortgage. Otherwise there would be a fraud on the vendee. *In re North Assam Tea Co.*, L. R., 4 Exch. 387. To sustain the ends of justice, a decree of specific performance is as much a matter of course as damages at law. Sir Wm. Grant, 9 Ves. 608. The court reserves to itself a discretion, not of giving or refusing its aid to enforce agreements arbitrarily or capriciously, but of doing so upon a sound and temperate consideration of the merits of each particular case. *Brodie v. St. Paul*, 1 Ves. 326, 334 n. 1. To be exercised not arbitrarily, but according the circumstances of the case. *Withan v. Salvin*, 10 E. L. R., Ex. 274.

The just conclusion would seem to be that courts of equity ought not to decline the jurisdiction for the specific performance of contracts, whenever the remedy at law is doubtful in its nature, extent, operation

or adequacy. 2 Story Eq. Jur., § 728. Lord COTTENHAM, *Vigers v. Pike*, 8 Cl. & Fin. 645. The court more readily listens to an objection made against a party seeking specific performance, because of necessity he can get relief at law. *Webb v. D., L. and P. R. Co.*, 1 De Gex, M. & G. 529; 6 Beav. 605; *Willard v. Tyler*, 8 Wall. 167; *Garrard v. Lentz*, 2 Jones, 186. Judgments against vendors and vendees under articles, bind the interest of each judgment-debtor and nothing beyond, and the purchaser at sheriff's sale of the vendor's interest takes precisely his title, subject to the equitable estate of the vendee, and of the vendee's interest takes the equitable title subject to the unpaid purchase-money, except where the vendor obtains judgment for the purchase-money and sells the land by means of process issued on it, when he must be considered as selling all the estate in the land he agreed to sell to the defendant, whether the vendor or a stranger is the purchaser. Where the sale takes place on the vendor's judgment for purchase-money, the purchaser takes the whole title, the vendor's judgment is not an independent lien on the vendee's interest, but so far as the lands are concerned, merely a remedy to enforce the vendor's claims, not adding any thing to his right in the land. In this case the sale was not under the vendor's judgment. *Wierheller's Appeal*, 12 Harris, 105. If the vendor buys from the purchaser, at sheriff's sale of the vendee's interest, who had paid only part of the purchase-money, the vendor cannot recover the rest from the vendee. If the contract exists for any purpose, it must for every purpose, for the purpose of being executed on both sides, and by consequence the vendor can recover only by showing a conveyance. *Purviance v. Lammon*, 16 S. & R. 292. Taking of a judgment bond by a vendor for purchase-money is, as a mortgage taken as a security for it, operating as a lien on the land. *Love v. James*, 4 Watts, 471. Taking from the sheriff the balance of the proceeds of the sale of lands stops the person taking from denying he was a party to the proceedings resulting in the sale. *Wilkins v. Anderson*, 1 Jones, 407-408; *Berryhill v. Kirchner*, 15 Norr. 492. The recording acts apply to both equitable and legal estates, and the rule of *Chew v. Barnett*, that a purchaser of an equitable title takes subject to all equities against the legal in previous holders' hands, is not law. *Bellas v. McCarty*, 10 Watts, 29, 45. In this respect an equitable is the same as a legal purchase. *Rhires v. Bond*, 5 Wr. 265. The purchase of an equitable title can stand on want of notice of a fraud avoiding it. *Stuart v. Reed*, 10 Norr. 289. The assignee of a chose in action holds only an equitable title, but a person advancing money and taking a judgment on the faith of its validity, cannot be defeated by showing fraud in obtaining the assignment. *Powell's Appeal*, S. C., 10 W. N. C. 485. The holder of the lien of a judgment-creditor of the vendee who has paid part of the purchase-money binds his equitable interest even as against the proceedings of the vendor for the balance of his purchase-money, upon a judgment-bond subsequently proceeded on. *Appeal of Lloyd*, 1 Norr. 485.

Samuel S. Blair, for defendants in error. Blair never had possession. His title was a tax title under the act of 1804. He bought it in

1806 and was unable to show that the requirements of that act had been observed in the sale. Blair on that title could not have recovered either against Proctor, if he had been in possession, or the Allegheny Railroad and Coal Company who were in possession, for they had a color of title; they were not mere *tortfeasors* or intruders. *Shearer v. Woodburn*, 10 B. 511; *Water v. Sharman*, 8 S. & R. 357; *McReynolds v. Longer*, 7 P. F. S. 13; *Bigler v. Karns*, 4 W. & S. 137. In further support of our contention, that Pomeroy could not avail himself of this title of Proctor to recover forty-eight one hundred and thirty-fifths of the land, the following authorities are cited: *Walker v. Hall*, 15 Ohio, 355; *Venable v. Beauchamp*, 3 Dana, 321; *Maple v. Kussart*, 3 P. F. S. 348; Bigelow Estop. The reargument of plaintiff in error denies the right of the defendants to avail themselves of Heylman's admitted fraud on Pomeroy, and places this inability on the ground that fraud is not a merchantable commodity. But this is a total misapplication of that principle that is the rule where no thing or estate is assigned, where nothing passes by the assignment but a bare right of action, as the right merely to file a bill for fraud committed on the assignor. Such an assignment is void as against public policy, being champertous, as a mere right to sue for a tort is not assignable; but wherever a substantial interest passes, the assignee and those claiming under him stand in the right of the assignor. Story Eq. Jur. 1041, and note. The title of Pomeroy as at the time of the transfer is vested in the defendants. They are privies in estate with him, and came into possession of the land under him, and are entitled to set up any defense to any attack upon it of which he might avail himself. But it is said, whilst Pomeroy could have successfully resisted Heylman, the defendants have been divested of that right by estoppel. When an equitable estoppel is raised for the purpose of passing title to land by the mere receipt of money, it falls rather within the principle of election between inconsistent rights. The money received is in some way the price of the estate of him who receives it, as where a distributee takes his share of the sale of a decedent's land in the orphans' court. *Nelson v. Bagger*, 7 W. & S.; *Simonds' Estate*, 7 Harr. 439; *Hamilton v. Hamilton*, 4 Barr. 193. Or, where the defendant in an execution receives the surplus of the purchase-money, as in *Smith v. Warden*, 7 Harr. 424; *Wilkins v. Anderson*, 1 Jones, 399. Or, where a creditor accepts a dividend under an assignment for his benefit, as in *Adlum v. Yard*, 1 Rawle, 163; *Furness v. Ewing*, 2 Barr. 479.

CLARK, J. By the terms of the contract of 9th October, 1856, it was agreed between T. G. Pomeroy and J. C. Heylman, that they would purchase, together, the Proctor title and such other titles as might be necessary to secure to them the lands in controversy; that the legal title to said lands should be vested in Pomeroy, one-half for his own use and the other half for the use of Heylman Pomeroy to convey the one-half held in trust to such person as Heylman, might designate, "providing the purchase-money for said J. C. Heylman's interest is paid to the said T. G. Pomeroy, his heirs and assigns, at the cost of the same, with interest from the date of payment, before the execution of said deed."

The plaintiffs claim title to an undivided part, as purchasers of the interest of Heylman. Under the contract the defendants claim as the holders of the title of Pomeroy.

The Kittanning Coal Company are admittedly invested, not only with the absolute title to Pomeroy's half interest in the lands purchased under the agreement, but with the legal title of Heylman's half, according to the terms and conditions of the contract. It is plain, then, that the Kittanning Coal Company, holding the full title of Pomeroy, are privies in estate with him, and in this controversy stand in his stead. It is not pretended, much less shown, that Heylman or any of those claiming under him were at any time in the possession of the premises; the Allegheny Railroad Company, and their successors in title, the Kittanning Coal Company, from the date of and indeed long prior to the inception of Heylman's equity, have admittedly held the exclusive actual occupancy of all the lands covered by this dispute.

This ejectment is one, therefore, by the holder of a merely equitable title, out of possession, against the holder of the legal title, in the admitted peaceful, actual and adverse occupancy of the land. In such a case it is clear that an ejectment will not lie to turn the trustee out of the possession, until one-half of the purchase-money advanced, and one-half of the expenses incurred by Pomeroy have been paid, or tendered in compliance with the contract.

The general rule is that in an ejectment founded on an equity only, the plaintiff, to be entitled to recover, must not only tender the money before suit brought, but, to show his readiness to perform, he must also have it in court ready to be paid in the event of a verdict in his favor. *Minster v. Morrison*, 2 Yeates, 346; *Core v. Kinney*, 10 Watts, 139; *Eberly v. Lehman*, 4 Out. 546. If, however, the equitable owner by the terms of his contract is entitled to, or by consent is once fairly put into the possession under his title, and by force, fraud, or other illegal means is ousted therefrom, the rule as stated does not apply. *Harris v. Bell*, 10 S. & R. 39; *Gregg v. Patterson*, 9 Watts, 208; *D'Arras v. Keyser*, 2 Casey, 252; *Chase v. Irwin*, 6 Norr. 288.

In the very recent case of *Bell v. Clark*, 17 W. N. C. 44, the rule is thus stated: "Where the possession of the vendor is lawful, his vendee cannot maintain ejectment against him, without proof of a previous tender of the purchase-money, and he must maintain that tender by producing the money in court." These cases have been followed by the still more recent case of *McGrew v. Foster*, in the eastern district, not yet reported.

It is contended, however, on part of the plaintiffs, that the purchase-money has been fully paid, in accordance with the contract; that three certain notes which Heylman gave to Pomeroy, on the 22d September, 1858,—one for \$997.58, at two months; one for \$950.53, at four months; and one for \$950.53, at six months,—were for the purchase-money and expenses of this joint purchase, and for reimbursement of Pomeroy for the money advanced on the contract; that all of these notes were, before the institution of this suit, fully paid, and that the contract was, on Heylman's part, thus fully complied with, by means

whereof he was entitled to a conveyance and, therefore, to the possession as incident to his title.

On the other hand, however, it is alleged, and the jury has so found, that Heylman, in the settlement which resulted in the execution and delivery of these notes, perpetrated upon Pomeroy a most gross and glaring fraud; that by falsehood and forgery he deceived Pomeroy as to the amount he actually applied to the purchase of these titles, and that in consequence, the notes did not, in fact, represent the sums which Heylman owed Pomeroy, under his contract.

In that settlement Heylman received credit for \$2,000, which he alleged he had paid for the interest of one Z. P. Lea; this money Pomeroy had advanced to Heylman upon the faith of a conveyance to him by Heylman, under authority of a letter of attorney from Lea, which Heylman himself had forged. He also received credit for \$850 more than he paid of Pomeroy's money, for the interests of Miller, Myers and Batcheler, having falsely and fraudulently altered the true consideration mentioned in the respective deeds, to accomplish this purpose. These fraudulent transactions of Heylman are not denied; they are frankly admitted, and in addition, as we have already said, they have been found by the jury. The several sums of money of which Pomeroy was thus defrauded, with the interest thereon, actually exceeds the amount covered by the obligations, taken at the settlement of 22d September, 1878, and although the obligations were accepted as securing the full amount of Heylman's half of the purchase-money, in no proper sense can it be said that the purchase-money has been paid, indeed the entire amount of it remains unpaid.

It is of little consequence, we think, that some of the transactions complained of, occurred prior to the agreement of October 9, 1856; for it is plain from the subsequent settlement, either that the agreement was made upon the faith of and embracing these previous purchases, or they were afterward brought into it, and accepted by Pomeroy as part performance thereof, and if it be assumed that the fraud of Heylman was not in the making of the contract itself, but in the performance of it only, the result is the same in this case, as without a full and fair performance on the part of the plaintiffs, or a tender thereof, there can be no recovery.

The case, in either event, is to be determined as if the parties to the suit were the original parties to the contract; the Kittanning Coal Company stand in Pomeroy's place as the holder of the legal title in possession, and the plaintiffs, by setting up the equity of Heylman, cannot deprive them of that possession except upon showing that they are in no default under their contract. It is one of the elementary and fundamental principles of equity, that "he who seeks equity must do equity," and another, that "he who cometh into equity must come with clean hands;" the doors are shut against one who in his prior conduct in the very subject-matter at issue, has violated good conscience, good faith or fair dealing.

Therefore, if the fraud of Heylman may be considered as having entered into the contract itself at its execution, a court of equity will not afford a remedy for its enforcement in his favor; if it affected only

the performance, as the plaintiffs assume, the defendants cannot be compelled to yield the possession until the purchase-money has been paid.

Fraud, it is true, is not a marketable commodity; the right to avoid or to invalidate a contract upon the ground of fraud, unless the fraud be of such a character as to render it absolutely void, is in some sense personal; fraud will not form the substance of an assignment so as to constitute a cause of action in the hands of the assignee. It may pass, however, as incident to a proper subject of assignment. It can only be pleaded by him whose option it is to affirm or disaffirm the contract, or by his representatives, or for his interest, or in his right; as here, by his privies in estate. *Waterman Cont.*; *Story Eq. Jur.* 1041, note.

Nor can we make any distinction in principle in this respect between the ordinary case arising upon articles between vendor and vendee and this case, which is said to arise out of an agreement containing an express superadded declaration of trust. When an agreement for sale of land is fully executed in writing, the vendor thereby at once assumes the character of a trustee and holds the legal title in trust for the vendee, under the terms and conditions of the contract; the trust which in equity is implied is precisely of the same character as if it had been fully expressed on the face of the paper.

Upon careful examination of the whole case we are of opinion the judgment must be affirmed.

Judgment affirmed.

PANCAKE ET AL. v. CAUFFMAN.

October 4, 1886.

DEED—MORTGAGE—EQUITY OF REDEMPTION—EJECTMENT—INNOCENT PURCHASER FOR VALUE—IMPROVEMENTS—NOTICE—ESTOPPEL.

A., by a deed absolute upon its face, conveyed to B. certain real estate, and paid B. rent for it whilst he held the title; three years later B. conveyed the same premises to C., who notified the occupying tenant to leave, which notice was complied with; C. then received the key of the purchased property from A., who resided in the adjoining house, and moved in; for twenty years C. resided on the premises, and, during that time, with the knowledge of A., made valuable improvements; pending all that period A. and C. were visiting acquaintances; and A. knew of the sale to C., but at no time laid claim to the property. After the expiration of twenty years from C.'s entering into possession, A., alleging the deed to B. was but a mortgage, brought an action of ejectment to enforce her equity of redemption. *Held*, the circumstances called for the trial judge to give binding instructions to find for the defendant.

Error to the court of common pleas of Blair county. The facts are stated in the opinion.

Daniel J. Neff, for plaintiffs in error. As in the case of *Rovland v. Finney*, 15 Norr. 199, in which the court reversed the judgment of the court below, this was a clear case for binding instructions to the jury to render a verdict in favor of the defendant below. As this court say in *Plummer v. Guthrie*, 26 S. 458, as lands become more valuable the temptation to commit fraud and perjury will be increased. Hence the requirement of clear and explicit evidence of the alleged agreement should not be relaxed. Even if the consideration expressed

in the deed were more than the money actually paid — which is not shown — that circumstance would be immaterial. As was held in *Stewart's Appeal*, 2 Out. 384, "at best this of itself amounts to but little." Facts and circumstances relied on must not be of doubtful import. It is not sufficient that they be merely consistent with the instrument, being a mortgage, they must be clearly inconsistent with its being an absolute conveyance. Evidence less than this cannot establish a parol defeasance. Titles regular and legal on their face cannot be swept away by parol evidence of doubtful facts or ambiguous inferences. *Burger v. Dankel*, 4 Out. 118. Here all the facts, circumstances, and acts of the parties were inconsistent with the instrument being a mortgage. The agreement must be substantially contemporaneous with the execution and delivery of the deed. *Nicolls v. McDonald*, 5 Out. 514.

A mortgage, though in form a conveyance of land, is nevertheless regarded as a security, merely, for a debt, and as to third persons, the mortgagor is looked upon as the real owner of the land, to all intents. *Morris v. Souder*, 3 Phila. 114. "When a party is in possession under a lease, the knowledge of the lease dispenses with the inquiry of how the possession is held. That knowledge the agent had and of the very terms of the lease. That was enough for him; he was not bound to inquire of the tenant in possession if the lease was fair or fraudulent, or whether there was a trust notwithstanding." *Leach v. Anspacher*, 5 S. 81. In *Moyer v. Schick*, 3 Barr, 247, Philip Zieber was in possession receiving rents from tenants. *Held*, his possession was not notice to a purchaser. But suppose Mrs. Cauffman had not been holding under Good, but her tenants were in possession, paying rent to her. Even then the possession of her tenants would not be constructive notice to Mrs. Pancake. "It is not true that notice of a tenancy is notice of the title of the lessor, and that a purchaser, neglecting to inquire into the title of the occupier, is affected with any other equities than those which such occupier may insist upon." *Morrow v. Louder*, 3 Phila. 113. The possessor may by his own act, in putting upon the record an instrument inconsistent with title in himself, or by executing and delivering such a recordable instrument, be estopped from relying upon his possession as evidence to subsequent purchasers that he claims title to the premises. *Wade Notice*, 128. The general rule is that possession of land is notice to a purchaser of the possessor's title. But this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive upon that subject; having declared by his conveyance that he makes no reservation he is estopped from setting up any secret arrangement by which his grant is impaired. *Van Keuren v. Cent. R. R. Co. of N. J.*, 38 N. J. Law (9 Vr.), 165-167. *Pomeroy's Equity Jurisprudence*, 616-617; *Bloomer v. Henderson*, 8 Mich. 395; *Scott v. Gallagher*, 14 S. & R. 333. Possession by mortgagor was held not to be notice in the cases of *Crasson v. Sworeland*, 22 Ind. 427, and *Newhall v. Pierce*, 5 Pick. 450. The possession of a *cestui que trust*, and the exercise by him of acts of ownership, are not

constructive notice to a purchaser of a legal title from the trustee; there should be direct, express and positive notice of the fact. *Yocum v. Morris*, 3 Phila. 414. The possession of land is notice to the world of every title under which the occupant claims it, unless he has put a title on record inconsistent with his possession. *McCulloch v. Cowher*, 5 W. & S. 439. To the same effect is *Hood v. Fahnestocks*, 1 Barr, 470.

The true ground of the determination in all cases of notice is that in itself it is a species of fraud, and takes away the *bona fides* of the purchaser and puts him in *mala fide*. *Peoples v. Reading*, 8 S. & R. 496-7. The notice, if implied, must be of such a character that a failure to make inquiry would be gross and culpable negligence. *Bank of Phillipsburg Appeal*, 10 W. N. C. 265. In equity, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. *Carr v. Wallace*, 7 W. 400; *Woods v. Wilson*, 1 Wr. 384; *Comm. v. Moltz*, 10 Barr, 531; *Morgan v. R. R. Co.*, 6 Otto, 720; *Chapman v. Chapman*, 9 S. 219; *Bigelow Estop.* 492; *Doe v. Oliver*, 2 Sm. L. C. 653. If the mortgagee has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. 2 Jones Mortg. 1115; *Harper's Appeal*, 14 S. 323; *Mickles v. Dillaye*, 17 N. Y. 80.

Samuel S. Blair, for defendant in error. The delay in bringing suit was a fact to be considered by the jury as bearing on the question whether the deed was a mortgage, and they were so instructed. Delay in asserting a deed to be a mortgage has not the same effect as in seeking in equity to enforce the performance of an executory contract. The only effect it has as to a mortgage is its bearing on the primary question, mortgage or no mortgage. *Odenbaugh v. Bradford*, 17 P. F. S. 96. "A mortgagee is not the owner of the land and is entitled only to his money and interest. No question of delay in filing the bill can arise. It is not a case of specific performance to which the doctrine of abandonment by laches can apply. It is not a parol trust and is not affected by the limitation in the sixth section of the act of 22d April, 1850." *Fessler's Appeal*, 25 P. F. S. A purchaser who claims protection as being *bona fide* and without notice must show payments of the purchase-money before notice, for the transaction is not complete until the purchase-money is paid. 1 Dan. Ch. Pr. 677. *Bona fide* payment is an affirmative fact peculiarly within the knowledge of the party making such payment or claiming advantage from it. It is easy, therefore, for him to prove it, while on the other hand the opposite party, who is a stranger to the transaction, might have insuperable difficulty in proving a negative. *Lynch v. Lloyd*, 5 Cas. 416. Even if he had been entitled to allowance for improvements, it was perfectly clear that the rents were far in excess of any view of the debt and cost of the improvements. The plaintiff was not disposed to insist on a stringent account, otherwise a large balance would have been justly due from the mortgagee. *Odenbaugh v. Bradford*, 17 P. F. S. 96.

GREEN, J. This is an extraordinary case. It is an action of ejectment to enforce an alleged equity of redemption brought by one who

had conveyed the fee-simple title to the land in question by an absolute deed, upon the ground that it was subject to a parol defeasance. The defendant is a purchaser for value from the grantee of the plaintiff. The deed from Mrs. Cauffman, the plaintiff, to Good, her grantee, was made in 1859, and the deed from Good to Mrs. Pancake, the defendant, was made in 1862. After her purchase of the property, Mrs. Pancake sent word to the tenant in possession that she had bought it and wanted to move in, and that the tenant must move out by the time named. On the day appointed Mrs. Pancake moved in and took possession, the former tenant left after a little demur, on account of another house he had rented not being quite ready, and from that day to the day of her death, about twenty years later, Mrs. Pancake continued to live on the premises in quiet and uninterrupted possession. At the time Mrs. Pancake moved in, Mrs. Cauffman lived in the adjoining house, and has continued to live there ever since. According to the testimony of Mrs. Cauffman and her daughter and son-in-law Huss, when Mrs. Tinker, the former tenant, moved out, she left the key of the house with Mrs. Cauffman, and on the same day the key being demanded by a son of Mrs. Pancake, it was given to him. This is denied by the son, who says the key was in the door, but it is not very material, since, in point of fact, all three of the plaintiff's witnesses, including the plaintiff herself, agree in saying that the key was delivered, or, as they say, thrown to him and taken by him. During the whole twenty years Mrs. Cauffman and Mrs. Pancake lived by the side of each other in adjoining houses, and, after a year, upon visiting terms, yet Mrs. Cauffman neither at the time Mrs. Pancake took possession nor ever afterward informed the latter that she claimed title to the property, or that the deed to Good was or was intended to be a mortgage or any thing other than what it purported to be; she never either before or after the deed to Mrs. Pancake from Good made any demand upon Good for a reconveyance of the property or offered to pay him back the money which she says he loaned her, or in any manner asserted her claim of title either to Good or Mrs. Pancake until she brought the present action. In the meantime Mrs. Pancake made considerable repairs and improvements upon the property, costing, according to the testimony of her son, about \$1,500 in the aggregate, part of which was the erection of another building. No objection was made to this by Mrs. Cauffman, nor was any notice of her claim of title given.

During at least part of the time while Good held the title, Mrs. Cauffman paid rent or rent money to Good. He says she rented the property from him and paid him rent for several months, and she says she paid him the rent money she received from tenants and took receipts for it, but did not produce the receipts, saying she had lost or destroyed them. The following extract from Mrs. Cauffman's testimony indicates the undisputed character of most of the foregoing facts: "Q. You have lived in the property adjoining the Pancake property ever since that time, have you? A. Yes; I have been there. Q. That is, you lived on one-half of the property and Mrs. Pancake on the other side? A. Yes; I am making my home with Huss. Q. And he lived on the adjoining property? A. Yes, sir. Q. Were you living there at the

time Mrs. Pancake lived in the property? A. Yes, I was; and you seen me there, too; I was sick at the time, not able hardly to come down stairs; I didn't know you; I didn't know who you was. Q. Do you know how much rent you paid to Mr. Good? A. Oh, I can't tell you. Q. You took no receipts for the money you paid? A. Oh, I had receipts, you know; he gave me receipts; I told you they were lost; I think I burned them. Q. Then you haven't any of these receipts now? A. No, sir; I haven't got any of them. Q. Did you ever ask Mr. Good to convey this property to you — that is to make you a deed for it? A. No; I don't think I did. Q. You never asked him to give you that property back? A. Well, no; I don't believe I did. Q. Can you tell near about how long you lived there? A. Since he sold it? Q. Yes, ma'am. A. Well, Pancake, about twenty-one years, I guess; no, I guess only about twenty years before I said any thing about the property, you know. Q. You knew at the time Mrs. Pancake was living in there she had bought the property? A. Well, yes; of course she said she bought it."

Conceding that there is a sufficiency of testimony to prove that the original transaction between Mrs. Cauffman and Good was a loan and not a sale, there was not a particle of testimony in the entire case to prove any kind of actual notice to Mrs. Pancake that the conveyance to Good was of such a character. The only kind of notice with which it is sought to charge her is the constructive notice which flows from the fact that some one other than Good was in possession. But the whole effect of that fact is destroyed by the entirely undisputed fact that as soon as Mrs. Pancake demanded possession it was given to her by the person who held it. She claimed possession as the alienee of Good, and when the person holding possession yielded it in response to that demand, how could she infer that the holding of that person was adverse to Good's title? In truth the inference would be precisely the opposite. In addition to this the plaintiff and two of her witnesses testified that she had the key of the house, on the day Mrs. Pancake moved in, and gave it up on demand of her son. Having done this, how could Mrs. Pancake infer that Mrs. Cauffman claimed title as owner, and what duty of inquiry rested upon her the disregard of which would imperil her honestly-acquired title? Why should she inquire for an adverse title when no adverse title was interposed, or made to appear, against her in any manner whatever? What occasion was there for her to inquire for any thing or from anybody? She held her perfect paper title; when she went to take possession it was given to her; what more was she to do? Neither then nor for twenty years after was there even a whisper to her, so far as appears in the evidence, of any adverse title in Mrs. Cauffman, and that, too, although Mrs. Cauffman was her next-door neighbor during every day of that entire period. Mrs. Cauffman says it was about a year before Mrs. Pancake came in to see her, implying that after that, neighborly intercourse existed between them, yet she does not say or intimate that she ever informed Mrs. Pancake of her claim or made the slightest allusion to it. Moreover, Mrs. Cauffman paid rent for the premises to Good during a part, if not the whole of the time he held the title, and we

must infer that if inquiry had been made it would have developed that fact. We cannot agree that there was either actual or constructive notice of plaintiff's title either at the time of the sale to the defendant or when she took possession, or for twenty years afterward. The case is, therefore, fatally defective upon the merely technical ground of want of notice to an innocent purchaser for value. But it is equally defective upon other grounds. It is not possible to regard the case as one in which the evidence of mortgage is clear, precise and indubitable. The plaintiff and her daughter and son-in-law testified to facts tending to show a loan, but none of them testified to any distinct agreement to reconvey, or any actual payment, or offer to pay the whole of the loan. The purchaser, Good, denies most emphatically that there was any loan or any agreement to reconvey.

The subscribing witness who was present at the execution of the deed to Good testified that he heard nothing said about the deed being given as a security for money loaned, and the substance of Barry's testimony is, that Good was willing to make a loan at ten per cent, but he does not say what the final agreement of the parties was. In this state of the testimony the plaintiff admitting that she knew of the sale to the defendant; that she made no claim of title to the defendant; that she never asked Good to reconvey the property to her; that she surrendered the key of the house when the defendant demanded it; that she lived for twenty years in the next house to the defendant and acquiesced in her possession and her title during all that time without the slightest objection, and it being clearly proved and not contradicted that the defendant made valuable improvements upon the property of which the plaintiff must have known, and it being also the undisputed fact that the plaintiff paid rent to Good, we cannot possibly regard the proof of a mortgage as either clear, precise or indubitable, even had there been clear and definite evidence of an agreement by Good to reconvey the property upon the repayment of the money paid out by him, the facts of the voluntary surrender of the property to the defendant, the payment of rent to Good, and the very long acquiescence of the plaintiff in the defendant's title and possession, without ever once asserting her present claim of title, are so entirely inconsistent, so utterly at war with any theory of mortgage that they cast the gravest possible doubt upon the whole claim. There is not one word of explanation of the enormous delay of the plaintiff in asserting her claim. It is laches of the grossest character. There is, however, a very suspicious reason for asserting it at this late day in the fact of the large increase in the market-value of the property, and in her rather frank admission that this way there would be some "money to go on." Sitting as judges in chancery, we are not satisfied with the testimony in support of this claim. To our minds it is shocking both to the moral and the judicial sense to permit a recovery upon such a state of facts. We think the learned court below should have given a binding instruction to the jury to find a verdict for the defendants, and we reverse the judgment on the first, second and fifth assignments.

Judgment reversed.

VOWINOKEL v. PATTERSON.

October 4, 1886.

RULE IN SHELLEY'S CASE — PURCHASE — DESCENT — ORPHANS' COURT — PARTITION — JURISDICTION.

A testator devised as follows: "Also, I direct that the small house on lot No. 81 on the corner of Allegheny and Montgomery streets, in the town of Hollidaysburg, now being built, shall be finished as soon as possible, and that my wife Nancy shall have and enjoy the rents and profits of said lot, and all the buildings thereon erected, during her natural life, and after her death the same shall go to her heirs absolutely; but if during the continuance of her life said buildings should be destroyed by fire, in that event she shall have full power to sell said lot and appropriate the proceeds to her own use. . . . The share of my real and personal estate, thus given to my wife, to be in lieu of her dower at common law." He also directed that if a child should be born to them, his will and all the provisions therein contained should be null and void, and that said child should be heir to all his estate, real and personal, subject to the widow's right of dower. No child was born to them. *Held*, the surviving widow, Nancy, took a fee-simple.

The widow, Nancy, made a will by which she devised the Hollidaysburg property to her sisters and brothers, six in number, naming them; she died, leaving sisters and brothers eight in number. *Held*, the six devisees took by purchase, and the orphans' court had no jurisdiction to decree partition of their interests.

Error to the court of common pleas of Blair county.

This was a case stated for the opinion of the court in the nature of a special verdict; the facts are sufficiently set forth in the syllabus.

Aug. S. Landis, for plaintiff in error. The technical construction of the language employed must yield to the obvious intent of the testator. He had a right to restrict her interest to an estate for life, and if that intention appears from the whole will, by every canon of construction, the courts should so declare it. Primarily he so directs himself, and so it would actually operate but for the word "heirs," to whom it is to pass on her death. If it was his intention she should only enjoy a life estate, that view of the question ought to prevail. *Chew's Appeal*, 1 Wr. 23; *Still v. Spear*, 9 id. 168; *Reck's Appeal*, 28 Sm. 432. The accidental employment of a technical word, not to describe the kind of estate, but only to designate individuals, the remaindermen, after the extinction of the life estate, will not defeat the intention of the testator and enlarge her life estate to a fee. *Guthrie's Appeal*, 1 Wr. 9; *Chew's Appeal*, id. 23. As to the jurisdiction of the orphans' court in proceedings in partition in cases of testacy, it is hard to see why the jurisdiction should be confined to cases where, by the provisions of the will, the course of descent is not altered. But the legislature confines it to such cases and the cases of minors. Fourth section of the act of 13th April, 1840.

Ben. L. Hewitt, for defendant in error. The terms of the devise in this case require the application of the rule in *Shelley's* case. The rule simply is, "that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation, and not of purchase, *v. e.*, the ancestor takes the whole estate comprised in this term." 3 Jarm. Wills, 99. This is a grant of an estate for life, giving an irrevocable right to hold and enjoy the

premises for life, which is a freehold. 4 Kent Com. 23. The duration of the estate gives character to it. Nancy Thompson, then taking a freehold estate, the limitation to "her heirs absolutely" after her death, makes it an estate of inheritance. The word "heirs" has a fixed legal sense in a will, which will adhere to it until it is explained away, and this, it is said, can only be done by making the contrary intent appear so plainly that no one can misunderstand it. 3 Bos. & P. 620; *Auman v. Auman*, 9 Harr. 347; *Porter's Appeal*, 9 Wr. 201. The gift is to Nancy Thompson during her natural life, with remainder at her death to "her heirs absolutely," which is an estate in fee-simple. These are words of technical meaning, and the legal presumption is that the testator used them in their technical sense, and there is no qualification whatever from which even an inference can be drawn that he intended otherwise from any part of his will. *Curtis v. Lonstreth*, 8 Wr. 302. The decisions in all the cases show the undoubted tendency of the judicial mind of this State to follow the true intention of the donor, and whenever he means to limit an estate to the heirs of the life tenant, no matter how his intent is expressed, an estate of inheritance will vest in the tenant for life. *Dodson v. Ball*, 10 P. F. S. 500; *Huber's Appeal*, 30 id. 355, 356, 357. The word "heirs" as used here is strictly a word of limitation; it points to no persons, and simply expresses the character in which the remaindermen take. It gives to Nancy Thompson more than a life estate, for it is a devise to her for life, with remainder to "her heirs absolutely," which raised it to an estate in fee-simple. *Angle et al. v. Brosius*, 7 Wr. 189. Technical words are taken to be used according to their proper technical sense, unless the other parts of the will imperatively require otherwise, or a contrary intent be apparent from a reading of it. If the intention be ascertained that the "heirs" are to take "*qua*" heirs, they must take by descent, and the inheritance vests in the ancestor. *Doebler's Appeal*, 14 P. F. S. 9; *Porter's Appeal*, 9 Wr. 201; *Eby's Appeal*, 14 id. 311; *Irwin's Appeal*, 10 Out. 184; *Dodge's Appeal*, id. 216, 220; *Barnett's Appeal*, 8 id. 348. In this case lot No. 31 is devised to Nancy Thompson and her heirs absolutely. It is without limitation or restriction to any particular heir or heirs. There is no devise over in default of heirs. This leaves it a devise in fee to her. A devise to her and the whole body of her heirs without limitation or restriction "absolutely;" strictly bringing it within a definition of a fee-simple.

Identical in phraseology with the devise in *Steiner v. Kolb*, 7 P. F. S. 123, which was "a devise to Elizabeth for her life-time, but immediately after her decease, it shall be and belong to her legal heirs, share and share alike," which passed a fee. Also similar to *Quillman v. Custer*, 7 P. F. S. 125, etc., which was "a devise to my son the mesuage, etc., the use and occupation thereof during his natural life, where he now occupies. . . . At the decease of my son, the property to descend to his heirs at law." The devisee took a fee. These two cases sustaining *Haldeman v. Haldeman*, 4 Wr. 29; *Walker v. Vincent*, 7 Harr. 369; *Reifenyder v. Hunter*, id. 41; *Curtis v. Lonstreth*, 8 Wr. 297, 302; *Porter's Appeal*, 9 id. 201. The act of 13th April, 1840, extended the jurisdiction of the orphans' court to cases of

testacy, "where the parties or some of them were minors, or where the course of descent under the intestate law was not altered by the will; the same proceedings to be had thereon, subject always, however, to the provisions of the said last will and testament and the true intent and meaning of the testator." This was followed by the act of April 10, 1849, "conferring jurisdiction in cases of testacy, when the estate was in whole or in part devised to two or more children, either in equal or unequal proportions." The two clauses in the act of 1840 are in the disjunctive. The course of descent is not "altered" or interrupted. The only difference is—there being eight brothers and sisters—the quantity of estate is changed, limiting her devisees to six instead of eight. As the court expresses it, "merely limiting the number of takers to less than would have enjoyed the estate under the intestate laws." Testate or intestate, the course of descent is the same. The legislature evidently contemplated objections might arise, and in the proviso say, "the same proceedings to be had thereon, subject always, however, to the provisions of the said last will and testament and the true intent and meaning of the testator," manifestly intending that quantity of estate was to be subject to and under the control of the testator, so long as the course of descent was not changed or the interest passing restricted to the same channel, as if she had died intestate. The orphans' court would not have jurisdiction under this act if strangers or those taking nothing under the intestate laws took by the terms of the will. And as the court expresses it, "the course of descent is not changed when devisees under a will take more or less than they would have taken without a will." We think this interpretation is strengthened by the provisions of the subsequent act of 1849 on the same subject, conferring jurisdiction in cases of testacy, expressly providing that the jurisdiction attaches in the orphans' court without regard to the quantity of interest, so long as the course of descent is not altered, thereby committing to the orphans' court the partition of any interest, large or small, of minors or others designated by the testator, when the course of descent is not altered or interrupted.

TRUNKY, J. Isaac Thompson devised the rents and profits of the land described in the case stated, to his wife during her life, and at her death to her heirs. The learned judge of the common pleas rightly decided that under the operation of the rule in *Shelley's* case, Nancy Thompson took an estate in fee-simple. The rule operates to give the ancestor an estate for life in the first instance, and by force of the devise to his heirs the inheritance also, by conferring the inheritance on him as the stock from which alone they can inherit. *Hileman v. Bonslaugh*, 13 Penn. St. 344.

Other clauses of the will fail to show an intent different from the meaning of the words of the devise. That the devisees might sell the land and use the proceeds in case of destruction of the buildings, it is enough to show the testator's intent to give a mere life estate to her, in absence of such destruction. It is obvious that one object of the testator in making a will was to vest in her a larger estate than she could take under the intestate laws. He was childless. He made provision that in case a child should be born to them the will should be

null and void. The contingency did not happen. Surely such a provision does not evidence that his words which pass a fee-simple were intended only to pass a life estate to his widow.

The next inquiry is, had the orphans' court jurisdiction of the proceeding in partition? The plaintiff contends that such jurisdiction was conferred by the act of April 13, 1840, P. L. 320, which includes all cases of testacy "where the course of descent is not altered by the provisions of the last will and testament of the decedent." It is not alleged that any other statute gives that court jurisdiction.

The testatrix had eight brothers and sisters, and she devised the land to six. Under the intestate law each of the heirs would be entitled to one-eighth of the land; under the will, each devisee is entitled to one-sixth. A few elementary principles dispose of the question. Purchase includes every other method of coming to an estate, but merely that by inheritance. If the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase. But if a man, seized in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent. Even this rule, in England, was long ago abrogated by a statute which enacts that an heir to whom land is devised by his ancestor shall take as devisee, and not by descent.

The principal difference, in effect, between the acquisition of an estate by descent and by purchase consists in two points: 1. By purchase, the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor; and 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. And the intestate law of Pennsylvania, which differs from the common law in many particulars, provides "that no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall, in any of the cases before mentioned, take any estate or inheritance therein."

It is impossible for the six children to take the whole of the estate except by virtue of the devise. Necessarily they hold the estate by purchase, and it acquires a new inheritable quality. The course of descent was broken, altered. Had the devise been made to strangers, they would have taken as purchasers. The six heirs hold precisely in the same way, for their title is the will. And the effect on the legal course of descent is the same as if the devise were to strangers.

Soon after the enactment of April 13, 1840, GIBSON, Ch. J., remarked of the provision relative to cases where the descent had not been altered, that it "was, perhaps, superfluous, for wherever exactly the same interest passes by the law that would pass by the will, the devisee takes by descent, and the testator may be said, in language strictly technical, to have died intestate as to the particular land." *Selfridge's Appeal*, 9 W. & S. 55. In *Waln's Appeal*, 41 Penn. St. 502, the same justice spoke of this provision as unnecessary and amounting to nothing. These dicta, contemporaneous with the enactment of the statute,

though not authority, show how quickly the great jurist saw that no devise could be made of an estate different from that which would descend to the heir without altering the course of descent.

The judgment must be reversed for the reason that the orphans' court had no jurisdiction of the proceeding for partition.

Judgment reversed, and now judgment is entered for the defendant.

BUCK v. WILSON & Co.

October 4, 1886.

NEGOTIABLE INSTRUMENT — EXTINGUISHMENT OF DEBT — BOOK ACCOUNT — FORMER RECOVERY.

A promissory note taken for the whole or part of a debt will only operate as an extinguishment of it if so intended by the parties.*

A debt due upon a continuous account of book entries made in the ordinary course of dealing is entire, and cannot, in the absence of an agreement to that effect, be split up into separate and distinct demands so as to form the basis of several suits.†

It is against the policy of the law to permit a party to recover in an action what was included in and might have been recovered in a former one.

A., who was indebted to B. on a book account, gave five several notes, which were taken and held as concurrent securities. When two of the notes fell due B. instituted an action upon the account declaring the goods sold and delivered, and filed an itemized bill of particulars, credit being allowed for the amount of the notes not then due. In that action the verdict was for plaintiff. When all of the remaining three notes had fallen due B. brought another action for goods sold and delivered, and filed a copy of the book of entries the same as contained in the former action. Indorsed upon the *narr.* was a statement that the claim was for the portion of the account represented by the last three notes. *Held*, B. could not recover in the second action.

Error to the court of common pleas of Blair county. The facts are stated in the opinion.

Samuel S. Blair, for plaintiff in error. There was no agreement for an extension of the time of payment of the account other than may be implied from the mere receipt of the notes. These notes, therefore, presented no obstacle to a recovery of the whole balance on the account. It is a familiar principle that the receipt of the debtor's note does not discharge the debt unless it be so agreed. It is a mere concurrent security. *Weakly v. Bell*, 9 Wr. 280. There is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note at a future day on account of it. *Shaw & Leigh v. The First Reformed Presbyterian Church*, 3 Wr. 226. The whole account then having been due and recoverable in the first suit, the plaintiff is not at liberty, either out of a spirit of courtesy or any other spirit, to take a verdict and judgment for a part only and sustain a subsequent suit for another part of the account. *Hess v. Heehle*, 6 S. & R. 57. If the evidence in the second suit would have been equally available in the first suit, then the verdict and judgment in the first is an absolute bar to any recovery in the second. *Logan v. Caffray*, 6 Cas. 177. There is no rule of legal practice of higher value than that which arrests the strife of litigation by declaring that one suit and judgment is an end of controversy as to all matters in issue, and which ought to have been put in issue. *Russell v. Langley*, 7 H.

* See 36 Eng. Rep. 210.

† See 29 Eng. Rep. 595; 62 How. Pr. 346; 24 Fed. Rep. 530; 2 Am. Rep. 348.

508. To permit a party to recover in a second action what was included in and might have been recovered in the first action would be against the policy of the law and unjust. *Brenner v. Mayer*, 2 Out. 274. The rule is not to be relaxed from any consideration of hardship. *Hess v. Hebble, supra*; *Logan v. Caffray, supra*.

A. A. Stevens, for defendant in error. If parties agree that a debt shall be payable in installments, they have severed it and a recovery of one installment under a declaration which accounts for the whole debt does not bar a subsequent suit for an installment not due when the first suit was brought. *Sterner v. Gower*, 3 W. & S. 143. Where consideration was to be paid in parts, partial payment may be enforced without involving the whole debt. *Logan v. Caffrey*, 6 Cas. 201. *Assumpsit* will lie for money to be paid at different times as each sum becomes due. *Cook v. Whorwood*, 2 Saund. 338; *Ashford v. Hand*, Andrews, 270, cited in *Wilson v. Wilson*, 9 S. & R. 429. If claims may be counted on separately they are separate causes of action, and a suit for one cause is no bar to the other. *Killion v. Wright*, 10 Cas. 92; *Croft v. Steele*, 7 Watts, 374. What the contract or understanding was at the time the notes were given as to the extension is to be proved as a fact, dependent for its existence on the understanding of the parties at the time. *Shaw v. Leigh*, 3 Wr. 226. Where a judgment in a former trial between the same parties is relied on by way of evidence as conclusive *per se*, it must appear by the record of the former that the particular controversy sought to be concluded was necessarily tried and determined. *Packet Co. v. Sickles*, 5 Wall. 592. Where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be conclusive. *Ib.*; *Coleman's Appeal*, 12 P. F. S. 272; *Hawk v. Bridenback*, 5 S. & R. 204; *Sterner v. Gower*, 3 W. & S. 143. When it appears from the face of the records that the amount sued for was not due and payable at the time of instituting the first action, and that the plaintiff then had no right to demand it in the first action, he may recover all that was not due at the time of the first action on subsequent ones, and the first judgment will not be a bar. *Kane v. Fisher*, 2 Watts, 253; *Sterner v. Gower*, 3 W. & S. 143; *Bull v. Hopkins*, 7 Johns. 22. The evidence in this case would not have been available in the first. The statement of claim at the conclusion of the *narr.* was equivalent to a bill of particulars, and nothing could be recovered thereunder that was not included in the *narr.* and bill. *Dilzer v. Beethoven Building Ass.*, 13 W. N. C. 165; *Gilpin v. Holwell*, 5 Barr, 54. The plea of former recovery is composed partly of law and fact, is a mixed question, and where there is any conflicting testimony is always for the jury. *Wilson v. Wilson*, *id.*; *Rockwell v. Langley*, 7 Harr. 509. It was competent for the plaintiff below at the trial in this case, and he did show that at the first trial the amount claimed in the present suit was not claimed or included in the former suit, but on the contrary was distinctly excluded because it was not due and payable, and was not passed upon by the jury. *Carmony v. Hooker*, 5 Barr, 309 (foot of page), 310.

CLARK, J.* This action of *assumpsit* was brought by W. H. Wilson & Co. against Dr. M. J. Buck, on a book account for goods sold and delivered. The defendant gave in evidence the record of a former action, upon which judgment had been rendered in favor of the plaintiff, and under the plea of the general issue defended upon the ground of a former recovery. See *Pinly v. Handbest*, 6 Casey, 190. The former suit was also an action of *assumpsit* for goods sold and delivered, and an examination of the particular statement of the plaintiff's claim, filed in the respective suits, shows that the items are in each case identical. The sales, it is admitted, were on thirty days' credit; the last item in the account was for goods sold and delivered 23d April, 1884. The first suit was instituted on the 1st July, 1884, and the entire claim of the plaintiff was, therefore, at that time, due and payable.

The plaintiffs contend, however that on the 1st July, 1884, their whole account against the defendant amounted to \$1,595.95; that the defendant had given to them his notes, as follows: March 6, 1884, at three months, for \$225; April 2, 1884, at two months, for \$100; April 10, 1884, at three months, for \$100; April 2, 1884, at four months, for \$125; and May 17, 1884, at sixty days, for \$267.65, and that the payment of the account was thereby extended, according to the tenor and effect of the several notes.

Deducting the credits and the amount of these notes, the balance of the account on the 1st July, 1884, was \$52.67, and the plaintiffs say, that the suit instituted on that day was for the recovery of that portion of the account represented by this balance and the first two of the notes above recited, which were then due and unpaid; that the itemized copy of account filed showed a balance of \$52.67, and was accompanied by copies of the two notes only. The verdict and judgment in that case was for the plaintiff in the sum of \$393.30.

The present action, they say, is brought to recover that portion of the account represented by the last three notes. The suit is not upon the notes, it is for goods sold and delivered; a copy of the book entries, properly verified by the oath of the plaintiffs' book-keeper, is filed, and these entries are, as we have said, precisely the same as were contained in the former suit; the balance, however, which the account discloses to be "due and owing thereon" is \$875.46, which is, as the account itself shows, the amount of the whole five notes before mentioned, with the interest thereon, and the \$52.67, which with the first two notes was embraced in the previous action. The plaintiffs' claim at the trial, however, notwithstanding the showing of the account and of the accompanying affidavit, was for that part of the account only which is represented by the last three of the notes, and as showing this, we are referred to an indorsement on the *narr.* to that effect.

It is admitted that the notes were neither given nor received in payment of the account; that there was no other extension of time on the part of the plaintiffs when the notes were given than was to be implied from their receiving them. Mr. Wilson, the plaintiff, testified that they were not considered as a payment until they were paid. "They weren't taken," he says, "as a settlement of the account, because they weren't paid; they were charged back to his account, the same as you would

take a check ; if the check is good it is all right." A promissory note, taken for the whole or part of a debt, will only operate as an extinguishment of it, if so intended by the parties. The notes did not, therefore, discharge the original debt, evidenced by the account, they were taken merely for convenience and as concurrent securities only.

A debt due upon a continuous account of book entries made in the ordinary course of dealing is entire; it cannot, without agreement to that effect, be split up into separate and distinct demands, so as to form the basis of several suits; if divisible into two parts, it may on the same principle be divided into as many parts as it contains distinct items of charge, and no one would suppose that an action might be instituted on every item in a book account. It is undoubtedly true, however, that if parties contract that a debt shall fall due and be payable in installments they have severed it, and distinct recoveries may be had for the several installments in portions of the debt, according to the agreement, without involving the whole debt; but when the consideration is fully executed and there is no stipulation of severance the obligation to pay is ordinarily indivisible and entire. *Sterner v. Gower*, 3 W. & S. 143; *Logan v. Caffre*, 6 Casey, 196.

In this case, however, it is not pretended, as we have said, that there was any actual or express agreement to this effect. Mr. Wilson himself says there was "no special agreement" about extending the account more than was implied in taking the notes; that the notes were credited in the account and charged back if not paid; they can, therefore, neither be regarded as effecting payment of the debt nor an extension of the time of payment. For "where a creditor takes from his debtor a note payable at a future day on account of his claim, the law raises no implication that he agrees to give time, until the maturity of the note, for the payment of the original debt; but the agreement must be proved as a fact dependent upon the understanding of the parties at the time when the security was given." *Shaw v. Church*, 3 Wr. 226. See, also, *Weakly v. Bell*, 9 Watts, 273; *Bank v. Potius*, 10 id. 150. When the cause of action is the same, a former judgment, in a suit between the same parties, though an inadequate one, is a bar to a second recovery. *Pinney v. Barnes*, 17 Conn. 420. So, an action brought for a part of an entire and indivisible demand and a recovery therein will bar a subsequent suit for the residue of the same demand. *Renulavogle v. Cocks*, 19 Wend. 207. See, also, *Staples v. Goodrich*, 21 Barb. 317; *Warner v. Comings*, 6 Cush. 103; *Lewis v. Lecompte*, 42 Ill. 303.

There can be no question, under the evidence, that on July 1, 1884, if, in case of the threatened insolvency of the defendant, the plaintiffs had desired to collect the whole debt they might have done so; the entire claim and demand of the plaintiffs was then due and unpaid and they had the undoubted right to sue for and recover it. It is equally clear that the plaintiffs had a right in the first suit to proceed upon the two notes then due, which they then held as concurrent or cumulative securities; but they proceeded also upon the account, declaring for goods sold and delivered, and filed an itemized statement or bill of particulars embracing every item of charge in the account filed in the present case. If they allowed credit upon it, to which the defendants

were not entitled, and in consequence failed to recover as much as they were in fact entitled to recover, their failure must be attributed to a misapprehension as to the effect of such a proceeding, but in our view of the case they are certainly barred from recovering in a second suit for the same subject-matter embraced in the first. To permit a party to recover in a second action what was included in and might have been recovered in the first would be against the policy of the law and unjust, because it would harass a defendant and expose him to double costs. *Brenner v. Mayer*, 2 Out. 274; *Hess v. Heeble*, 6 S. & R. 57.

The judgment is, therefore, reversed.

APPEAL OF HAMBURG BANK ET AL.

October 4, 1886.

TRUSTEE — SURCHARGE — ACCOUNT — ORPHANS' COURT — JURISDICTION.

C., who held two mortgages against D., assigned them to E.; later C. died, and E. was made his administrator; he filed an account by which the estate appeared to be insolvent; exceptions were filed because E. had not charged himself with the two mortgages, which it was alleged had been assigned for the purpose of collection only, with the understanding that if the money secured by them were collected in the life-time of C. it was to be paid over to him, but if not collected till after his death it was to be paid over to the sisters and brothers of E. C. died before the collection of the sums so secured. *Held*, if the trust in favor of the sisters and brothers existed, the orphans' court had no jurisdiction of it; further, E. could not be compelled to account in the orphans' court for the fund secured by the mortgages till the trust be stricken down, which could only be done at the instance of the creditors of C.

Appeal from the decree of the orphans' court of Berks county. The facts are stated in the opinion.

W. D. Horning and *H. Willis Bland*, for appellants. *F. R. Schell* and *R. E. Wright, Jr.*, for appellees.

STERRETT, J. Exceptions having been filed by creditors and others to the account of Benjamin B. Trexler, administrator of the estate of Nathan Trexler, deceased, an auditor was appointed by the orphans' court to pass upon the same, restate the account, if necessary, and distribute the balance. The duty of the auditor under this appointment was two-fold. 1st. To ascertain the correct balance due by accountant; and 2d. To distribute the same among the parties entitled thereto. It is only to the former branch of his duty that any question arises on this appeal. As to the parties who are entitled to participate in the distribution of the balance that may be found due by the accountant; there appears to be no controversy.

One of the exceptions, and the only one involved in this contention, was that accountant should be charged with the proceeds of the Leisenperger mortgages, one for \$3,780, and the other for \$709.50, both of which were assigned by the intestate to his son, the accountant, and collected by him. It was alleged by exceptants that the mortgages were assigned solely for the purpose of collection, with the distinct understanding that if accountant succeeded in collecting them in his father's life-time the proceeds should be paid to him; if not, they should be accounted for as assets of his estate. It is conceded that

accountant collected the debts secured by the mortgages, and has since died, without having accounted for the proceeds. The burden, of course, was on the exceptants to show that the assignment was not intended to invest accountant with the absolute ownership or title to the mortgages in his own right, but only in trust for the purpose stated.

Accountant's mother and sister, having first assigned their respective interests in the estate and executed releases to the administrator *de bonis non*, were called by exceptants and testified in relation to the assignment of the mortgages and the purpose for which it was made. On their testimony in connection with that of other witnesses the learned auditor found in favor of exceptants, and accordingly surcharged accountant with the proceeds of the mortgages and interest, amounting in all to \$5,547.35, ascertained the balance due by him and distributed the same. The orphans' court, however, held that accountant being dead at the time of hearing before the auditor, his mother and sister were incompetent to testify that the assignment was executed merely for the purpose of facilitating the collection of the mortgages and not with the view of transferring title absolutely to accountant. We are not prepared to say there was any error in this; but assuming for the sake of argument that the witnesses in question were competent, their testimony establishes a special trust that is not cognizable in the orphans' court, and for that reason, if no other, there was no error in sustaining the exceptions to the auditor's report. As to the disposition accountant agreed to make of the mortgage money when collected, the substance of their testimony is that if Benjamin, the accountant, collected the money in his father's life-time, he was to pay it to him. If he collected it after his father's death, he was to pay it to his brothers and sisters in equal shares. The exact language of Mary Trexler, as we find it on the record, is: "My father said to him, Benjamin, that if he collected the mortgages in his life-time he would have to pay the money over to him, my father; and if he, my father, didn't live, he would have to pay it out to his brothers and sisters. This was at the time the assignments were made; that is, my father said this in the morning, when the assignments were made in the evening of the same day. Benjamin said he would pay it over." The widow, Mrs. Lydia Trexler, testified as follows: "I was present when my husband assigned the mortgages to Benjamin. After the mortgages were assigned he, Benjamin, said to me the mortgages were assigned to him for collection. He said that he, Benjamin, was to pay the money back to his brothers and sisters, and if he would collect it in his father's life-time, he would have to pay it to him." The learned auditor also found as a fact that the assignor of the mortgages intended to create a trust for the benefit of his children in case the money was not collected in his life-time.

It is conceded the assignor of the mortgages died before they were collected. If an alternative trust, such as was testified to by the witnesses and found by the auditor, was created, it necessarily follows that accountant held the proceeds of the mortgages not in trust for his father's estate, nor for his father's creditors, but in trust for his brothers and sisters. If the assignment was made for the purpose of hindering,

delaying or defrauding his creditors, they are the only parties who can assail it. His widow and heirs cannot question its validity; nor can the trustee be compelled to account in the orphans' court until the trust is first stricken down, at the instance of the assignor's creditors, as a fraud upon them to the extent of their respective claims. This has not been done; and we think there was no error in holding that the court had no jurisdiction of a trust created by accountant's intestate in favor of his children.

Decree affirmed and appeal dismissed at the costs of appellants.

READING FIRE INSURANCE AND TRUST COMPANY, GUARDIAN, ETC., v.
RIEDEL.

October 4, 1886.

MARRIAGE — REPUTATION — COHABITATION — ILLICIT RELATION — CUMULATIVE
EVIDENCE.

Cohabitation and reputation alone are not equivalent to a marriage, they are merely circumstances from which it may sometimes be presumed, and this presumption may be rebutted by other facts and circumstances.

When the relation between a man and woman has been of an illicit character in its commencement, cohabitation and reputation are not sufficient to establish a marriage, there must be proof of subsequent actual marriage; this, because the unlawful relation is presumed to have been continued.

Where a woman lives with B. as his mistress, and subsequently and during the life of B. lives with C. in the same manner, and upon the death of C. endeavors to establish with him the relation of husband and wife, because of reputation and cohabitation, reputation of marriage with B. based upon cohabitation with him and upon statements made by him, would tend to strengthen the possibility that her relations with C. had been formed meretriciously.

Appeal from the decree of the orphans' court of Berks county. The facts are set forth in the opinion.

Bland & Dettra and *Isaac Hiester*, for appellant. The finding of facts by an auditing judge will not be set aside except for plain error, and when the testimony is conflicting, this court will not reverse. But this court has uniformly held that when the questions decided grow out of inferences from clearly proved facts or conclusions derived from reasoning, the report has not the same weight. *Sproull's Appeal*, 71 Penn. St. 137; *Phillip's Appeal*, 68 id. 130; *Kutz's Appeal*, 100 id. 75. The question, therefore, is whether a marriage should be inferred from the facts shown. Marriage is regarded in this State as a civil contract, and is provable in all civil actions by cohabitation, reputation, acknowledgment of the parties, reception of the family, and any other circumstances from which it may be inferred. *Lehigh Valley R. R. Co. v. Hall*, 61 Penn. St. 361; *Senser v. Bower*, 1 P. & W. 450; *Thorndell v. Morrison*, 25 Penn. St. 336; *Hanna v. Phillips*, 1 Gr. 253; *Guardians of the Poor v. Nathans*, 2 Brewst. 149; *Physick's Estate*, 2 id. 179; *Bicking's Appeal*, id. 202; *Chambers v. Dickson*, 2 S. & R. 475; *Vincent's Appeal*, 60 Penn. St. 228. Reputation consists of the speech of the people who have an opportunity to know the parties, to be proved by them. *Com. v. Stump*, 3 P. F. S. 132. The best evidence of a reputation is that it never was discussed or questioned in the

* See *Harbeck v. Harbeck*, 5 East. Rep'r, 785.

community. The admissions of the party to the fact of marriage are entitled to great weight, while denials are entitled to but little consideration. *Greenwalt v. McEnalley*, 85 Penn. St. 352. The reception by the respective families is conclusively established. Though Ribble's choice of a wife was not satisfactory to his family, they positively, expressly and frequently recognized the marriage relation as above shown. General reputation, which the conduct of the parties established, may be, with cohabitation, primary evidence of marriage. *A fortiori* is family reputation of marriage authoritative in such case. 1 Whart. Ev., § 84; *Blackburn v. Crawford*, 3 Wall. 175; *Senser v. Bower*, 1 P. & W. 450; *Physick's Estate*, 2 Brewst. 179. Declarations, part of the *res gestæ*, are evidence to show the relation of the parties to each other. 1 Whart. Ev., § 259; *Potts v. Everhart*, 26 Penn. St. 493; *Kimmel v. McRight*, 2 id. 38; *Jones v. Brownfield*, id. 55; *Rees v. Livingstone*, 41 id. 113; *Ellis v. Guggenheim*, 20 id. 287; *Postens v. Postens*, 3 W. & S. 127; *Koch v. Howell*, 6 id. 350. "The fact that a woman cohabited with and spoke of a man as her husband is sufficient to bar her claim to the estate of another man whom she claimed to have married during the life-time of the former." *Adose v. Fossit*, 1 Pears. 304; *Thompson v. Thompson*, 10 Phila. 131; *Kenley v. Kenley*, 2 Y. 207; *Heffner v. Heffner*, 23 Penn. St. 104; *Griffith v. Smith*, 1 Clark, 479. "Where the testimony of one of the parties to an alleged contract of marriage shows that there was no contract by words '*in presenti*,' all other evidence on the subject is of no importance." *Tholey's Appeal*, 12 Norr. 36. "A relation between a man and a woman, which was illicit at the commencement, is presumed to continue so until proof of change, and a marriage, therefore, will not be presumed from cohabitation and reputation where the relation between the parties was of an illicit origin, in the absence of proof of a subsequent actual marriage." *Hunt's Appeal*, 5 Norr. 294. "Where there is no proof of actual marriage, cohabitation and reputation are necessary to ground a presumption of marriage; proof of cohabitation alone is insufficient." *Com. v. Stump*, 3 P. F. S. 132. "Both reputation and cohabitation must be shown to establish the presumption of a marriage in fact." *Smyth's Estate*, 1 Leg. Gaz. R. 210. "The repute of marriage must be general, the conduct of the parties must be such as to make almost any one infer that they were married." *Bicking's Appeal*, 2 Brewst. 202. "A man may live with his kept mistress in such a way as to create a kind of repute of marriage among some persons. He may even, to gratify her, allow himself to be held out, or hold himself out, to her friends and acquaintances as her husband; may recognize the fruit of the connection as his children, and manifest affection and tenderness toward them and yet the evidence may fall far short of that which ought to satisfy the mind that there was an actual agreement to form the relation of husband and wife." Per SHARWOOD, J., *Bicking's Appeal*, 2 Brewst. 202. See, also, *Yardley's Estate*, 75 Penn. St. 207; *Hill v. Hill*, 32 id. 511; *Brinckle v. Brinckle*, 12 Phila. 232; *Tholey's Estate*, 93 Penn. St. 36.

H. O. Schrader and Ermentrout & Ruhl, for appellee. The law favors the legality of marriage, and will not uselessly bastardize issue.

The presumption of law is always in favor of innocence. That which in law and equity a man ought to do is considered done. Public cohabitation of parties as husband and wife is presumptive proof of a valid marriage and becomes conclusive proof of marriage when not distinctly proved that the parties did not intend to contract matrimony. *Montague v. Montague*, 2 Addams, 375. For cohabitation is presumed to be lawful till the contrary appears, and in questions of marriage and of legitimacy where children are concerned, the presumption of law is in favor of innocence. *Senser v. Bower*, 1 Penn. St. 450; 2 Greenl. Ev., § 462. In the case of equal conflicting presumptions, the one in favor of innocence must prevail. In all civil cases involving the right of property, the fact of marriage may be proved by long-continued cohabitation and reputation. *Thorndell v. Morrison*, 1 Casey, 326. Even where the relation is shown to have been illicit at its commencement, and, therefore, raised no presumption of marriage, yet if there is proof of a change in the character of the relation, and a marriage in fact, this marriage in fact can be proven by acts of recognition, continued matrimonial cohabitation, and general reputation from which marriage can be inferred under the decisions. *Physick's Estate*, 2 Brewst. 179, and *Hunt's Appeal*, 5 Norr. 294; *Ribhard v. Brehm*, 73 Penn. St. 140. A marriage in fact does not mean a marriage by a priest, minister or justice, but, as was said by Judge BIDDLE, can be presumed from the actions of the parties, etc. Also *vide* Husband's Married Women, *Taylor's case*, page 11 *et seq.* The evidence in this case is of two kinds — circumstantial and direct or positive: the circumstantial, that which proves marital cohabitation and reputation, circumstances from which a marriage may be presumed. For civil purposes, reputation and cohabitation are sufficient evidence of marriage. This principle of law is well established by the following authorities: *Senser v. Bower*, 1 P. & W. 450; *Thorndell v. Morrison*, 25 Penn. St. 326; *Lehigh Valley R. R. Co. v. Hall*, 61 id. 361; *Hanna v. Philips*, 1 Gr. 253; *Guardians of Poor v. Nathans*, 2 Brewst. 149; *Bickling's Appeal*, id. 202; *Physick's Estate*, id. 179; *Brice's Estate*, 2 W. N. C. 112. The direct and positive proof consists of his declarations that she was his wife — *Physick's Estate*, 2 Brewst. 179, auditor's report, confirmed by supreme court — and this, together with proof of cohabitation and reputation, is most satisfactory evidence of an actual marriage. *Vincent's Appeal*, 10 P. F. S. 225. In *Com. v. Litzengerger*, the court say: "The husband's declarations and admissions that the complainant is his wife will sustain a proceeding for desertion;" and in *Hill v. Hill*, 8 Casey, 511, his declarations that she is not his wife are not admissible to disprove the marriage.

MEROUR, Ch. J. This is an appeal from a decree setting off \$300 worth of property to the alleged widow of Jacob R. Riegel, deceased. Whether the appellee was ever his lawful wife is the question in the case.

It is clearly proved that they lived and cohabited together for several years. She gave birth to a child which he claimed and recognized to be his. There is evidence that at times he declared she was his wife and introduced her as such. On one occasion when he conveyed some

real estate she joined in the deed as his wife. At other times when asked whether he was married to her, he would give evasive answers neither admitting or denying that he was or was not. At the time the child was born, Rebecca Forney swears they were not married. That witness asked each of them about that time. "He said he was not married; that he would take her for a housekeeper." "He said he would never marry her." "She said she was long ago married."

At other times the appellee spoke of him as her husband. Mrs. Dr. Rhoads, however, testifies, after Riegel and the appellee had lived together for some time, that the latter "complained to her that he would not marry her. She blamed his sister for being opposed to his marrying her. She said whenever she would ask him to marry her he would say, 'I cannot; my sisters don't want you in the family.'" Witness further testified, the appellee said "she told Jacob Riegel to get himself another housekeeper if he would not marry her."

The whole evidence discloses quite a difference of opinion in the minds of their neighbors as to whether they were married. It was so uncertain that there appears to have been much talk questioning it while they were living together. The evidence does not show any actual marriage, nor any well-recognized, general reputation that they were married.

Soon after the death of Riegel and before his funeral, Ressler swears he was at her house and said to her, "you know there are rumors on the streets that you and Jacob Riegel were not married?" and she answered, "if we ain't married, I was true to him all the time we lived together."

She was afterward called and testified in her own behalf. She denied generally that she had such a conversation with Mrs. Rhoads, and swore that she did not tell her that she said to Jacob: "If you don't want to marry me, then get yourself another housekeeper." She did not specifically deny other portions of Mrs. Rhoads' evidence equally as strong and expressive that no marriage existed, nor did she deny having used the language testified to by Ressler. She did not swear that she was ever married to Riegel or that there was any agreement between them under which they lived together as husband and wife. On the argument of the case in the court below, it appears by the opinion of the court that the appellant asked why she was not examined with reference to her marriage with the decedent. The answer was that she was called and testified only in rebuttal. The learned judge says: "The question why she was not called and did not testify in chief still remains unanswered, and I submit that I am not able to answer it."

We think the easy and correct solution of this question is to infer she was not called in chief to testify to an alleged marriage with Riegel by reason of her known inability to testify to any fact sufficient to prove a marriage.

Undoubtedly they lived together for a long time under circumstances sufficient to prove intimate sexual relations, but cohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances. *Hunt's Appeal*, 86 Penn. St. 294. When the relation between a man and a

woman living together is illicit in its commencement it is presumed to so continue until a changed relation is proved. Without proof of subsequent actual marriage it will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin. *Id.*

Here the evidence establishes with sufficient certainty that in its inception the relation between the appellee and Riegel was illicit, and there is no sufficient evidence to create a legal presumption of any subsequent marriage. In arriving at this conclusion we do not doubt the correctness of the law as declared in *Richard v. Brehm*, 73 Penn. St. 140, and numerous kindred cases. Many times marriage may be proved by acts of recognition, continued matrimonial cohabitation and general reputation. Here, however, the evidence falls far short of satisfying the mind that there was ever any actual agreement to form the relation of husband and wife.

There is another feature in the case which if proved would establish that she is the wife of another man, who is still living.

The appellant gave evidence tending to prove that before the appellee formed any relations with Riegel, she lived and cohabited with one Jeremiah Ribble, and was reputed to be his wife, and he is still living. Some eight witnesses testify that Ribble and she were living together, and keeping house, and reputed to be husband and wife. Four of these witnesses were neighbors, living on the same street with them. One was a cousin of the appellee and three of them were brothers of Ribble. Two of the brothers testify that he told them he and she were married, and were living together or keeping house.

The evidence of cohabitation and reputed marriage with Ribble, during the time she lived with him, is of the same general character as that given to prove the subsequent relations between her and Riegel, but that time was of much shorter duration.

She swears she never lived with Ribble as his wife. If, in fact, she lived and cohabited with him as his mistress, the reputation proved, and his declaration would not make her his wife. They would not be sufficient to establish the existence of a valid marriage with him. They do, however, tend to strengthen the probability that she may have formed the same kind of meretricious relation with Riegel. The evidence of any marriage with him is too weak and uncertain to establish that relation, and the learned judge erred in holding otherwise.

Decree reversed at the costs of the appellee, the confirmation of the appraisal to her is taken off, the exceptions thereto are sustained, and the appraisal is set aside.

LEVAN *v.* MILLHOLLAND.

October 4, 1886.

ACTION — PARTIES — JOINDER — DECEDENT — DEBTS — REAL ESTATE — CHARGING — JUDGMENT — VALIDITY — RETURN — CONCLUSIVENESS — CONTRADICTION — SALE — DECREE.

A., who was indebted to B., devised his real estate to certain of his relatives. After the death of A., B. instituted an action against the administrator of A.,

c. t. a., to recover the amount of his claim, and joined, as defendants, the devisees under the will. Judgment was eventually entered in the action in favor of B., and execution issued thereon, and the real estate of A. was sold. *Held*, that while the correct practice under the act of 1884 to charge the real estate of A. with the payment of his debt would have been to have followed the channel set out in the case of *Atherton v. Atherton*, 2 B. 112, yet, the course pursued, being but an error in practice, which might have been corrected, but which passed unnoticed, did not affect the validity of the judgment.

In ejectment brought by certain of the devisees under the will of A., against vendees holding through title from the sheriff's vendee, it was offered to be shown that the return of the sheriff made in the action brought by B. against A.'s administrator, *et al.*, and which purported to return a service on the guardian of one of the defendants, was invalid, as no such trustee existed. *Held*, the conclusiveness of the sheriff's return could not be thus contradicted.

The inclination is to sustain judicial sales fairly carried into execution, when made under the decrees of courts possessing general jurisdiction of the subject.

Error to the court of common pleas of Berks county.

Anthony F. Miller, owning property, devised the same to his sister and to their lives and the life of the survivor, with remainder to the children of Albert Miller, who were then minors, and later died.

Solomon Ely, having a claim against Anthony F. Miller, on September 14, 1864, brought a suit against Jacob Schmucker, the administrator, with the will of the decedent annexed, and joined as defendants therein the decedent's wife and sister, the life tenants as aforesaid, and Eva, Susan, William, Ellen and Mary Miller, the minor children of Albert Miller, entitled to the remainder. The sheriff made return of service upon the administrator, the life tenants and "Francis Bright, guardian of the minor children of Albert Miller." This service was made September 20, 1864; following, this entry was made upon the record: "October 5, 1864, Francis Bright suggested as guardian for Eva, Susan, William, Ellen and Mary, minor children of Albert Miller." A determination was thereupon entered to choose arbitrators, and after due proof of notice arbitrators were chosen, who awarded in favor of the plaintiff. This award becoming absolute, a writ of *fieri facias* and then a writ of *venditioni exponas* were issued, and the property was sold to Benjamin Tyson for \$7,800, which money was paid to the sheriff. There were judgments against Anthony F. Miller, obtained in his life-time, and which were a lien upon the property in question. Out of the fund in the hands of the sheriff, as aforesaid, the amounts of the judgments were distributed to the plaintiffs therein, and the balance of \$5,354.40 was, under an order of the court, paid to the administrator, he filing a bond in the sum of \$10,000 for the faithful appropriation of the fund, which bond was approved by the orphans' court, pursuant to the act of assembly.

Benjamin Tyson, the purchaser at the sheriff's sale, died, and a proceeding in partition had upon his estate, resulting in an order of sale, and a sale of the property in question to Isaac Eckert. Isaac Eckert sold to James Millholland. James Millholland died intestate, and the property descended to his widow and heirs. Ejectment was then commenced by certain of the children of Albert Miller to recover possession. The verdict was for the defendants.

E. H. Deysher, for plaintiffs in error. The proceedings were irregular, in that the widow and devisees were originally joined as

defendants with the administrator in the suit brought by Solomon Ely. The method of proceeding to charge the real estate of a decedent with his debt has been plainly pointed out by this court in the case of *Atherton v. Atherton*, 2 Barr, 112, decided in 1845, wherein it was held that the plaintiff should first "proceed on a judgment against the executor or administrator. Having obtained such a judgment, the next step is a *scire facias* against the owners of the land." . . . "That course is not only free from embarrassment, but it is the natural one. It was pointed out in *Murphy's Appeal*, 8 Watts & Serg. 168, but as the decision in that case was in a proceeding in the orphans' court, it is proper to establish the practice in the common pleas." The act of 13th June, 1836, section 83, article 3, P. Laws, 587, provides that "if any such defendant be under the age of fourteen years, and have no guardian as aforesaid, service thereof shall be made upon the next of kin of such defendant, residing in the county wherein such defendant shall reside, in the manner aforesaid." "But in every case in which any such defendant shall not have a guardian as aforesaid, it shall be the duty of the plaintiff, upon or after the day on which he might take judgment by default against such minor, if he were of full age, and before any plea pleaded or rule ever taken in the action, to make application to the court, in which such action shall be brought, for the appointment of a guardian of such minor in that case, if such minor shall not have appeared by his guardian as aforesaid, and, such appointment being made, he shall give notice thereof to the person appointed." The record of the suit shows upon its face that a rule to arbitrate was taken in the action before a guardian was appointed for the minor children of Albert Miller, and before application to the court for the appointment of such guardian, and that at no time during these proceedings was there an appearance for them by guardian or otherwise; and that it does not show that at any time was there a guardian appointed for them. This method of procedure is in direct violation and utter disregard of the provisions of this act, and, consequently, the judgment obtained thereon was void as to them. To hold it otherwise were to permit that to be done which manifestly this act was intended to guard against and prevent. *Meredith v. Shewall*, 1 Penr. & Watts, 495, decides that "the general rule is that a sheriff cannot be admitted to contradict his return; as to himself, it is conclusive, but it is not, under all circumstances, conclusive as to others." In the case of *Coulter v. Selby*, 3 Wr. 358, it is decided that "the widow and heirs are regarded in the light of terre-tenants, for the law of descent casts the title upon them." In the case of *Mitchell v. Hamilton*, 8 Barr, 486, Chief Justice GIBSON overrules in terms the case of *Minier v. Saltmarsh*, 5 Watts, 293, in which it was held that where a terre-tenant has been summoned, even though the land was discharged of the lien, yet if he failed to avail himself of that defense on the *sci. fa.*, he was concluded." . . . "Were the objections to that case purely technical, I would not consent to raise a finger against it; but as it has worked palpable and revolting injustice in the very case in hand, we must conclude that it would do so again; and we are, therefore, bound to overturn it on every principle of honesty and conscience.

In the case of *Dengler v. Kiehner*, 1 Harr. 38, GIBSON, Ch. J., decides that "the creditor must, at least, have laid a *prima facie* case; he must show that he whom he calls a terre-tenant actually stood in the relation of one, else there will not have been such privity between them as would estop the latter by the judgment." In the case of *Drum v. Kelly*, 10 Casey, 415, the court below, after a full consideration of the cases bearing on this subject, decided that "the mere circumstance that a person is summoned as a terre-tenant in a *scire facias*, who in point of fact is not such, is not estopped by a judgment had on the *scire facias*." In the case of *Fetterman v. Murphy*, 4 Watts, 424, Justice HUSTON says: "A fraud practiced under the forms of law is at least no better than if it had assumed another dress." In the case of *The Executrix of Christman v. Evans' Adm'r*, 13 S. & R. 14, Justice GIBSON says: "As it is not necessary to his," the executor's, "safety to resist the demand on its merits, collusion with the plaintiff may, and frequently does, take place. A judgment against the executor for a pretended debt is often made an instrument to divest infants of their land, and to deprive them of the shield with which the common law has covered them." *Riland v. Eckert*, 11 Harr. 215, decides that "the thirty-fourth section of the act of 1834 is directory, and was designed to protect the estates of dead men from those collusive judgments which are sometimes concocted between faithless administrators or executors, and pretended creditors, and which have been used as instruments for stripping families of their inheritance."

Louis Richards and *Cyrus G. Derr*, for defendants in error. The joining as defendants of the devisees with the administrator *cum testamento annexo* in the action of Solomon Ely was, under the provisions of the act of February 24, 1834 — § 34, *Purd. Dig.* 530, pl. 112 — correct and proper. *Dingman v. Amsink*, 27 S. 114. A mistake in practice will not render a judgment void, nor will it avoid the title of a purchaser at a sheriff's sale held pursuant to process issued upon such judgment. *Freem. Judg.*, § 135; *Spear v. Sample*, 4 W. 376; *McFee v. Harris*, 1 C. 102; *Wilkinson's Appeal*, 15 S. 189; *Atkinson v. Tomlinson*, 10 *Norr.* 284; *Hering v. Chambers*, 7 *Out.* 172. The return of the sheriff that he had served the summons personally on "Francis Bright, guardian of the minor children of Albert Miller," etc., was conclusive of the fact that Francis Bright was the guardian of the said children, and the said return cannot be contradicted. *Kleckner v. Lehigh Co.*, 6 *Wh.* 66; *Kinnard v. R. R. Co.*, 1 *Phila.* 41; *Patton v. Insurance Co.*, id. 396; *Commonwealth v. R. R. Co.*, 1 *Pear.* 341; *Mentz v. Hammon*, 5 *Wh.* 150; *Flick v. Trossell*, 7 *W. & S.* 65; *The Church v. The Church*, 5 id. 215; *Benwood Iron Works v. Hutchinson*, 12 *W. N. C.* 495; *T. & H. Prac.*, § 260.

STERRETT, J. Both parties to this action of ejectment claim under Andrew F. Miller, who, in 1863, devised the land in controversy to his wife and sister for their joint lives and the life of the survivor, with remainder in fee to the children of Albert Miller, who were then minors, but are now adult plaintiffs, claiming as devisees in remainder. The defendants claim through a sheriff's sale on a judgment

against the administrator *de bonis non*, etc., of Andrew F. Miller, the devisor, with notice to his devisees for life and in remainder.

In the suit against the administrator, the summons was returned by the sheriff, served on the administrator *de bonis non*, etc., the life tenants, and "Francis Bright, guardian of the minor children of Albert Miller." Arbitrators chosen after due notice awarded in favor of plaintiff and against the defendants in that suit. The award unappealed from had all the effect of a formal judgment *de terris*. A writ of *feri facias* was issued, and in due course a writ of *venditioni exponas* was issued on which the property was sold to Benjamin Tyson for \$7,800. The purchase-money having been paid to the sheriff, part of it was applied to judgments obtained against Andrew F. Miller, the devisor, in his life-time, and the residue was ordered paid to the administrator *de bonis non*, etc., upon his giving bond as required by act of assembly.

Under the devise to them in remainder, plaintiffs, of course, have a *prima facie* case; but defendants, having acquired title by *mesne* conveyances from the purchaser at sheriff's sale, contend that they are invested with such title as the devisor had at and immediately preceding his decease, and consequently the title which otherwise would have been complete under the devise was divested by the sheriff's sale. This position is undoubtedly correct, unless there is some radical defect in the judgment itself, or on the proceedings thereunder, that rendered the sheriff's sale not merely irregular and voidable, but absolutely void.

It is claimed, by plaintiffs, in the first place, that they were improperly joined as defendants in the original suit against the administrator *de bonis non*, and for this they rely mainly on what was said in *Ather-ton v. Atherton*, 2 Penn. St. 112, as to the proper practice in such cases. The act of 1834 provides that, "In all actions against the executors or administrators of a decedent, who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debts, the widow and heirs or devisees, or the guardians of such as are minors shall be made parties thereto," etc. The course pursued in the case at bar would appear to be strictly conformable to the act; but, assuming the correct practice to be as stated in the case above cited, making the devisees defendants with the administrator *de bonis non* was at most an error in practice, which might have been corrected, but which, passing unnoticed, did not affect the validity of the judgment. The court undoubtedly had jurisdiction of all the parties as well as of the subject-matter; and conceding for the sake of argument that there were irregularities or even errors that might have been corrected if they had been complained of in time, it does not follow that either the judgment or the proceeding thereunder was void. That question has been so often considered and uniformly decided against the contention of plaintiffs that it is useless further to discuss the matter.

Another ground of objection to the judgment, not apparent on the face of the record, is that the devisees in remainder — the present plaintiffs — had no guardian at the time the summons, according to the return

of the sheriff, purports to have been served on "Francis Bright, guardian," etc., and they propose to prove, in direct contradiction of the sheriff's return, that such was the fact. It is scarcely necessary to say that the conclusive effect of the sheriff's return cannot be evaded in that way. If it could, what security would there be in titles based on sheriff's and other judicial sales? The most that can possibly be said of the judgment on which the property was sold is that it might have been reversed if its regularity had been called in question; but even the reversal of the judgment after the sale could not affect the title of defendants as purchasers at the sheriff's sale. The act of 1705 provides: "That if any of the said judgments which do or shall warrant the awarding of the said writs of execution, whereupon any lands, tenements or hereditaments have been or shall be sold, shall at any times hereafter be reversed for any error or errors, then and in every such case none of the said lands, tenements or hereditaments, so as aforesaid taken or sold, or to be taken or sold upon executions, nor any part thereof, shall be restored, nor the sheriff's deed or delivery thereof awarded; but restitution in such cases only of the money or price for which such lands were or shall be sold."

The record of the judgment in question discloses nothing that was clearly erroneous, certainly nothing that rendered the judgment void or insufficient to sustain the execution. Being thus regular on its face, the purchaser was not bound to inquire as to the truth of what is there averred. He had a right to accept all the essential averments as verity. In *Spear v. Sample*, 4 Watts, 376, it was adjudged that "an execution issued upon a judgment after the death of the defendant is not absolutely void, but only voidable, and a sale of land upon such execution vests in the purchaser a good title." In the interests of debtors and on grounds of public policy, courts have always inclined to sustain judicial sales, especially when made under the judgments or decrees of courts possessing general jurisdiction of the subject and after being fairly carried into execution. After acknowledgment of a sheriff's deed in open court the title of the sheriff's vendee cannot be affected by mere irregularities, however gross. *McAfee v. Harris*, 25 Penn. St. 102. The same principle is reiterated in many cases, among which are, *Wilkinson's Appeal*, 65 Penn. St. 189; *Atkinson v. Tomlinson*, 91 id. 284; *Hering v. Chambers*, 103 id. 172. In *Wilkinson's Appeal*, *supra*, an execution had been issued on award of arbitrators immediately after filing the award and before the time for appeal had elapsed, and the court, in sustaining the sheriff's sale, made by virtue of the execution, said: "It is settled, if any thing can be, that an erroneous judgment or an irregular execution — not void — can be set aside only by direct and appropriate action by parties having an interest in the same, and not by a collateral attack under cover of any other proceeding."

A return of *nulla bona* to the writ of *fiery facias* was not a pre-requisite to the issuing of the *venditioni exponas*.

It is unnecessary to notice the remaining specifications of error. There is no merit in either of them.

Judgment affirmed.

SUPERIOR COURT OF DELAWARE.

RUSSELL v. FAGAN.

November, 1886.

INNKEEPER — INJURY TO MARE.

An innkeeper is, like a common carrier, an insurer of the goods of his guest. An innkeeper is liable in damages for injury to the beast brought by a traveler, and provided with stabling in the stables attached to his inn, even though the traveler had no personal entertainment at the inn, but lodged and supped elsewhere. Such traveler is a guest of the inn.

Livery-stable-keepers are under different and less weighty responsibilities than innkeepers, as persons residing near to and using the former are not entitled to the same protection as are travelers on a journey.

Action for damages for the loss of a mare stabled in the stables attached to the defendant's inn or hotel. The case appears in full in the charge of the court.

Levi C. Bird and *A. E. Sanborn*, for plaintiff, cited *Shaw v. Berry*, 31 Me. 478; *Cogges v. Bernard*, 1 Smith Lead. Cas. 375; *Master v. Brown*, 1 Cal.; Story Bailments, § 477; *York v. Grindstone*, 1 Salk.; *York v. Greenough*, 2 Ray.; *Sibley v. Aldrich*, 33 N. H.; *Mason et al. v. Thompson*, 9 Pick.; *Peet v. McGraw*, 26 Wend.; *Hulett v. Swift*, 42 Barb.; *Bennett v. Meller*, 5 Term Reports; *Hall v. Pike*, 100 Mass.; *McDaniel v. Robinson*, 26 Vt.; *Clute v. Wiggins*, 7 Am. Dec.; *Norcross v. Norcross*, 53 Me.; *Pinkerton v. Woodward*, 33 Cal.; *Berkshire Co. v. Proctor*, 7 Pick.; *Gale v. Libbey*, 36 Barb.; *Washburn v. Jones*, 14 id.; *Jalie v. Cardwell*, 35 Wis.; *McDowell v. Edgerton*, 5 Barb.; *Grinnell v. Cooke*, 3 Hill; *Richmont v. Smith*, 8 B. & C.

Lore & Emmons, for defendant, cited Story Bailments (9th ed.), §§ 470, 472, 482; *Merritt v. Claghorn*, 23 Vt.; 2 Kent, 592 and 593; *Cayle's case*, 8 Rep.; *Dawson v. Chalmers*, 48 E. C. L.; *Burgess v. Clements*, 4 Maule & Sel.; *Cutter v. Bonney*, 14 Am. Law Reg.; *Horoth v. Franklin*, 20 Tex.; Redf. Com. Car. 595, 596, 597; *McDaniel v. Robinson*, 26 Vt.; *Johnson v. Richardson*, 17 Ill.; *Richmon v. Smith*, 8 Barn. & Cress.; *Metcalf v. Hess*, 14 Ill.; *Johnson v. Wood*, 17 id.; 1 Pars. Cont. (4th ed.) 629; *Berkshire Co. v. Proctor*, 7 Cush.; *York v. Grindstone*, 1 Salk.; *Binns v. Pigot*, 9 Carr & Payne, 208; *Dawson v. Chamney*, 48 C. L.; *Grinnell v. Cook*, 3 Hill; *Ingallsbee v. Wood*, 33 N. Y.; *Healey v. Gray*, 68 Me.

COMEGYS, Ch. J. This action is brought by the plaintiff to recover from the defendant damages to the extent of \$500 for the breaking of one of the hind legs of the plaintiff's mare whilst she was in the defendant's stable in Wilmington.

The plaintiff is a citizen of the State of Pennsylvania, resident at Landenberg in Chester county, and the defendant at the time of the accident was and yet is a common innkeeper or hotel-keeper at the sign of the *White Horse*, in this city. On the day before the time of the accident, the plaintiff having occasion to journey to Wilmington, came

here in the afternoon and went to the defendant's inn, where he put up his mare and carriage, and at the same time delivered a quantity of oats to be fed to her during his stay in the city, and also a bottle of liniment which he directed should be rubbed from time to time upon her hind leg, in which she was lame, as he said, from the travel of eighteen miles. Plaintiff left and returned the next afternoon. Plaintiff had no personal entertainment at the inn, nor did he ask for any—having it provided for him elsewhere. The next morning it was discovered that the mare's leg aforesaid was broken, according to the defendant's two witnesses, by her attempting to rise in the stable after she had shortly before lain down. According to the groom the mare was very lame when brought to the stable. She had lain down for about fifteen minutes. After her effort to rise, examination proved that the leg was broken. The plaintiff, as a witness, in reply to a question put to him by his counsel, stated, that when the mare was put in the stable, he discovered that there was a hole in one of the side walls, a board there having been broken. He called nobody's attention to this fact. Defendant denied this statement by his two witnesses, and asserted that the stall was in good condition. The mare was killed to relieve her suffering. As the plaintiff had furnished oats for his mare, he paid nothing for her grain diet, but he paid twenty-five cents for hay given her in the stable which was attached to and part of the inn property. Payment for the loss of the mare was demanded by plaintiff and refused. The mare was proved to have been worth from \$200 to \$250. Upon this statement of fact, plaintiff asks for a verdict for the value of the mare with interest from September 7, 1884, the date of the casualty. The defendant resists such demand, insisting that no liability on his part can arise out of them—his principal grounds being that the plaintiff was not a guest of his inn, and that the accident was the result of some natural or other defect of the bone of the mare's leg, of which he could not have any knowledge, nor against accident from which he could protect himself, and that, therefore, the occurrence was one against which human foresight could make no provision and comes within the exception of extreme liability in the case of carriers known to the law as inevitable accident.

The first question to be decided is: Was the plaintiff a guest of the defendant at the time of the accident to the mare? If he was, then what liability to him on account of receiving the mare by defendant, and placing her in his stable to be served with hay, fell upon or was incurred by said defendant. If he became liable for her return to him in as good condition as she was when the defendant received her, is there any thing which will excuse such liability, and if so, did such excuse exist in this case upon the testimony of the defendant and his witnesses. These are, under the circumstances very interesting questions, none of them having before been presented in this State, for consideration to a court and jury. They concern the whole traveling public, and that body of men, very numerous in this county, called innkeepers, or keepers of what are now called hotels. It is said that inns exist for the benefit of the traveling community. In fact they are almost as much a necessity to travelers as the public means of conveyance and locomotion

are. There was a time when any one could keep an inn, but that time is long past, and none are allowed to maintain them but persons regularly licensed by public authority. In them, wayfaring people of every kind, if they can afford the expense which the host charges for the same, can be accommodated with diet and body lodging; in other word, can be entertained in their journeyings. The necessities of such people oblige them to solicit entertainment at the common or public inns, both for themselves and their beasts where they travel with such, otherwise they would be without shelter and food. Because of this necessity, and that the host or entertainer is generally unknown to a party resorting to his house or inn, and that such party is compelled to trust himself and his property to his keeping, and that he is charged by the innkeeper for such entertainment of himself and his beasts, and the custody of his property, the law holds the innkeeper to a strict liability; not from any contract between the parties, but from the duty growing out of his public employment. One of the incidents of his business of common innkeeper is that he is bound to receive and entertain all such as apply to him for that purpose, and are in fit condition to be taken into a public inn as guests, provided there be room for that purpose. There are, statutory exceptions to this rule, but I am not now concerned to speak of them. Another of them is that he is bound for the safe-keeping, and the well-keeping of the beasts of his guest and his goods, that is his luggage, apparel, money, etc., so that if any of them be stolen, or otherwise lost or damaged in his inn, while the relation of host and guest continues, he must make good such loss or damage. Every one who is received into an inn and has entertainment there for which the innkeeper has compensation by way of remuneration or reward for his services is a guest.

The relation of host and guest exists. This general definition, however, only includes those who in a legal sense are travelers or wayfarers; and boarders, or persons who reside in the same place, are not embraced by it. It is only travelers or wayfarers that the innkeeper is bound to accept as guests, and it is for them alone that he is under extraordinary responsibility for the safe-keeping of beasts and goods. Inns are for them, as the books teach us; that is for their sustentation and nourishment and protection of their goods from depredation by thieves and robbers at stages of repose in their journeying. The liability of innkeepers and others than those just mentioned are not so great; but they are very adequate. Taking the definition before given in its strict sense, it would seem that the term "guest" only applies to those who lodge or obtain meat or drink at an inn for compensation to the innkeeper. But this is not the case, as we think. Upon this subject the authorities are, unfortunately, not agreed; but after a careful consideration of them, especially upon review of the older ones, those nearest to the time when inns began to be recognized and controlled by law, we are satisfied that the law may be given to you by us, and we now declare it for your guidance, that if a person who comes within the meaning of the term "traveler" or "wayfarer"—that is being upon a journey passing over the country from place to place, or from one place to another and returning—has occasion to seek entertainment for his

beasts, and obtain it for them, upon a consideration of reward or pay charged him by the host or landlord, he is in legal sense a guest as much so as if he had himself received personal entertainment; and while such entertainment for his beasts continues, if any damage or injury happen to them or they be stolen, he is, subject to certain exceptions to be mentioned, absolutely liable for them, to the same extent as if he had undertaken against the particular damage by a special agreement. The law makes the owner a guest because of the compensation charged by the innkeeper. The liability of the traveler for that—which attaches upon the reception of the beasts—constitutes this relation of host and guest. It is his property that is nourished, while upon his journey, and that in law is the same as if he had been in his own person the actual recipient of entertainment. It would be otherwise entirely of dead or inanimate things left at the inn by such traveler, as to which nothing would be paid to the innkeeper. The existence of an inn involves in legal contemplation a stable attached to it also; and travelers with horses and carriages are not to be presumed to put them up at the inn to be kept there otherwise than as in the inn stables strictly; whereas those not travelers in the sense I have been employing, but merely putting up their teams at the inn stable as a livery—as is the case with persons residing near towns who use such stables as mere convenience—are not to be considered in the light of guests, and entitled to the same degree of protection as travelers are. They do not strictly come within the definition of travelers—persons upon a journey. Livery-stable-keepers are under different and less weighty responsibility than innkeepers; and they are justly without one great benefit the latter possess.

I have said that where the relation of guest in an inn exists, whether from personal entertainment or for that given to the traveler's beasts, the innkeeper is absolutely liable for all loss or damage to the property of the guest, subject to certain exceptions. They are what is called the act of God, such as earthquake, lightning, flood—the public enemy, that is the forces of a nation engaged in hostile war with that of the innkeeper—and the act or conduct of the guest or his friends or servants. The first of these is aptly called inevitable accident without the intervention of man—2 Kent Com. 597—that is some casualty which human foresight could not discern, and from the consequences of which, therefore, no protection could be provided. If the statements of the witnesses for the defendant are to be believed the fracture of the mare's leg was not occasioned by any defect in the stable in which she stood, for they and the innkeeper also, testify to its good condition, but was the result of accident entirely—falling upon the leg in the endeavor by the mare to get up. If it was broken in that manner, then it could not have been prevented by any care or previous provision by the innkeeper. You must disbelieve this testimony entirely if you give credit to that of the plaintiff, who swears to a hole made by a broken board in one side of the stall—in which state it might be supposed that the mare got her leg in that hole, and thus it was broken. You have three witnesses to one that there was no hole at all; but still you may consider the evidence of that one of greater weight than that of the three

others. The plaintiff, however, and the defendant are both interested witnesses, and stand alike with the bias of interest upon their minds. Until of late parties to a suit could not be witnesses, from risk of perjury. The risk still exists though the law has been changed; but the jury are to judge of their credit, according or not as their statements are corroborated, or from all the circumstances they appear to be correct. The mare was certainly lame in that leg when she came to the stable by all accounts, though the statements as to the degree of lameness differ. She had come but eighteen miles, however. There is, I believe, no evidence before you that a horse with good limbs would be likely to fall lame more or less in a drive of eighteen miles; and there was no agreement of counsel in that respect. This is a matter of experience and observation; among the qualities of a beast worth \$200 it would seem there should be one that it can stand without lameness a drive of eighteen miles. The theory of the defendant is that the lameness arose from previous injury to the leg, and scars upon it at the place of the fracture were sworn to in behalf of the defendant as existing at the time the mare came to be bathed and rubbed with the liniment the plaintiff had brought with him to the inn. That of the plaintiff is that it arose wholly from the drive that afternoon. The shoe from the foot on that leg was removed by the groom upon the request of the plaintiff; but if the testimony of the groom is to be believed, that gave no relief, for the mare appeared down to the time of the accident to be in great misery. The plaintiff also swore, as suggesting a cause of the broken leg, that there was a horse in an adjoining stall; but the defendant and his groom swore the contrary.

Having instructed you that, in contemplation of law, the plaintiff was a guest of the inn at the time of the casualty to his mare which was entertained there, the question for you to decide is this: Was the breaking of the mare's leg a pure accident; that is, a casualty in no degree chargeable to any act or omission of the defendant or his groom? An innkeeper is, like a common carrier, an insurer of the goods of his guest. When such liability is the subject of an action, he is deemed in law to be *prima facie* responsible, so that if a plaintiff proves himself a guest, in legal sense, and sustains a loss while that relation exists, the innkeeper's obligation to pay for it at once becomes perfect, unless he can show that the loss occurred by the act of God, the enemies of the country, or the fault or misconduct of the plaintiff or his servants or friends of his company as before stated. Nothing short of inevitable accident, casualty of war, or act of the plaintiff, his servant or such friends will excuse him. This is apparently hard law; but were it otherwise, the property of guests at an inn would be in such insecurity from the practices of dishonest landlords with corrupt servants, that the necessity of travel would be encountered with dread and apprehension. Public policy demands that the necessities of intercourse by travel shall not involve danger of loss from innkeepers any more than from common carriers, who are liable to those employing them, exactly as innkeepers are to their guests; and they alike have a right to protect themselves by special contract not contravening such policy, and have also the important privilege of retaining the property for which their

liability exists until their charges in the one case for the entertainment given, and in the other for the carriage of the goods, are paid. A livery-stable-keeper nor a private carrier has by the common law any such privilege. He may excuse himself by showing due diligence.

We may say, we trust with a due sense of the gravity of the observation, that we think the report of *Cayle's* case did not justify the opinion of it expressed by some eminent judges, particularly Justice STORY, in treating of the law concerning innkeepers. Lord COKE, certainly, we think, did not mean that an innkeeper was not an insurer, or he would not have used the language immediately following, that relied upon by Justice STORY, in support of his theory of qualified liability beyond that of a carrier. His meaning seems to be that ascribed to his language by a learned California judge in *Mateer v. Brown*, 1 Cal. 221.

Upon the evidence in the case the jury rendered a verdict for the defendant.

CONNECTICUT SUPREME COURT OF ERRORS.

DONAGHUE v. GAFFY.

July 27, 1886.

LIBEL AND SLANDER—WHETHER LIBELOUS PER SE—WHEN QUESTION FOR COURT.

Ordinarily in actions for libel it is for the jury to say whether or not there has been a publication referring to the plaintiff, whether or not it is malicious and false, and whether or not the sense and meaning are as charged. But if the publication is expressed in terms so clear and unambiguous that no circumstances are required to make it clearer than it is of itself, the question of libel or no libel is one of law for the court.

The publication in this case—set out in the opinion—held not to be libelous *per se*; and no special damage having been shown, plaintiff was not entitled to recover.

Action for libel. The opinion states the case.

C. E. Perkins and *J. G. Calhoun*, for appellants. *G. G. Sill*, *H. C. Flaherty* and *D. L. Aberdeen*, for appellee.

PARDEE, J. This is a complaint for libel. The issue was closed to the jury, and judgment rendered against the plaintiff, as in case of nonsuit; he appeals. Upon the trial the plaintiff introduced evidence tending to prove that the defendant published of him a circular in words as follows:

“To the liquor dealers of Hartford and vicinity: In order that you may be on your guard and protect yourselves against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. The concern I refer to is Donaghue Bros., consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them for years, but, because I quit buying of them, they went to the Middle

town Savings Bank, of which I rented my place, and offered \$10 more a month than I was paying, and, after getting their lease of the premises, served a notice on me to immediately vacate. Considering the mean and unfair manner in which this firm have treated me, I have wondered to myself whose turn will come next, should anybody feel like exercising their right to buy of whom they like. I believe it is time to speak out and warn the trade against a firm who, because we buy of somebody else, subject ourselves to the same treatment I have received. The firm of Donaghue Bros. are not worthy of our support, being guilty of foul and unfair dealings to 'get square,' as they say, with one who exercises that right that every honest man has who pays his bills, to trade where he likes, and I sincerely believe they deserve that kind of warfare recently inaugurated in a little green isle across the sea, known as 'boycotting,' and request those who believe in the fair thing, as between man and man, to give their support to some other house. For further particulars call on the undersigned.

"J. H. GAFFY."

The plaintiff also offered evidence tending to prove that, at the time of said publication, he was engaged in the wholesale liquor business in Hartford, with his brother Edward, as copartners, under the firm name of Donaghue Brothers, and claimed from that evidence that the libel was published as well of and concerning the plaintiff as of and concerning the firm. The plaintiff then offered to prove injury and damage to his reputation and feelings caused by the publication, to which evidence the defendant objected, on the ground that the circular, if a libel, was not a libel against the plaintiff as an individual; and second, because the complaint contained no allegation of injury to the feelings and reputation of the plaintiff as an individual, nor any allegation as to special damage. The court sustained the objection and refused to admit the evidence, and the plaintiff excepted. The plaintiff claimed that the circular was libelous *per se*, and that he might recover in the suit without proof of special damage; but the court held otherwise.

The plaintiff, at his request, was permitted to offer evidence of any damage caused by the circular to the business of the firm, or to his interest as a partner thereof; but, after permission given, he did not offer any such evidence. The defendant moved for a nonsuit, because no evidence of any damage had been given, and no special damage had been shown. The plaintiff objected thereto, and claimed that he had a right to have the question submitted to the jury, whether, if they found the circular to have been published as alleged, it had a tendency to hold him up to scorn and ridicule, and throw a contempt upon him which might affect his reputation and comfort. But the court held otherwise, and gave judgment of nonsuit against the plaintiff, on the ground that no damage had been proved. To all of which the plaintiff excepted.

The plaintiff in his brief claims that there are two errors in the rulings of the court: 1st. In refusing to allow the jury to determine whether the publication is or is not libelous; 2d. In rejecting evidence as to injury to his reputation and feelings, and in holding that the circular is not libelous *per se*. As to the first. In civil causes for libel there is a

substantial agreement in the decisions of the courts that the court may be required to pass upon the effect of the language of a publication by a demurrer to the declaration as a whole, or to a count in particular; also, when the question is whether the verdict is contrary to the evidence. Otherwise, in some States the rule is, that the court shall determine the question as to libel or no libel. *Hunt v. Bennett*, 19 N. Y. 173; *Pittock v. O'Neil*, 63 Penn. St. 253; *Pugh v. McCarty*, 44 Ga. 383; *Gabe v. McGuinness*, 68 Ind. 538; *Gregory v. Atkins*, 42 Vt. 237; *Gottibehurt v. Hubacheck*, 36 Wis. 515. In others the jury. *Shattuck v. Allen*, 4 Gray, 540; *Van Vactor v. Walkup*, 46 Cal. 124; *State v. Gould*, 62 Me. 509.

Of course it is for the jury to say whether or not there has been a publication referring to the plaintiff, whether or not it is malicious and false, and whether or not the sense and meaning are as charged. But if the publication is expressed in terms so clear and unambiguous that no circumstances are required to make it clearer than it is of itself, we think the better rule is, that the question of libel or no libel is one of law to be determined by the court, and we think we are not concluded to the contrary by the decisions of this court. The case of *Troombly v. Monroe*, 136 Mass. 464, seems to recognize a possibility that questions of fact may be so entirely absent from a cause that the question of libel or not shall remain one purely of law to be disposed of by the court as by a nonsuit or its equivalent; the court saying: "We are satisfied with the rule that at the trial of civil actions against libel it is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as matter of law, that the publication is not libelous, or withdraw the case from the jury, or order a verdict for the defendant." In the jurisdictions in which the question is submitted to the jury in the first instance, it often comes upon motion in arrest or other like form to be reviewed and re-determined by the court of last resort as a pure question of law. It would seem to be better, therefore, that it should be so treated from the beginning, and thus avoid a possible unseemly result, namely, the submission of a question of law to the jury and a reversal of their determination thereon by the court.

For instance, in England, in *Parmeter v. Coupland*, 6 M. & W. 105, the judge, after telling the jury what in point of law constituted a libel, left it to them to say whether the publications in question were calculated to be injurious to the character of the plaintiff. The jury having found a verdict for the defendants, the court of exchequer set it aside because the jury had erred upon that point. In *Mulligan v. Cole*, L. R., 10 Q. B. 549, a civil suit for libel, the judge directed a nonsuit upon the ground that the publication was not capable of the defamatory meaning attributed by the innuendo. It was held that the nonsuit was properly granted, *Mellor, J.*, saying of the publication: "I cannot help thinking that, to an ordinary person, it would contain no more than the legitimate information, and that no such defamatory meaning as that imputed by the innuendo, nor any other defamatory meaning, was intended to be expressed." In *Capital, etc., Bank v. Henty*, 5 C. P. Div. 514,

the question of libel or no libel was left to the jury; they failed to agree, and were discharged. On motion to enter judgment for the defendants, it was held by the common pleas division that the publication was susceptible of the meaning alleged, that there was evidence to support the innuendo and also of express malice, and that the case must go again to the jury. On appeal it was held in court of appeals, reversing the decision of the court below, "that there was no evidence that the circular was defamatory in either a primary or a secondary sense, and that, even if there was any such evidence, the circular was issued on a privileged occasion, and there was no evidence of express malice." On appeal to the house of lords, 7 App. Cas. 741, it was held, affirming the decision of the court of appeal, "that in their natural meaning the words were not libelous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the *onus* lay on the bank to show that the circular had a libelous tendency; that the evidence, consisting of the circumstances attending the publication, failed to show it; that there was no case to go to the jury; and that the defendants were entitled to judgment."

As to the second point. This court has defined a libel as being a false and malicious publication of a person which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him. This publication is by a retail seller concerning wholesale sellers of liquor. It charges that the plaintiff, moved to anger because the defendant ceased to be a purchaser from him and his partner, overbid him in the matter of a lease, and compelled his removal. The sting of the publication is that this act was born of a desire on the part of the plaintiff rather to get the defendant out of, than to get himself into, a particular place of business. But to overbid is permissible in law—permissible even when the motive is to supplant another in the possession of an advantageous location and an established run of custom. Of course these acts fall far short of the requirements of the golden rule, as do many others in the heat of competition in trade. The publication is a hostile comment upon the manner in which the plaintiff used, within the pale of the law, the power inseparable from the possession of money; it is a declaration that, in his eagerness to accumulate, he disregards the interests of others. The public will read the circular and disapprove of the plaintiff's methods in business, but it does not impute to him any act which will expose him to their hatred or contempt, or will cause them to separate themselves from him, in the sense or to the degree required by the law of libel. In the absence of special damage he has no cause of action.

There is no error in the judgment complained of.
In this opinion the other judges concurred.

NEW JERSEY COURT OF CHANCERY.

SCHMITZ v. SCHEIFELE.

Where the court is called upon to decide a disputed point in solving the discharge of an obligation, it will be justified in presuming that the defendant intended that which is least onerous or expensive to himself.

Defendant gave to complainant a bond and mortgage on certain real estate. The bond was conditioned for the payment of a certain sum with interest, payable semi-annually, and if the interest was not paid within thirty days after it became due, principal and interest should be forfeited at complainant's option. On the same day and contemporaneous therewith, the said parties entered into a written agreement, in which the said complainant agreed to take pay for said installments and interest in good and salable lager beer, at the market price.

By the same instrument the said defendant agreed not to sell, either directly or indirectly, "to any other person in Egg Harbor city lager beer for bottling purposes but to said Henry Schmitz, until the whole of the said principal, money and interest due upon said bond and mortgage is paid in full."

April 1, 1885, there remained due for interest \$67.88, which remained unpaid for over thirty days. The complainant elected to take advantage of the legal right secured by the bond, and declared the whole amount due. He filed his bill to foreclose. The defendant answered and insisted that no forfeiture has taken place; claiming that the true meaning of the agreement respecting payment in beer was that the defendant would furnish good and salable beer, which he was always ready to do and which he did, and that it did not require him to furnish beer for bottling purposes; the complainant insisted that, under the agreement, he was entitled to all the beer for bottling purposes that he desired. *Held*, on consideration of the evidence, that the defense was not established; the forfeiture contemplated by the parties was complete and complainant justified in filing his bill. Defendant having failed to establish a tender his case was fatally defective.

Bill to foreclose. The opinion states the case.

Stape & Stephens, for complainant. *S. E. Perry*, for defendant.

BIRD, V. C. On 1st October, 1883, the defendant gave a bond conditioned for the payment of \$7,000 in yearly installments of \$1,000 each until all should be paid, with interest payable semi-annually, to the complainant. The bond contained a condition that if the interest should not be paid within thirty days after it became due, the whole amount of principal and interest should be forfeited at the option of the complainant. To secure this bond he gave a mortgage on lands upon which he had erected a brewery. On the same day and contemporaneous therewith, the said parties entered into a written agreement, in which the said complainant agreed to take pay for said installments and interest in good and salable lager beer at the market price.

By the same instrument the said defendant agreed not to sell, either directly or indirectly, "to any other person in Egg Harbor city lager beer for bottling purposes but to the said Henry Schmitz, until the whole of the said principal, money and interest due upon said bond and mortgage is paid in full."

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and insists that no forfeiture has taken place. He says that the true meaning of the agreement respecting payment in beer is that the defendant will furnish good and salable beer, which he was always ready to do and which he did, and that it does not require him to furnish beer for bottling purposes; whereas the complainant insists that, under the agreement, he is entitled to all the beer for bottling purposes that he desires.

In the first place it has been shown that all beer when first manufactured is regarded as fit for bottling purposes, and the difference between beer for bottling and beer for kegs and barrels, and to be sold from kegs and barrels and not sold from bottles is that which is to be sold from kegs or barrels is flavored with bi-carbonate of soda. It is, therefore, less expensive and less troublesome for the defendant to furnish beer for bottling purposes. But if there were any serious difficulties as to the correct interpretation of the agreement, the conduct of the parties under the agreement would aid the court in arriving at a correct interpretation; in cases of doubt this is a safe rule, and was adopted in *Trotter v. Heckscher*, 13 Stew. 612.

The proof is that at least five-sixths of the beer delivered to the complainant was beer for bottling. Nor is there any evidence that any question arose between them during the year and one-half, of any disagreement as to the meaning of the contract that beer was being furnished under the contract, at that rate or in that proportion. Besides, where the court is called upon to decide a disputed point in solving the discharge of an obligation, the court will be justified in presuming that the defendant intended that which is least onerous or expensive to himself. Therefore, the defendant having furnished so large a proportion of the beer, and it is so plainly being to his advantage to furnish it for bottling; I conclude that the defense that the complainant was not entitled to beer for bottling, and that the defendant was always ready to furnish good and salable lager beer cannot prevail, supposing it to have been established that he furnished or offered to furnish good and salable lager beer sufficient in quality to make the payments due upon the contract.

But there is a fatal defect in the defendant's case, in that he fails to establish a tender of good and salable lager beer for the amount due on the 1st day of April, 1885, or at any time thereafter before the filing of this bill, on May 13, 1885. He says he was able and ready and willing to furnish such beer, and that he instructed his drivers to furnish it; but there is no proof of a proper legal tender of any beer during the time specified. As the case stands before me, I must conclude that the forfeiture contemplated by the parties in the condition of their bond is complete, and that the complainant was justified in filing his bill.

I will advise a decree accordingly. The complainant is entitled to costs.

LEHIGH VALLEY RAILROAD COMPANY v. ORANGE WATER COMPANY.

Public grants are to be strictly construed. The grantee can take nothing except what his grant plainly gives.

Where a right to cross or occupy a highway is granted by implication, the corporation can only occupy so much as may be reasonably necessary; in case of dispute the extent of the grant must be settled by the courts.

The twelfth section of the charter of the Morris canal gives them a right to cross public highways wherever it is necessary that they should do so, but they must exercise this right in such manner as to cause the least possible inconvenience to the public.

Under the right to cross, the canal company do not take the fee of the land covered by the highway where their canal crosses, but simply a right of way, and so long as they are left in the free and unobstructed use and employment of that, though the highway may be appropriated to other purposes than travel, they suffer no wrong and have no cause of complaint.

Where two highways meet, neither is entitled to destroy the other, but each must in some degree yield to the other what would be their strict legal rights, if they did not meet and collide.

On final hearing on bill and answer and proofs taken before a master.

Thomas N. McCarter, for complainants. *Joseph L. Munn* and *Henry C. Pitney*, for defendants.

VAN FLEET, V. C. The defendants by their charter are empowered to procure and supply water "for the use of the people of Orange, and its vicinity in the county of Essex," and to this end they are given authority to lay pipes and other conduits in the public highways therein free of charge. P. L. 1865, p. On the 1st of August, 1883, the defendants made a contract with the township of Bloomfield, in the county of Essex, to supply water to that township for both public and private use. Authority to make such a contract was conferred by a statute passed in 1881, which enacts, "that it shall be lawful, for the governing body of any municipal corporation in this State to make a contract for water, for the extinguishment of fire, and for such other public uses and purposes as may be found necessary, or convenient." P. L. 118. The validity of this statute, and also of the contract made by the defendants under its authority, have already, as between a tax payer and the township, been the subject of judicial consideration, and both have been pronounced valid. *Van Griesen v. Bloomfield*, 18 Vr. 442. It is also authoritatively settled in this State, that a corporation created to supply the inhabitants of a town with water for their private use, and which is charged with the duty of supplying water on reasonable terms to all who may apply, so manifestly subverts the public welfare, that it is competent for the legislature to authorize such a corporation to exercise the right of eminent domain. *Olmstead v. Morris Aqueduct*, 17 Vr. 495; S. C., on error, 18id. 311; *Van Griesen v. Bloomfield*, *supra*. One of the provisions of their contract made it the duty of the defendants to lay pipes in such of the streets of the township of Bloomfield as the town committee should designate. The street so designated was Bloomfield avenue. This is an ancient highway, having been used as a public road long prior to the construction of the Morris canal. It was formerly called the Newtown road. The canal crosses it. The canal at the point where it intersects the avenue is constructed in a cut, and the avenue is carried over the canal by a bridge about twelve

feet in width, and standing above the water of the canal between nine and ten feet. The defendants have carried their pipe across the canal by means of a bridge built within the lines of the avenue. Stone piers were erected within the lines of the avenue, on both sides of the canal, but not on the lands belonging to the canal company, and on these piers timbers were laid, and the pipe carried across on these.

The bridge was built and the pipe carried across in November, 1884. The complainants are lessees of the Morris Canal and Banking Company, and by virtue of a lease executed in May, 1871, under legislative authority, are in possession of all the franchises, property and rights of the canal company. The defendants erected their bridge and carried their pipe across the canal without the consent of the complainants and against their protest. This suit is brought to procure or compel the removal of such part of the bridge as spans or overhangs the canal. The important question which the case presents, it will be seen, is whether the defendants in erecting the bridge across the canal, and laying their pipe on it, committed such an invasion of the complainants' right as entitles them to the aid of a court of equity? It is not pretended that the bridge has suffered any injury whatever. The bill admits that it stands a little higher, above the water of the canal, than the highway bridge erected by the canal company, at the same place, so that it is entirely clear that while the highway bridge remains at its present elevation, the defendants' bridge will not impair or obstruct, to the slightest extent, the full and free use of the canal for the purposes for which it was constructed. It is also true that it is an undisputed fact in the case that twenty of the twenty-five bridges crossing the canal, between the avenue in question and the tracks of the Pennsylvania railroad in the city of Newark, some of which constitute a part of the streets of the city of Newark which are more extensively used than any others, and others constitute a part of the road beds of railroads, stand either lower than the defendants' bridge, or at about the same elevation. But five of them stand higher, so that it would seem to be almost absolutely certain, in view of the character and importance of the rights involved, that no material change will be made in the elevation of the bridge on the section of the canal during the next fifty years. Indeed the probabilities are very strongly against any material change being made at any time in the future. Unless, therefore, the complainants or their lessors own the *locus in quo* in fee, or have some higher or stronger right than a simple right of way, or easement over the land in question, it would seem to be perfectly clear, that, inasmuch as what the defendants have done does not, even in the slightest degree, obstruct the complainants in the full and free exercise of all their rights, no wrong has been done, or injury sustained, and consequently that no judicial redress can be given.

The charter of the canal company was granted in 1824. It invests them with extraordinary powers, such as, since the adoption of the Constitution of 1844, the legislature are prohibited from granting to either individuals or private corporations. They are authorized to take private property without first making compensation. Entry by them upon private property, and the appropriation of it to their purposes without

first making compensation is not a trespass, nor will ejectment lie against them for its recovery. Their power to this extent stands supported by uniform course of decisions. *Kough v. Darcy*, 6 Hal. 237; *Den v. Morris Canal*, 4 Zab. 587; *Lehigh Valley R. R. Co. v. McFarlan*, 4 Stew. 706; S. C., 14 Vr. 607. But no such power has been given to them over public property or public rights. They can take nothing belonging to the public except what their grant plainly gives. The principle is fundamental and universally recognized, that public grants are to be strictly construed. The grantee can take nothing except what his grant plainly gives. Any ambiguity in its terms will be fatal to his claim. To doubt such a case is to deny. *Pennsylvania R. R. Co. v. Stational Railway Co.*, 8 C. E. Gr. 455. Public highways ought not to be destroyed, even in part, under pretense of legislative authority, unless it is conferred either in express terms, or by necessary implication. If the words are ambiguous, the construction ought to be in favor of the common right of highway, not against it. *State v. R. R. Co.*, 5 Dutch. 353.

The canal company had an undoubted right to construct their canal across the public highways running across the route of their canal. Such a right would exist by implication even if their charter said nothing upon the subject, for it is a fact which must be understood without mention, that it would be impossible to construct a canal from Easton to Newark without crossing many highways, and, therefore, a grant to construct a canal between those two points would necessarily confer, by unavoidable implication, a right to cross the highways lying across the route of the canal. Where a right to cross or occupy a public highway is granted by implication, the corporation can occupy only so much of the public easement as may be reasonably necessary to enable them to accomplish the purposes for which they were created. Beyond this they cannot go, and the question as to the extent of their grant in this respect, or how far a reasonable necessity will allow them to occupy, is a matter which the corporation cannot determine for themselves, but must, in case of dispute, be determined by the courts. *Newark and New York R. R. Co. v. Newark*, 8 C. E. Green, 515; *Greenwich v. E. & A. R. R. Co.*, 9 id. 217; S. C. on appeal, 10 id. 565; *N. J. Southern R. R. Co. v. Long Branch Commissioners*, 10 Vr. 28. Where, however, the charter contained provision defining the powers and duties of the corporation in this regard, that must, of course, be taken as the standard of their rights and obligations. The twelfth section of the charter of the canal company declares that when the canal shall cross any public road it shall be the duty of the company at their own proper expense to make good and sufficient bridges across the canal and to keep the same in repair, so as to prevent any inconvenience in the usage of the road by reason of the canal crossing the same. P. Laws 1824, 165. The legislative purpose in making this enactment is, I think, entirely clear. They meant to give the canal company a right to cross highways wherever it might be necessary that they should do so to accomplish the purposes for which they were created, but they also meant that they should exercise this right in such manner as to cause the least possible injury and inconvenience to the public. They were

to take what it was reasonably necessary for them to have and no more, and to this extent, and to this extent only, the public were to yield their rights. This section has been the subject of judicial consideration. Chief Justice GREEN, in *Morris Canal v. State*, 4 Zab. 67, said, that the design of this section was to prevent the canal company from committing a nuisance, and that the legislature intended that the highways where the canal crossed them should, so far as possible, be left just in the condition the canal company found them. Mr. Justice ELMER, in the same case, intimated that where a public highway is laid out over the canal, and the highway is carried across the canal by a bridge so built as not to materially interfere with the appropriate use of the canal, it might well be considered that in such a case there was not such a taking of canal property as required compensation to be made. And Chancellor WILLIAMSON subsequently declared in *Morris & Essex R. R. Co. v. Newark*, 2 Stockt. 352, that where a railroad corporation are authorized to construct their road across a highway, that what the corporation appropriate in crossing is not any right or title of the owner of the fee of the land over which the highway passes, but only the public easement, and for that reason there is in such a case no such taking of private property as entitles the owner of the fee to compensation. "The authority," said the chancellor, "to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the fee as it is contemplated" by the constitutional provision which forbids the taking of private property for the use of a private corporation without first making compensation. If these views are correct, it would seem to be undisputable that the only right or interest which it was possible for the canal company to acquire in the *locus in quo* was a right of way, in other words, a right to take and appropriate so much of the public easement as should be necessary for their purposes. If this is so, it is manifest that so long as nothing is done which prevents the canal company from having the full, free and unobstructed use and enjoyment of such right of way, they suffer no injury whatever and have no right to redress.

But there is another adjudication much more directly in point, and which this court is bound to recognize as a conclusive authority on the question now before us. The case referred to is *The Morris Canal v. Jersey City*, 1 Beas. 252; S. O. on appeal, id. 547. In this case it appeared that a street called Hudson street, had been dedicated in 1804. As laid down on the map, by which the dedication was in part effected, the street extended from the fast land in Jersey City to the waters of the New York bay. The most of the street was located on land below low-water mark. About 1835, when the canal company extended their canal from Newark to the waters of the Hudson river at Jersey City, they constructed a basin across this street, filled in the land and built an extensive coal wharf partly within the lines of this street. They also built a pier, as a means of approach to the basin within the lines of this street. The canal company, in 1835, acquired, by deed, the title of the person who made the dedication. The city authorities did nothing evincing a purpose to accept that part of this street which extended

below low-water mark, until 1854, and until after the canal company had completed their basin and changed the natural condition of the land covered by this street in the manner above described. They then notified the canal company to remove the buildings and other obstructions which they had placed on the street, and they also took the necessary corporate action to open the street to the basin over the pier which the canal company had erected. This court, at the suit of the canal company, enjoined further action by the city authorities, and on the final hearing of the cause the injunction was made perpetual. The judgment of this court was placed mainly on the ground that a riparian owner had no such estate in or right to land under water as gave him a right or power to make an effectual dedication of it. On appeal the decree of this court was reversed, the court of errors and appeals holding that a riparian owner may, with the assent of the State, make a valid dedication of land under water for the purposes of a highway, and that the city authorities had a right to extend Hudson street over the pier of the canal company to the canal basin. The relative rights of the public and the canal company were defined as follows: Where two public highways meet, as in this case, neither is entitled to destroy the other; each must, in some degree, yield to the other what would be their strict legal rights, if they did not meet and collide. The public are entitled to the use of the place in question as a public street, and the canal company are also entitled to the use of it as the side of their basin.

The city corporation may not, under color of the right to regulate and control streets, do any act destructive of the basin, or prevent the use of it as a canal basin for the legitimate purposes of canal navigation, and the canal company have no right to exclude the public and occupy it as a coal yard, or as a place for permanent storage. It is a public street, but a public street over a canal pier, to be used by the canal company for all necessary purposes not inconsistent with the right of the public in it as a street. The important principle established by this adjudication is, that where the rights of the canal company come in conflict with the rights of the public in a highway, the public will be required to yield their rights to such an extent only as may be reasonably necessary to enable the canal company to accomplish the purposes for which they were created. Applying that principle to this case, it is clear that no relief be given to the complainants. Whether the use the defendants have made of Bloomfield avenue is lawful or not, as against the public, is a question which cannot be decided in this case. The question here is, whether or not the defendants have invaded the rights of the complainants, or committed any acts, which, as against them, are wrongful, and which have resulted in legal injury. On that question I entertain no doubt.

The question whether the defendants have a right to carry their pipe across the complainants' right of way, by constructing a tunnel under the bed of the canal, is not before the court, and it would not, therefore, be proper that any opinion on that question should be expressed, but it is obvious, I think, that the method of crossing differs so essentially in many important respects from the one adopted by

the defendants, that it should not be assumed because the one adopted is sanctioned, that the other will be.

The complainants' bill must be dismissed, with costs.

VANNEMAN v. THE SWEDESBORO L. & B. ASSOCIATION.

L. being the owner of building loan stock, purchased loans, and used the money in purchasing a lot and erecting a dwelling thereon, taking the title in the name of his wife, and she gave a bond and mortgage on the lot for the amount loaned, he not joining therein; after this, both L. and his wife joined in a mortgage to the present complainants; then the association, the present defendants, filed a bill against Mrs. L. and these complainants, for relief, in which, amongst other things, it alleged that said loan was made to Mrs. L.; it was held, in this court, that the loan was an equitable lien on the land, and prior to the lien of the mortgage given to these complainants; the sale of the land did not produce enough to satisfy the amount due the association; in the meantime the association had taken a bond from L. and his wife for the whole amount of the loan, and about the time of the filing of the bill had taken an assignment of the stock, through the wife, to its self as collateral; after the determination of that suit, in behalf of the association, the present complainants obtained a judgment at law against L., and have filed this bill in which they attack that assignment, insisting that it was fraudulent because voluntary, and that it was in legal effect voluntary, because the association had, in their bill, alleged that the debt was the debt of Mrs. L., by which allegation it was bound; and *held*, that the decree in that case did not rest on that allegation, and, therefore, that such allegation is not conclusive; and *held*, also, that the debt being the debt of the husband, he had a right to secure its payment, and that the assignment for that purpose, though first made to the wife, and by her to the association, was not a badge of fraud; and *held*, likewise, that the bills in chancery are, ordinarily, but slight evidence without more of the statements contained in them, and that advantage cannot be taken of such statements unless it is shown that the party relying upon them has been misled to his prejudice.

Creditor's bill. The opinion states the case.

R. T. Miller, for complainants. *C. G. Garrison*, for defendants.

BRED, V. C. This is a creditor's bill. In 1871 L. became a member of the defendant association and the owner of the seven shares of its stock. In 1872 he purchased seven loans of the association, paying for three of them \$49.50 each, and for four of them \$46 each by way of premiums. The then anticipated value of each share was \$200, which value, however, to the owner depended upon his fulfilling all his obligations to the association. L. was paid at the rate on the loans he purchased less the premium, which indicated their value at that time—that is, \$1,400 less the premium. The association took no assignment of the stock from L. as security at that time, but it is claimed that that was intended and understood according to the custom and by-laws of the association, and that the omission was an oversight. The by-laws clearly make such provision. The object L. had in view in taking the loans was the purchase of a lot worth the proceeds thereof and the erection of a dwelling-house thereon. Of this money, \$300 was paid by L. for a lot, the deed of conveyance for which he had executed and delivered to his wife. The wife executed a mortgage to the association for \$1,400. The husband (L.) did not join in executing this mortgage.

All the money so advanced by the association was paid out by L., either for the title to the land or for material and labor in the erection of a dwelling upon the land.

In 1876 L. and his wife executed a mortgage upon the same premises to the present complainants, which were given to secure the principal sum then due, for which with interest they afterward obtained a judgment at law, as will appear.

In December, 1879, L. and his wife executed a bond to the association to secure the amount of the said loan, with the condition that if they should pay the association the interest on \$1,400, with the regular monthly installments of \$1 per share, on seven shares of the capital stock of the association, owned by the said L., on the first Monday of each month until the surplus assets of said association shall be sufficient over and above its debts and liabilities to pay on each unredeemed share the sum of \$200, the said bond should be void, and in case they failed so to pay for six months, then the said \$1,400 should be due, and said bond be in full force and virtue. To this bond was a power of attorney annexed to confess judgment. L. and his wife joined in executing another mortgage on the said lot to secure the payment of this bond. According to a certificate indorsed on this bond, judgment was entered thereon 6th October, 1882, after the condition had been broken.

When this last bond and mortgage were executed and recorded, the scrivener ordered the cancellation of the prior mortgage made by Mrs. L. alone. It appears that this was done without the assent or knowledge of the association.

In September, 1881, the association filed a bill against L. and wife and the Vannemans — the complainants in this suit — seeking relief in the premises. The result of that suit was a decree, declaring that the claim of the association was an equitable lien on said land, and was entitled to precedence over the mortgage of the Vannemans. The property was sold but the amount realized was insufficient to pay the claim of the association, a large balance still being due. In September, L. assigned all his right, title and interest in said stock to his wife, who upon the same day assigned it to the said association as collateral security. As I understand the admission of counsel for the complainant, there is still a balance due to the association, over and above the value of these shares of stock.

The Vannemans, recovering nothing upon the sale of the land, obtained judgment against L., and by their present bill attack the said assignment of stock by L. to his wife, and by her to the association. They insist that the assignment was made for the purpose of defrauding them, as creditors of L. The principal facts relied upon to establish the fraud have already been given, except the allegation that the association in its bill to foreclose the said mortgage given by Mrs. L. alone, it *alleged that the loan was made to her*, and, also, except the fact that the president of the association applied to L. to assign to it his said stock. L. says: "I don't know that I can give his exact language; the substance is this, inasmuch as it is nearly or quite certain that Vanneman could get possession of the property, it would be but fair and just that the association should have what money it had paid." At that time it had not been determined whether the claim of the association was a prior lien upon the premises to the mortgage of the Vanne-

mans or not. Its claim to priority was subsequently very earnestly resisted by the Vannemans.

Was the conduct of the parties fraudulent? L. owed the association at the time of the assignment; therefore, the assignment was not *voluntary*, for notwithstanding the sale of the lot, and the application of the proceeds thereof to the claim of the association, the present value of the stock will not liquidate the balance still due. I say, not voluntary, because L. not only purchased the loans as a stockholder, but afterward made his bond to the association for the amount borrowed, as above recited, showing an unquestioned liability, which must stand in any court, until its *bona fides* shall have been successfully impeached, which has not been done in this case, nor attempted. It is true, the insinuation is that the assignment to the wife was a gift, being as to her without consideration, and, therefore, void as to creditors; but I do not find that it was intended as a gift to the wife. The intention of the husband was to assign his stock to the association, which he did by first assigning it to his wife. That there was no necessity for this round-about method is plain enough, but I cannot perceive that this course can be regarded as a badge of fraud.

But the present complainants insist that the association having accepted a bond and mortgage from Mrs. L. alone, it thereby made her its debtor and released her husband, and consequently must look to her and to her separate estate alone. This view they seek to enforce by presenting the bill filed in the suit above named, in which the association declared that they had loaned the money to Mrs. L. and thereby sought to strengthen their hold for equitable relief. It is urged that the association making such an allegation and obtaining a decree in their favor under such a bill cannot now question or gainsay the allegation, the allegation not only having been made in a judicial proceeding, but the court having solemnly adjudged it to be true; citing *Love v. Truman*, 10 Ohio St. 54, and *The Duchess of Kingston's case*, 11 St. Tr. 291; *McGee v. Smith*, 1 C. E. Gr. 462, 466; 1 Greenl. Ev., § 205, and 1 Whart. Ev., § 887.

This legal proposition, to the extent it has been established, cannot, by its own force, control this case, because the decree was not founded alone, if at all, on the relation of debtor and creditor, but upon the equitable rights in behalf of the association springing out of the transaction, which otherwise had and could have no foundation. The debt was regarded as the debt of the husband, and the act of the wife was regarded as an effort on her part to secure and pay that debt by a lien on her land as in equity she might, provided her husband joined. To support this view I found numerous cases in our own State. It was decreed that the amount of the money actually expended in paying for the land and for material and labor was an equitable lien on that land. Hence it cannot be said that the court has adjudged that Mrs. L. was the debtor and that the association are, therefore, entrapped from saying any thing to the contrary. Very different from this is the case of *McGee v. Smith*, where an answering defendant was held to be estopped by the allegations in her answer, a vendee having purchased upon the faith of such answer and upon reliance in the truth of its statements.

In this as in every other investigation in this forum, where the equitable rights of suitors are sought for, the intention of the parties is always of great importance, especially where that intention can be easily discovered, and a decree founded thereon without doing any actual injustice to any third party. In this case L. purchased the loans and his wife did not. L., therefore, became the debtor, and years after gave a bond to secure it. With this money he bought the land named and built on it, taking the title in his wife's name. The association proceeded against her and against this land, because the title was in her name, and because all the money for which the husband had become liable had been expended in the purchase of the land and in making the improvements thereon, and because she had executed said mortgage, showing an intention to bind her interest, creating the lien already mentioned. I say the intention is always of great importance in such cases. When no injustice will be done to third parties by giving effect to that intention, will any injustice be done to the complainants in this case by permitting the transaction between L. and the association, by which L. paid his just obligations, to stand? As in every such case the influence of such transactions upon the conduct of the third party is always a material consideration. Were the complainants in anywise influenced or controlled by the dealings between the association and L. in giving and receiving the bond and mortgage of the wife, or especially by the transfer of the stock to the association, as collateral to the payment of his indebtedness? There is nothing in the case to indicate such influence.

L. became a debtor to the association in 1872, and, as I have said, there is nothing to indicate that his liability was discharged by the association accepting a bond and mortgage from the wife, nor that the present complainants changed their situation because of that fact. The indebtedness of L. to the present complainant was created 1876, nothing whatever appearing that it originated from or had any thing to do with the stock transactions between L. and the association. With this field before us can it be said that fraud anywhere appears? If the payment of this claim by L. should be declared to be fraudulent, then might not the same be said in behalf of any creditor who is not first paid, and who fails to find sufficient assets to satisfy his judgment? It seems as though that result would follow in every case. Had L. had the money he could have safely paid the debt. If the insinuations of the complainants be true that said stock belonged to L. in 1881, at the time of the assignment, L. could have sold it, and with the proceeds discharged any legal liability. It would, therefore, most surely follow that he could discharge any such liability by the transfer of the stock itself, there being no actual fraud, or, in other words, the transaction being *bona fide*.

As to the effect of the statements in the bill filed in the former suit by the association — 1 Greenl. Ev. 278 — where that learned author regards the admissions made in a bill in chancery as very feeble evidence, so far as they may be taken as the suggestion of counsel. In *Doe v. Sybourn*, 7 Term. R. 2, Lord KENYON, Ch. J., said: "A bill in chancery is never admitted in evidence farther than to show that such

a bill did exist, and that certain facts were in dispute between the parties in order to let in the answers or depositions *of the witnesses*." In *Barlow v. Rudin*, 6 Exch. 665; 12 Jur. 889, the law is stated thus: A bill in chancery is not evidence against the party in whose name it is filed, unless his privity to it is shown. Where that privity is established the bill is admissible to prove the fact that such a suit was instituted, and what the subject of it was, but it is not evidence by way of admission against the party by whom it was filed of the truth of the facts alleged or stated in it."

If this be the correct practice in ordinary cases, then, surely, it will apply in cases like the present, where the bill offered in evidence was filed by the counsel of a corporation. See, also, *Sweet v. Tuttle*, 14 N. Y. 465, 470.

I conclude that the allegation of fraud has not been sustained. The bill should be dismissed, with costs. I will so advise.

SUPREME COURT OF NEW JERSEY.

DONNELL, LAWSON & Co. v. WYCKOFF.

January 18, 1887.

PLEDGE — CONVERSION.

In an action by the pledgee for the debt for which the pledge was made, the defendant may set up a wrongful conversion of the pledge by way of a defense and be allowed the value of the pledge as payment of the debt *pro tanto*.

Stock of a mining corporation was pledged as collateral security for a loan. The company by legislative authority afterward reduced its capital and proportionately reduced the nominal value of the shares of the capital stock. *Held*, that the surrender by the pledgee of the original certificate of stock and the acceptance of a new certificate for the same number of shares was not a wrongful conversion.

On rule to show cause.

Argued June term, 1886, before BEASLEY, Ch. J., and Justices DEPUÉ, VAN SYCKEL and KNAPP.

Frank Bergen, for defendant. *Edward M. Colie*, for plaintiff.

DEPUÉ, J. This suit was brought upon a promissory note dated September 16, 1881, for the sum of \$7,500, payable to Donnell, Lawson & Simpson, the plaintiffs, on demand. The consideration of the note was money loaned by the plaintiffs to the defendant. At the time of the loan, the defendant deposited with the plaintiffs a certificate for twenty-five hundred shares of the capital stock of the Moulton Mining Company, in pledge, as collateral security. The corporation was organized under the laws of the Territory of Utah, with capital stock to the amount of \$10,000,000. The property of the corporation, its mine and all its interests were in Montana. After the pledge of stock to the plaintiffs, the stockholders of the company abandoned the original incorporation, and by legal proceedings under the laws of Montana

became a new corporation, with a capital stock of only \$2,000,000 divided into the same number of shares, the nominal value of each share of stock in the original company being \$25 and in the new company \$5. The defense in the case was made upon the conduct of the plaintiffs in dealing with the collaterals.

The first consideration is whether, in an action on the note, a defense of this character is competent under any circumstances. It is settled that the pledgee may bring an action for the debt without producing or accounting for the pledge. By the contract of bailment, the property pledged is delivered to the pledgee as security for the payment of the debt. Judgment for the debt is neither payment nor extinguishment. The debt remains in a new form, and until the debt is paid the pledgor under the terms of the bailment has no right to have the pledge given up to him. *Scott v. Parker*, 1 Q. B. 809; *Jones Pledges*, § 593.

The principle above stated does not cover the defense set up in this case. The defendant's contention is that the plaintiffs have destroyed the bailment by the wrongful conversion out and out of the property pledged. May not a defense of this nature and scope be made by the pledgor in the action for the recovery of the debt?

Upon a pledge of property as security for a debt the pledgee has only a special property. The general property is in the pledgor, subject to the rights of the pledgee. *Story Bail.*, §§ 287-303; *Jones Pledges*, § 7. Incident to the bailment and possession by the bailee under it, the duty is laid upon the pledgee to keep the property safely and to restore it to the bailor when the debt is paid. If the property is injured or allowed to deteriorate while in the possession of the bailee through his neglect or default, he will be subject to an action for damages. If it be lost or destroyed by his fault, or be converted by him, he will be liable to an action of trover or a special action on the case for the value of the pledge. If the pledgor sues in trover for a wrongful conversion, the debt being unpaid, the pledgee may have the amount of his debt recouped in the damages. *Story Bail.*, § 349; *Sedg. Dam.* (6th ed.) 601 (481), and notes; *Schouler Bail.* 203; *Longstreet v. Philo*, 10 Vr. 63-68; *Jarvis v. Rogers*, 15 Mass. 389; *Fowler v. Gilman*, 13 Metc. 267; *Work v. Bennett*, 70 Penn. St. 484; *Parish v. Wheeler*, 22 N. Y. 494; *Johnson v. Stear*, 15 C. B. (N. S.) 330-334; *Cheney v. Vral*, 5 H. & N. 288.

The allowance of the unpaid debt in abatement of damages in an action against the pledgee for a wrongful conversion does not rest upon recoupment strictly speaking, but is made upon the principle of avoiding circuity of action. *Sedg. Dam.* 601, note; *Schoul. Bail.* 227; *Longstreet v. Philo*, 10 Vr. 69. The principle applies with equal force to an action by the pledgee for the debt where the pledge has been converted out and out by the pledgee. In an action for the debt the court, in *Case v. Higenbottom*, 27 Hun, 406, recognized the wrongful conversion of the pledge as a legitimate counter-claim. In *Stearns v. Marsh*, 4 Denio, 227, the value of the property pledged and unlawfully disposed of was allowed in an action for the debt under a plea of *non-assumpsit*, and in *Carrington v. Ward*, 71 N. Y. 360, it was assumed that such a defense was competent. The loan of the money and pledge

of the stock as collateral security are parts of the same transaction, and the value of the property wrongfully converted and the amount of the debt can both be as readily ascertained in the action by the pledgee for the debt as in the action by the pledgor for the conversion of the pledge. In view of the fact that transactions of borrowing money on collateral securities have become common and in large amounts, and that the securities pledged are usually such as are negotiable and the pledge effected by blank indorsements, public policy requires the protection of the borrower from the consequence of the wrongful disposition of the property pledged as far as is consistent with rules of law and the forms of action. To deprive the creditor of all remedy for his debt because by inadvertence he has made an unlawful disposition of the pledge — it may be of less value than the debt — would be unjust. Equally unjust would it be to compel the debtor to pay the debt in full in the face of the wrongful disposition of the property pledged, and then put him to an action of trover against the same party — who may be insolvent and incapable of satisfying the judgment against him. The injustice that might be done to the pledgee in an action of trover for the wrongful conversion of the pledge — the debt for which it was pledged being unpaid — is obviated by allowing the amount of the debt in abatement of damages, on the theory that to that extent the property pledged has been applied to the pledgor's use. On the same principle the value of the pledge wrongfully converted may be treated as payment *pro tanto* or in full in an action for the debt.

The defense sought to be made is a defense capable of being made in this case. The merits of that defense remain for consideration. The stock pledged stood on the books of the corporation in the name of the defendant. It was pledged to the plaintiffs by the delivery of the certificate of stock, with an indorsement of transfer in blank signed by the defendant. The pledge included the dividends that might be made upon the stock, as well as the shares of stock. Jones Pledges, § 398. The transfer of the stock on the company's books out of the defendant's name was contemplated by the indorsement of transfer on the back of the certificate. An actual transfer of the stock on the company's books was necessary to enable the plaintiffs to collect and receive dividends, if not to protect the stock from the defendant's other creditors. The proof is that the transfer was made to enable the plaintiffs to receive dividends, and upon the transfer on the books dividends to the amount of \$1,250 were received, which are credited on the note.

The transfer on the company's books effected no change of title. The title passed as between the parties by the delivery of the certificate with the indorsement of transfer. The surrender of the original certificate and the acceptance of a new certificate in the plaintiff's name were not in violation of the bailment. They were acts necessary to effectuate the purpose of the bailment. *Hubbell v. Draxell*, 21 Am. Law Reg. (N. S.) 452 and note.

But it is insisted that the acceptance of the new certificate under the reorganization of the company was a wrongful conversion of the stock originally pledged. The original certificate was for two thousand five hundred shares of stock at the par value of \$25 a share. The actual

value was \$4 a share. The nominal capital of the company at the time certificate was issued was \$10,000,000. In the reorganization the company reduced its nominal capital to \$2,000,000 and the par value of its stock to \$5 a share. The reorganization of the company effected no change except in the reduction of its nominal capital. The reorganization was under the same corporate name. The business of the company was left under the same management, and its property and assets remained the same. The reduction in the nominal value of the shares of stock was in proportion to the reduction in the nominal capital of the company. The reorganization was made under competent legislative authority, and, for aught that appears, was prompted wholly by prudential motives. At all events the plaintiffs took no part in the reorganization. It was accomplished *in invitum* so far as they were concerned. The first certificate issued to them was after the reorganization was effected. A share of the stock of a corporation is simply the title of the shareholder to his proportion of the corporate property, and the certificate of stock is nothing else than evidence of the shareholder's right to a share of the net produce of all the property of the company. *Graydon's Ex'rs v. Graydon*, 8 C. E. Green, 229; Boone Corp., § 105. The new certificate accepted by the plaintiffs is for the same number of shares as the original certificate, and represents the same proportional share of the company's property and assets. As a representative of actual value the new certificate is an exact equivalent of the certificate which the defendant delivered to the plaintiffs.

The defense is without merits, and the judge's finding for the plaintiffs for the full amount of the note less the dividends received was correct. The rule to show cause should be discharged.

ZIMMERMAN v. MATHE.

January 18, 1887.

Section 84 of the school law—Rev. 1084—requires the township collector to pay all school moneys only on the order of the district clerks, which orders shall specify the objects for which they are given. *Held*, (1) that an order of the district clerk which specifies the object for which it was given, without any designation of the yearly taxes out of which it shall be payable, is a sufficient voucher for the township collector; (2) that the township collector, paying out school moneys on statutory orders, is not responsible for the application the school trustees have made of the money.

On case certified from Bergen circuit on the following statement of facts:

"This action is brought by Zimmerman, collector of Lodi township, against Mathe, late collector of the same township, to recover the balance of school funds in the defendant's hands, which he had failed to pay over to the plaintiff as his successor in office, pursuant to the order of the township committee of that township.

"The defendant was elected township collector of Lodi in March, 1873, and thereafter annually until and including March, 1883. The plaintiff was elected as his successor in March, 1884.

"For some cause, which does not appear to be chargeable to the defendant, the school moneys for the respective districts paid to him by

his predecessor and otherwise received by him from school appropriations made before September 1, 1873, were not sufficient to meet the orders issued by the respective district clerks, for school expenses incurred prior to September 1, 1873, and, therefore, he paid some of those orders out of school moneys appropriated to the respective district for the year from September 1, 1873, to August 31, 1874. Consequently, the district appropriations of that year were inadequate to meet the district orders issued for the school expenses of that year, and the defendant supplied the deficiency out of the district appropriation of the next year. A similar course was pursued by him throughout his incumbency.

"The orders issued sometimes showed in what school year the debts for which they were given were contracted, and sometimes did not, but in no case did they expressly direct that payment should be made out of the appropriations for any particular year.

"The plaintiff insists that in order to ascertain the balance of school moneys payable to him by the defendant, the defendant can charge against the school appropriations of each district for each year, only such orders as were issued for debts incurred in that year. The defendant insists that he can charge against the sum of all the school moneys received by him for each district the sum of all the school orders of that district paid by him, without distributing the same among the several years.

"The circuit court of Bergen county desires the advisory opinion of the supreme court as to which of these principles should govern the accounting, and as to any other matter which may seem to the supreme court necessary for the ascertainment of the balance due."

Argued before the chief justice, and Justices DEPUE, VANSYCKEL and KNAPP.

Wm. M. Johnson, for plaintiff. *Ackerson & Van Valen*, contra.

DEPUE, J. By section 84 of the school law it is made the duty of the township collector of each township to receive and hold in trust all school moneys belonging to the township, or to any of the districts thereof, whether received from the State appropriation, from township or district tax, or from other sources, and to pay out the same only on the orders of the district clerks of the several districts of his township, which order shall specify the object for which it is given, and shall be signed by at least one other trustee beside said clerk, and shall be made payable to the order of and be indorsed by the person entitled to receive it. Rev. 1086.

By the act establishing and regulating public schools in this State, every school district is a corporate body. Trustees are elected annually. In these trustees is vested the management and control of schools in their respective districts. The trustees employ teachers, provide school-houses; in fact upon these trustees devolves the whole subject of expenditures incident to the maintenance of public schools in their districts, and the application of public moneys appropriated for that purpose. Rev. 1076, title "school trustees." The district clerk is an executive officer elected by the trustees, among whose duties is that of paying

out by orders on the township collector all school moneys of the district secured from the State, township or district. Rev. 1076, § 35. With the expenditure of moneys raised for school purposes, and the application of the moneys to the purpose for which they were raised, the township collector has no official concern. His duties, as defined by section 84, are simply to receive the moneys raised or appropriated for school purposes, and to pay out the same only on the orders of the district clerks of the several districts of his township. The statute provides that the orders shall specify the object for which they are given. The statute does not contain a prescription that the order shall make any designation with respect to the yearly taxes, out of which it shall be payable. An order on the township collector which expresses the object for which the money is required, complies with the statute. Such an order is the voucher on which the collector is required to pay.

Nor is it material to the validity of the order on which the collector pays, that money in his hands is the product of the taxes for any particular year. If in fact he has in hand moneys raised for school purposes, no matter how or at what time received, the trustees of the school district are the official body by whom or by whose order in the name of the district clerk the money is to be withdrawn. The township collector if he pays over the money to the proper corporate body, and on the statutory order, fully performs his official duty. He is in nowise responsible for the application the trustees have made of the money.

A certificate will be made accordingly.

MARYLAND COURT OF APPEALS.

DUCKETT v. JENKINS AND WIFE.

December 17, 1886.

MARRIAGE — SUING WIFE FOR SERVICES — ACT 1873, CHAP. 270.

A husband and his wife by power of attorney duly executed, appointed appellant their attorney to represent them in the settlement of an estate. *Held*, that *assumpsit* would not lie against the wife — under act 1873, chap. 270 — to recover a reasonable compensation for services rendered, the remedy, if any, is by proceeding in equity against her separate estate.

Appeal from the circuit court of Prince George's county. Judges sitting, ALVEY, Ch. J., MILLER, BRYAN, YELLOTT and ROBINSON, JJ.

Charles H. Stanley, for appellant. *William Stanley*, for appellees.

ROBINSON, J. The appellees, husband and wife, by power of attorney duly executed, appointed the appellant their attorney to represent them in the settlement of the estate of Milburn Loper. This is an action of *assumpsit* by the appellant, to recover compensation for services alleged to have been rendered under the power of attorney, and the question is whether such an action will lie against the wife. No such action, it

is conceded, could be maintained at common law, because a wife could not be sued in an action at law on her personal contracts.

The question then is whether it comes within the provisions of the act of 1872, chapter 270, which provides that a married woman may be sued jointly with her husband in a court of law, on any note, bond, contract or agreement which she may have executed jointly with her husband. "May be sued on any note," "contract" or "agreement," that is the cause of action on which the suit is brought must be a "note," etc., made jointly with her husband. Now the suit here is not brought on a contract or agreement made by the husband and wife. It is not brought on the power of attorney, which is a sealed instrument, but the action is one of *assumpsit* against the wife to recover a reasonable compensation for services rendered her, and the power of attorney is offered in evidence to prove that the services were rendered at her request. Such an action is not in our opinion within the terms of the act of 1872. The power of attorney is an instrument revocable at any time by the parties who made it. If the appellant has in fact rendered any services under it, his remedy, if any, is by a proceeding in a court of equity against the separate estate of the wife.

Judgment affirmed.

SLINGLUFF v. STANLEY.

December 16, 1886.

PARTITION — ALLEGATIONS IN BILL — SUFFICIENCY TO CONFER JURISDICTION.

A bill was filed, under section 99 of article 16 of the Code, for sale of the real estate described, for the purpose of partition among the parties entitled; it being alleged that such real estate was not susceptible of division in kind without loss and injury to the parties concerned. The bill alleged that S. was, in his life-time, seized and possessed of seven-fifteenths undivided parts of a tract of land of one hundred and twenty acres; and that, being so seized, entitled, or possessed of such undivided interest, he died intestate, leaving the complainant, J., his only child and heir at law, and also his widow, surviving him. It is also alleged that the other part of said tract of land, being eight-fifteenths thereof, was owned by the appellant. It was further alleged that if it be found, as your orators charge, that said real estate is not susceptible of division, and that no division can be made except by greatly injuring and depreciating the value of said real estate, then they are entitled to a decree for sale for the purposes of partition. *Held*, that there was enough alleged on the face of the bill to give the court jurisdiction.

Courts have no power, under exceptions to a sale in partition made under a decree, to review and decide upon the merits of the decree; as between the parties to the suit, the decree is conclusive of the subject-matter involved; and, if the court had jurisdiction to pass the decree, that decree must be executed, unless it be reversed by regular proceeding had for the purpose.

Appeal from the circuit court for Prince George's county. In equity. Judges sitting, ALVEY, Ch. J., MILLER, LEVING, BRYAN, and YELLOTT, JJ.

Phil. H. Juck, and *Richard B. B. Chew*, for appellants. *Charles H. Stanley*, for appellees.

ALVEY, Ch. J. The appellant in this case has adopted the novel method of exception to the ratification of the sale, in order to have the decree reviewed and declared void, for supposed defects in the proceedings upon which the decree is founded, or the want of jurisdiction in

the court to pass the decree. If it be apparent upon the face of the proceedings that there was an entire want of jurisdiction of the court to decree the sale of the property, then, doubtless, the objection could be availed of in this mode. But clearly such mode of attacking the decree for mere defects, errors, or irregularities in the proceedings, though apparent upon their face, is wholly without precedent, and entirely unwarranted by any principle of equity pleading. Such defects, errors or irregularities, if they exist, could only be reached and corrected by a direct appeal from the decree, or by bill of review for errors apparent. *Tomlinson v. McKaig*, 5 Gill, 256; *Bolgiano v. Cook*, 91 Md. 375; *Gregory v. Lenning*, 54 id. 51.

It is urged, however, as an objection to the sale under the decree, that the allegations of the bill, upon which the decree of sale was founded, are not sufficiently clear and definite to confer jurisdiction upon the court to pass the decree for sale of the property. That there is no sufficient allegation of the seizin by James Sandford, under whom the complainants claim, of the land decreed to be sold, nor of the extent of his interest therein, at the time of his death. But in this we cannot agree.

The bill was filed, under section 99 of article 16 of the Code, for sale of the real estate described, for the purpose of partition among the parties entitled; it being alleged that such real estate was not susceptible of division in kind without loss and injury to the parties concerned. The bill alleged that James Sandford was, in his life-time, seized and possessed of seven-fifteenths undivided parts of a tract of land of one hundred and twenty acres; and that, being so seized, entitled, or possessed of such undivided interest, he died intestate, leaving the complainant, Jane Anna Page, his only child and heir at law, and also his widow, surviving him. It is also alleged that the other part of said tract of land, being eight-fifteenths thereof, was owned by the appellant. It is further alleged, that "if it be found, as your orators charge, that said real estate is not susceptible of division, and that no division can be made, except by greatly injuring and depreciating the value of said real estate, then they are entitled to a decree for sale for the purposes of partition," and a sale is accordingly prayed of the estate.

These allegations clearly make a case for the exercise of the jurisdiction of the court, under the section of the Code referred to. The test is, whether a demurrer would have been sustained, if interposed to the bill—*Tomlinson v. McKaig*, *supra*; and that it would not, we think is clear. *Bolgiano v. Cook*, *supra*. The allegations bring the case within the reason, though they do not pursue the strict letter of the statute; and, therefore, there was enough alleged on the face of the bill to give the court jurisdiction to decree the sale of the property.

It is further objected that the validity of the decree, and the sale thereunder, that there was no sufficient legal proof furnished, before the passage of the decree, of the actual seizin by Mrs. Page of that portion of the land alleged to have been owned by her father, in his life-time. But to this we cannot assent as furnishing any ground for declaring the decree void. It is the allegations of the bill that confer jurisdiction, and determine the power of the court to decree the sale; and though the

proof may be defective, or the decree be passed without proof, that does not affect the question of the jurisdiction of the court. Such defect may show error in the exercise of jurisdiction, but not the want of jurisdiction. *Tomlinson v. McKaig, supra*; *Bolgiano v. Cook, supra*. If the appellant had desired to avail himself of the objection to the supposed insufficiency of the proof to support the allegations of the bill, he should have paid heed to the summons of the court, and appeared and interposed his defense. But instead of that, he contemned the process of the court, and allowed the bill to be taken *pro confesso* against him; and notwithstanding a considerable delay occurred before the final decree was passed, up to which time he could have appeared and answered, he wholly neglected to appear to the case, and never did appear until after the sale made and reported, when he appeared in the case for the first time and then only to object to the sale. He is certainly in no position to object to the decree; and his objection to the sale is not founded upon any thing occurring subsequent to the decree. There is nothing alleged by him to impeach the terms of the sale, or the manner of making it; and the purchaser makes no objection, but is anxious to take the property as sold and reported by the trustee. The case falls directly within the well-settled principle, that courts have no power, under exceptions to a sale made under a decree, to review and decide upon the merits of the decree; for as between the parties to the suit the decree is conclusive of the subject-matter involved; and if the court had jurisdiction to pass the decree, that decree must be executed, unless it be reversed by regular proceeding had for the purpose. *Bolgiano v. Cook*, 19 Md. 395; *Patapsco Guano Co. v. Elder*, 53 id. 463.

Being of opinion that the court below was clearly right in overruling the exceptions to the sale, and finally ratifying the sale as reported, we affirm the order from which the appeal is taken.

Order affirmed and cause remanded.

CALDWELL v. BROWN.

December 17, 1886.

COMPROMISE — WHEN COURT WILL SUSTAIN.

When a court of equity is satisfied that a compromise among parties interested in an estate, entered into to avoid the expense and delay incident to litigation, is for the interest of all concerned, it has power, under act 1868, chapter 273, to ratify the same and decree a sale of so much of the property as may be necessary to carry it into effect.

Appeal from the circuit court for Baltimore county. In equity. Judges sitting, ALVEY, Ch. J., IRVING, BEYAN and ROBINSON, JJ.

Arthur Geo. Brown, for appellants. *Arthur W. Machen*, for appellees.

ROBINSON, J. John T. Johns died seized of a large and valuable real estate, leaving behind him six papers, purporting to be testamentary dispositions of his property. To each of these alleged wills, *caveats* were filed by Sarah M. Hodges and Anna Caldwell, his heirs at law. After a protracted and costly litigation, the *caveats* to five of

these alleged wills were sustained, and the wills set aside. This left but one will, the will of August, 1866, for further litigation. All the parties being anxious to avoid further litigation and the expense, delay and uncertainty incident thereto, agreed to compromise their several claims and pretensions, by the terms of which the claimants under the will agreed, in consideration of the sum of \$16,000 to be paid to them, to relinquish all interest in the estate of the said Johns.

A bill was then filed in the circuit court of Baltimore county, in equity, alleging that it was to the interest of all parties in anywise interested in said estate that the compromise thus agreed upon should be carried out, and praying: 1st. That the compromise agreement may be ratified and approved; and 2d. That Edwin Fitzgerald, trustee, to whom Mrs. Hodges had conveyed all her interest in said estate upon certain trusts, be authorized to unite with Mrs. Caldwell in making a sale or mortgage of so much of the real estate of the said Johns as might be necessary to raise the sum of \$16,000, which was to be paid under the compromise.

Testimony was taken to prove that it was to the interest and advantage of all the parties that the compromise should be carried out, and the court, upon full consideration of said testimony and by the consent of all the adult parties to the suit and the guardians of the infants, passed a decree, ratifying said compromise and appointing appellees to sell or mortgage property sufficient to raise the sum of \$16,000, required to be paid under it.

In pursuance of this decree, the appellees, as trustees, agreed to sell one of the farms to the appellant for the sum of \$30,000, but objection was afterward made to the title to be conveyed by them, founded entirely upon the deed of trust which was executed by Mrs. Hodges, pending the litigation. This deed, after reciting the objects and purposes for which it was made, conveyed to Fitzgerald the entire interest of Mrs. Hodges in the estate of the said Johns, upon the following trusts: To sell so much of said property as may be necessary to repay him all sums of money advanced, or to be advanced by him for counsel fees and expenses connected with said litigation, and all sums advanced for the support of Mrs. Hodges and her two unmarried daughters; and secondly, as to the residue, to apply the net income to the support of Mrs. Hodges and her two unmarried daughters; and thirdly, from and after her death, as to all the said residues of said property in trust, to belong to and be equally divided *per stirpes* among all her children and descendants of her children then deceased.

By the same deed, Fitzgerald was appointed the attorney of the settler with full power and authority to sue and recover by all lawful ways and means the said property, and generally on behalf of the said Sarah and her share of said estate, to conduct and manage said litigation to a final conclusion.

It thus appears that the residue of the property in the hands of the trustee was, after the death of Mrs. Hodges, to be divided *per stirpes* among her children and the descendants of her children then deceased. Now it is conceded that independent of the act of 1868 — chap. 273 — courts of equity have no jurisdiction to deal with estates of unborn

children. That act, however, provides, that in all cases where one or more persons are entitled to an estate for life, etc., with a remainder over, or an executory devise in the same land, a court of equity may, upon proper proceedings instituted for that purpose, decree a sale of said property, etc.; and shall direct the investment of the proceeds of sale so as to inure in like manner as in the original grant, to the use of the same parties who would be entitled to the land thus sold. And the argument is, that although a court of equity has power to decree the sale of land in which the unborn children of Mrs. Hodges may have an interest, yet the proceeds of sale must be invested in the manner prescribed by the act of 1868; and that a decree for the sale of land, for the purpose of raising money to compromise a litigation, is not within the terms of the act.

Whatever force there may be in this contention, we are of opinion, that looking to objects and purposes for which the deed was made, and the trusts therein declared, and the large and ample powers conferred on Fitzgerald as attorney, to sue and recover by all lawful ways and means the said property, and to conduct and manage said litigation to a conclusion, that a fair and judicious compromise made by him, by which the title of Mrs. Hodges as heir at law was established, is strictly within the powers conferred by the deed. And further, that a court of equity, being satisfied, by proper proof, that the compromise thus made was for her interest, and the interest of all parties concerned in the litigation, has the power to ratify it, and, if necessary, to decree the sale of so much of the property as may be necessary to carry it into effect. Under such a sale a valid title would pass not only as against Mrs. Hodges and her children now living, but also against the descendants of her children.

By the express terms of the deed Fitzgerald was authorized and empowered as attorney to sue for and recover, by all lawful ways and means, the said property, and to manage and conduct the litigation in regard to Mrs. Hodges' share in the estate to a final termination. Until there was an end to the litigation nothing vested or could vest in the children or their descendants. The only question it seems to us is, whether a compromise is a lawful way or means of bringing the litigation to a conclusion? The main object of the deed of trust was to enable the trustee and the attorney therein appointed to prosecute the litigation in regard to the alleged wills to a termination. And if this could be done by a fair compromise, instead of another trial involving large expenditures of money, further delay and uncertainty as to the result, such a compromise must be considered a lawful way and means of bringing the litigation to a conclusion. The proof shows beyond question that it is to the interest of all parties that the compromise agreement should be carried into effect. All the adult parties—the trustee under the deed, and Mrs. Hodges, the settler, who has reserved to herself and the trustee the control of the whole estate until the litigation is concluded—affirm it to be so. For these reasons the decree below will be affirmed.

Decree affirmed.

STEVENS ALIAS WRIGHT v. STATE OF MARYLAND. SAME v. SAME.

December 10, 1886.

CRIMINAL LAW — CHARGING RAPE AND ASSAULT WITH INTENT TO COMMIT RAPE — VERDICT ON ONE COUNT.

An indictment contained two counts, the first charging the commission of the crime of rape, and the other charging an assault with intent to commit a rape; the jury found a verdict of "guilty of the charge in the first count." *Held*, that a motion in arrest would not be granted on the ground that the jury had not found on both counts in the indictment.

Appeal from the circuit court for Somerset county.

Judges sitting, ALVEY, Ch. J., ROBINSON, BRYAN and YELLOTT, J.J.

William C. Handy and *Thomas S. Hodson*, for appellant. *Attorney-General Roberts*, for appellee.

YELLOTT, J. In the indictment, as shown by the record, are two counts. In the first count the plaintiff in error is charged with the commission of the crime of rape, and in the second count he is charged with an assault with intent to commit a rape. In the circuit court for Somerset county he was arraigned and pleaded not guilty, and was tried, convicted and sentenced to be hanged.

The verdict of the jury was "guilty of the charge in the first count." A motion for a new trial was filed and was overruled. A motion in arrest of judgment was then filed founded on the apparent fact that the jury, in rendering a verdict, did not find on both counts in the indictment. The court below overruled this motion, and the prisoner then presented a petition to have the record removed as upon writ of error. The prisoner was subsequently sentenced; and he afterward filed a petition which presents the question in relation to the legal effect of a sentence passed anterior to the decision of the court of appeals upon the writ of error.

The application of the first writ of error was premature as no final judgment had then been rendered; but as the attorney-general, not being disposed to take advantage of this irregularity, has fully argued the questions thus presented, it is deemed proper to consider and determine those questions without reference to any perceptible departure from regular procedure.

The first objection urged by the plaintiff in error is that the jury failed to find on both counts in the indictment. It is not contended that a felony and a misdemeanor, growing out of the same transaction, cannot be charged in separate counts in the same indictment, for this question was fully determined in the case of *Burk v. State*, 2 H. & J. 426, in which case the court said: "There is no substantial reason why a rape and an assault with intent to commit a rape may not be charged in the same indictment. But it is contended that when the jury found the accused guilty of a rape, they should also have passed upon the second count. It is clear that the jury could not, after finding him guilty of a rape, have found him not guilty of an assault with intent to commit a rape. The crime charged in the first count in the indictment could not have been committed without unlawful violence to the person of the unfortunate victim, and all unlawful violence of this nature is an assault with intent to commit the crime." As was said in *Hays*

v. *People*, 1 Hill, 352, "an assault is defined to be an attempt, with force or violence, to do a corporate injury to another; and may consist of any act tending to such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person." And in *Com. v. Thompson*, 116 Mass 348, it is said that "rape necessarily includes an assault and battery." Indeed so apparent is this, that it is impossible to frame an indictment charging rape without at the same time charging an assault, and in the very first count in this indictment it is alleged that the prisoner "with force and arms, etc., feloniously did make an assault," etc. It is manifest that the first count includes the offense set forth in the second, and the necessity for the second count is created by the obvious possibility that the evidence might not justify a conviction on the first, but might show that the accused was guilty of an assault with intent to commit the lesser offense. The first count not being divisible must be taken as an entirety, and, therefore, a second count charging the minor offense becomes necessary. But when there is a verdict of guilty on the first count, there is a merger of the minor offense. As was said by the court in determining this question, after hearing a very elaborate argument by counsel, "the higher crime necessarily merges the inferior offense and dispenses with the finding of *non. cul.* on that count." *Manly v. State*, 7 Md. 151. But as there was no judgment rendered in the case, the petition for the first writ of error must be dismissed. That which remains to be determined relates to the propriety of passing sentence in the court below before the determination of the questions brought by writ of error into this court. As has already been intimated it is impossible to perceive how there can be a writ of error before final judgment; but on this branch of the case it is sufficient to say that the provisions of the act of 1886, chapter 169, are not applicable. That act provides that a bill of exceptions shall be tendered to the court to be signed and sealed, and also requires that counsel shall make oath that the appeal is not taken for delay. There is no bill of exceptions in this record, nor has the required affidavit been made by counsel. The provisions of the act, therefore, do not apply.

There being no error in the rulings of the court below its judgment must be affirmed.

Judgment affirmed.

HEBB v. MOORE.

December 10, 1886.

TAXATION — LAWS 1874, CHAPTER 483 — SUBROGATION.

Section 82 of the act of 1874, chapter 483, provides as follows: "All taxes levied for county or city purposes shall be collected by the collectors of the counties or cities, respectively, within four years after the same have been levied; and, if the same shall not be collected within four years, the parties from whom such taxes may be demanded may plead this section in bar of any recovery of the same." *Held*, that said section was intended to apply only to such cases, and such persons, when the collector could, on notice, proceed summarily to sell the debtor's property for the taxes; and, whenever he could do so, and did not resort to his distress and sale, the statute was permitted to be pleaded as a bar after the expiration of four years from the levy of such taxes. It was not intended, and

could not have been intended, to be a bar when the law would not allow the collector to resort to his legal remedies for summary enforcement of payment.

When a court of equity had taken jurisdiction of the property liable for taxes, it was not admissible for a collector to step in, and by his summary process, sell the property for taxes, and transfer the jurisdiction over the title to another tribunal. In all such cases the collector's summary proceedings are, of necessity, suspended because the court of equity has charge of the property. It is *in custodia legis*, and he must seek payment of his taxes from the funds under the court's control.

Where a purchaser is bound, under his agreement for purchase, to pay the taxes thereon, and the trustee of the estate pays the same, the said trustee will be subrogated to the rights of the tax collector's rights as against him.

Appeal from the circuit court for Baltimore county. In equity.
Judges sitting, ALVER, Ch. J., MILLER, BRYAN, and IRVING, JJ.

D. G. McIntosh, for appellant. *B. P. Moore* and *Arthur W. Machen*, for appellee.

IRVING, J. In the matter of the trust estate of Thomas R. Matthews, pending in the circuit court for Baltimore county, in equity, Henry J. Hebb, treasurer of Baltimore county, and collector of State and county taxes for Baltimore county, filed his petition, alleging that all the State and county taxes since the year 1877 remained due and unpaid, and praying an order of the court directing the auditor, in stating his account in the cause, to allow the same with the interest which had accrued. The court, on the 21st of December, 1885, passed an order directing the allowance by the auditor of the taxes mentioned in the petition. Upon the same day the appellee, trustee in the cause, filed his petition, asking a modification of the order so as to exclude therefrom all taxes which had accrued more than four years before the filing of Hebb's petition, to which he pleaded the statute of limitation embodied in section 82 of the act of 1874, chapter 483, which repealed and re-enacted article 81 of the Code of General Public Laws of the State. Upon hearing the court adjudged that the statute relied on was a complete bar to allowance of the taxes for the years 1878, 1879, 1880 and 1881, and signed an order disallowing the taxes for those years. An auditor's report was accordingly made in conformity with that order, which was ratified, and this appeal is from the order of the court disallowing the taxes mentioned, and from the order ratifying the audit made in accordance with the order of May 15, 1886.

The sole question for decision is whether section 82 of the act 1874, chapter 483, operates as a bar to the allowance of taxes in the distribution of the proceeds of a trust estate like the present. We think it does not. The provision is as follows: "All taxes levied for county or city purposes shall be collected by the collectors of the counties or cities, respectively, within four years after the same have been levied, and, if the same shall not be collected within four years, the parties from whom such taxes may be demanded may plead this section in bar of any recovery of the same." This section of the Code manifestly was intended to apply only to such cases and such persons when the collector could, on notice, proceed summarily to sell the debtor's property for the taxes, and whenever he could do so, and did not resort to his distress and sale, the statute was permitted to be pleaded as a bar, after the expiration of four years from the levy of such taxes. It was

not intended, and could not have been intended, to be a bar when the law would not allow the collector to resort to his legal remedies for summary enforcement of payment. In *County Commissioners of Prince George's County v. Clarke and Barry*, 36 Md. 218, it was expressly decided that, when a court of equity had taken jurisdiction of the property liable for taxes, it was not admissible for a collector to step in, and by his summary process, sell the property for taxes, and transfer the jurisdiction over the title to another tribunal. In all such cases the collector's summary proceedings are, of necessity, suspended, because the court of equity has charge of the property. It is *in custodia legis*; and he must seek payment of his taxes from the funds under the court's control. This the appellant did, and was denied payment for the reason already stated. But it is said his petition was not filed within the four years after the levy of the taxes for the several years mentioned. To that the answer is that there is no statutory requirement for the filing of such petition within a particular time. It is not one of the methods legally devised for his enforcement of payment. It is only a method suggested by this court of bringing his claim to the attention, and to inform the court, that the trustee had not discharged his statutory duty in such case of paying the taxes.

The sixty-third section of article 81 of the Code, as re-enacted by the act of 1874, is very sweeping in its terms as to the payment of all unpaid taxes chargeable on the estate in the court's control. It directs that "all sums due and in arrear for taxes from the party whose property is sold shall be first paid and satisfied." There is no exception. The only thing to be known is that they are in arrear and unpaid. The present section is identical with section 71 of article 81, before its amendment by the act of 1874, and its effect was under consideration and pronounced upon. *Tuck v. Calvert and others*, 33 Md. 224. The court emphatically says it "is bound by the distinct language of the section, and cannot by construction avoid its provisions." The court said that in that case it operated onerously "upon the equities of innocent creditors," but said the taxes must be paid. If the collector cannot resort to the remedies ordinarily accorded him to enforce payment, he cannot be saddled with them because of neglect, and certainly it cannot have been intended that the public shall lose the benefit of such taxes toward defraying the expenses of the State and counties because of the collector's inability to coerce payment within ordinary statutory period. If the trustee has funds, it is his duty to pay such unpaid taxes; but until he has funds applicable he cannot be expected to pay them. The collector cannot enforce his summary remedies against him, and clearly he is not such person as the law contemplates may plead the statute in bar. The statute was clearly intended to promote the prompt collection of taxes, but was certainly not intended to apply to that condition of things when the person really owing the taxes could not be pursued in the usual way.

In the case of *Fulton v. Nicholson*, 7 Md. 107, the taxes were allowed out of the fund before the payment of the mortgage debt, although there was personal estate in the hands of an administrator from which they could be paid, because the law said the trustee should pay them;

but the court said that the mortgagee, who suffered to the extent of the taxes allowed, was substituted to the rights of the State and county, and could recover them from the personal estate. So here, if as is contended, Standford was bound as purchaser under his agreement to pay the taxes, the trustee will be subrogated to the collector's rights as against him, and to that extent the amount due by Standford will be swelled in the auditor's computation.

Both orders appealed from must be reversed, and the cause will be remanded that the auditor's report may be made to conform to this opinion.

Reversed and remanded.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

CUSHING v. NANTASKET BEACH R. R. Co.

November 24, 1886.

EMINENT DOMAIN — EVIDENCE — U. S. SENATE DOCUMENTS.

United States senate documents, containing chief engineer's reports, transmitted to the senate by the secretary of war, and ordered by that body printed, are not admissible in evidence in a proceeding to assess damages for land taken by a railroad company for the purpose of showing that the petitioners were benefited by the building of the defendant's road.

Petition for a jury in the superior court to assess damages for the taking of the petitioner's land in Hull by the Nantasket Beach Railroad Company. The verdict was for the petitioners. At the trial the respondents offered in evidence the printed document referred to in the opinion, which the judge refused to allow to be read, and the respondent excepted.

It appeared in evidence that the respondent road had been sold at mortgagee's sale, and that Arthur W. Moors had purchased the same, and held the title thereto as trustee, and the respondent offered in evidence a release by said Moors to the "heirs of Samuel T. Cushing" of a portion of their land taken by the road described in their petition, and offered to show that the same had been tendered to the petitioners during the trial. The judge excluded the release and the evidence, showing a tender of the same to the petitioners, and the respondent excepted.

D. C. Linscott, for petitioners. *R. M. Morse, Jr.*, and *A. Lord*, for respondent.

FIELD, J. The respondent has argued the exceptions to the exclusion of the printed document entitled "48th Congress; 1st Session, Senate, Ex. Doc. No. 74," and the exception to the exclusion of the release of a part of land, which was tendered at the trial. The other exceptions were waived.

The secretary of war, on January 24, 1884, transmitted to the senate of the United States a letter from the chief of engineers, submitting copies of reports made by Major Raymond, of the corps of engineers, and this letter, with the accompanying papers, when received by the senate, was referred to the committee on commerce and ordered to be printed. This printed document was offered in evidence by the respondent, for the purpose of showing from the reports of Major Raymond that the road-bed of the company protected the remaining land of the petitioners from being washed away by the sea, and that a special benefit was thus received by the petitioners from the location of the railroad, which should be considered in estimating the damages. The contents of papers, in any of the executive departments of the United States, are usually proved by a copy, authenticated under the seal of the department. Rev. Stats. U. S., chap. 17, § 882. We are not required to determine whether the printed document offered in this case would not be admissible in evidence, if a copy duly authenticated would be — See *Whiton v. Albany City Ins. Co.*, 109 Mass. 24 — because we think that the reports themselves are inadmissible for the purpose of proving, as between these parties, the facts stated in the reports.

The acts of Major Raymond and Assistant Engineer Bothfield, in surveying the headland in the town of Hull, cannot be called acts of State, nor are the facts stated in the reports public facts, in the sense that they are facts which the United States have, under the authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested to know them; but they are facts which have been ascertained in the course of preliminary surveys, made for the purpose of determining what action, if any, the national government may thereafter take for the purpose of protecting Boston harbor. The engineers who made the surveys can be called as witnesses, in the same manner as other persons who have knowledge of the facts. There is no necessity for the admission of unsworn written documents, and the facts do not bring the case within any known exception to the rule that evidence "must be given on oath by persons speaking to matters within their own knowledge, and liable to be tested by cross-examination." *Sturla v. Freccia*, 5 App. Cas. 623; S. C., 12 Ch. Div. 411.

The deed of release was rightly excluded. It recited that it was "in consideration of \$1 and the settlement of claim for land damages to the estate of the heirs of Samuel T. Cushing in Hull, Mass., the receipt whereof is hereby acknowledged," etc. If this release had been made to the petitioners, the acceptance of it would have been an admission by them that the claim for land damages had been settled. The release is, however, to the "heirs of Samuel T. Cushing and their heirs and assigns," without otherwise naming any persons so released. The petitioners are Benjamin Cushing, William L. Cushing, Mary J. Cushing and Abby C. Cushing, as she is executrix of the estate of Samuel T. Cushing, and they allege in their petition that said Benjamin, Samuel, William and Mary Jane were seized in fee as tenants in common of the land when the defendant took a strip of it for the location of its railroad; that the land was devised to them by the will of Mary Cushing,

and that by the will of Samuel, who died after the location of the road, "all his interest in said land and damages suffered by him were given to said Abby C. Cushing." The petitioners, therefore, do not appear to be the "heirs of Samuel T. Cushing." It is not necessary to consider whether it is shown that Arthur W. Moors, as "assignee and trustee in possession," had any authority to execute the release, or whether a railroad company may not abandon its location, or a part of it, without the consent of the land-owner, so that the land shall be thereafter discharged in whole or in part from the easement which the railroad company acquired by its location. There is no evidence of any abandonment, except the tender of this deed of release, which the petitioners were not required to accept for the reasons which have been given.

Exceptions overruled.

CHASE v. HORTON.

November 26, 1886.

DEED — EVIDENCE — SUBSEQUENT DECLARATIONS OF GRANTOR.

After a conveyance of real estate, the declarations of the grantor in disparagement of his grant, made in the absence of the grantee, are not admissible in evidence against the grantee.

FRAUDULENT CONVEYANCE — CHARGE AS TO GOOD FAITH.

Plaintiff's counsel requested the court to instruct the jury in substance, that if the grantor made the deed in question to his son in good faith and without any intention to defraud creditors, and the son afterward permitted the grantor to occupy the premises, it would be conclusive evidence of fraud as to the grantor's creditors. The request was denied. *Held* no error.

Writ of entry brought by Elijah P. Chase, as the administrator of the estate of Joseph G. Horton, late of Rehoboth, against his son, Josephus W. Horton, to recover the homestead farm formerly of said Joseph G. Horton, and on which he lived at the date of his death, August 11, 1883. The tenant pleaded *nul disseizin*, and the trial was had in the superior court, on this issue. The demandant showed title in said Joseph G. Horton of the demanded premises, from his brother, Levi Horton, by will, probated March 6, 1860, his appointment as administrator of the estate of Joseph G. Horton, November 7, 1884, a license issued to him by the probate court in and for the county of Bristol, authorizing him to sell the whole of the real estate of said Joseph G. Horton, for the payment of debts and charges of administration, dated May 5, 1885, and a formal entry made by the demandant as administrator of said Joseph G. Horton, on the premises demanded, before bringing the suit.

The tenant put in evidence a warranty deed of Joseph G. Horton, given to the tenant, dated August 20, 1878.

The demandant offered evidence tending to show that the said Joseph G. Horton continued to occupy and improve the demanded premises from shortly after the probate of the will of Levi Horton until his death, and after the deed given by him to the tenant in the same manner as before, as a homestead; that at the date of the deed to the tenant, said Joseph G. Horton and the demandant, and divers other persons who had before the date of the deed pressed him for payment,

and he had failed to make payment; that when so pressed, before said deed was given upon the premises demanded, he informed the various creditors that he had not the money to pay with, but there was ample property there to pay all debts; that if he did not pay them, Josephus, his son, the tenant, would see that they were paid. The demandant also offered to introduce evidence of statements and conversations of said Joseph G. Horton, made after the giving of the deed, of a similar nature to those above stated, but the court refused to admit the same, except such as were made in the presence of the tenant, and the demandant excepted. At the conclusion of the evidence the demandant requested the following among other rulings, being the first and third rulings requested:

Where a grantor executed a deed to his son of his homestead where he is living, and after delivering the deed, continues in the use and occupation of the homestead, as before and afterward, while in such occupation he refers creditors of claims against him existing prior to the date of the deed, to his son, who thereupon in conversing with them admits the purpose of the deed to be to protect the father from his creditors, the statements of the father, while in possession of the land and on the premises, but not in the presence of the son, referring such creditors to the son for payment, are competent against the son in impeaching his title.

If, at the time of the delivery of the deed by Joseph G. Horton, the father, to Josephus W. Horton, the son, there was any agreement or understanding between them by which the land thus conveyed would continue to be held and enjoyed by Joseph G. Horton as he had formerly held and enjoyed it, or in any way to his said Joseph G. Horton's benefit, the conveyance is void as against the creditors of Joseph G. Horton, or this administrator. The court refused to give these rulings. A verdict was returned for the tenant, and the defendant alleged exceptions.

Charles A. Reed and *J. H. Dean*, for demandant. *M. Reed*, for tenant.

MORTON, Ch. J. The rule of law is well settled that, after a conveyance of real estate, the declarations of the grantor, in disparagement of his grant, made in the absence of the grantee, are never admissible in evidence against the grantee. *Winchester v. Charter*, 97 Mass. 140; *Roberts v. Medbery*, 132 id. 100, and cases cited.

The court, therefore, rightly excluded the declarations of Joseph G. Horton, offered by the plaintiff. The first ruling requested by the plaintiff was properly refused, because it assumes that the defendant admitted that the deed to him was given to protect the father from his creditors, of which there was no evidence. The third ruling requested was also properly refused.

The court instructed the jury, in accordance with the second request of the plaintiff, that, "if the purpose of the conveyance to the son was to delay, defraud, or defeat other creditors of the father, and the son participated in this intent, whether the deed was voluntary, that is, without consideration, or for a consideration past or present, it is void

against the claims of creditors, or of the administrator, duly authorized to sell all his real estate for payment of debts.''

It would be erroneous to instruct the jury, as the third request of the plaintiff imports, that, if a father makes a deed to his son in good faith and without any intent to defraud creditors, it would be conclusive evidence of fraud, which would avoid the deed, if the son permitted the grantor to occupy the premises in any way to his benefit.

Exceptions overruled.

SAVINGS BANK v. POOL.

January 5, 1887.

MORTGAGE — INTEREST — STAKEHOLDER NOT CHARGEABLE WITH.

The defendant and his wife were each seized of an undivided half of certain premises. The husband executed a mortgage on the same to the plaintiff in which he covenanted that he was seized in fee of the entire premises. In this mortgage the wife joined only in releasing her dower. Some years after, the plaintiff discovering that the wife owned a one-half interest in the premises, procured from her a quit-claim deed of her interest, and, at the same time, gave her back an agreement or instrument of defeasance by which it agreed that in case the premises were sold to pay the husband's mortgage, it would pay to her the surplus. *Held*, that the quit-claim deed and the agreement back constituted a mortgage of the wife's undivided half of the estate; that the two mortgages were separate and distinct conveyances of their respective interests, and that the fact that it was the intention of all parties that the whole property should be included in the mortgage given by the husband, and that the money borrowed thereon had been expended in improving the common property, did not tend to make them joint mortgages.

A mere stakeholder who stands ready to pay to whichever one of the claimants is legally entitled to the money is not, unless special circumstances require it, chargeable with interest.

Bill of interpleader against William Pool, Catherine Pool and Charles W. Anthony, brought to determine to whom the balance of the proceeds should be paid in the hands of the plaintiff bank, obtained by the sale of real estate under a power contained in a mortgage held by the plaintiff bank. The balance of proceeds was claimed by defendants William and Catherine Pool, and also by the defendant Anthony.

The case was referred to a master who made report to the court and was reserved by a single justice upon the pleadings and master's report for the consideration of this court. The facts appear in the opinion.

E. L. Barney, for defendants William and Catherine Pool. *H. K. Braley* and *A. H. Hood*, for defendant Anthony.

GARDNER, J. William Pool and Catherine, his wife, were each seized in fee of one undivided half of certain premises. William executed a mortgage of the same to the plaintiff corporation, in which he covenanted that he was lawfully seized in fee of the entire granted premises, and that he had good right to sell and convey the same. In this mortgage Catherine joined only in releasing her dower. About five years after the mortgage was delivered to the plaintiff, the bank discovered that Catherine "owned one-half interest in fee in the estate mortgaged." Upon request she thereupon executed and delivered to the plaintiff a quit-claim deed of her interest in the premises, and the plaintiff simultaneously gave her an agreement or instrument

of defeasance, by which the savings bank agreed that in case the premises were sold for the purpose of paying her husband's mortgage to the bank, and one-half of the proceeds of sale would pay the amount due on the mortgage, then it would pay to her the remaining half, and if one-half the proceeds was not sufficient, to pay to her "such sum as may remain of the proceeds of said sale after deducting therefrom all such sum or sums as are lawfully due on or under such mortgage."

The quit-claim deed of Catherine to the bank and the agreement back to her constituted a mortgage of her undivided half of the estate. *Bailey v. Bailey*, 5 Gray, 505; *Murphy v. Calley*, 1 Allen, 107. The bank thus held two mortgages upon the estate. They had advanced money to William Pool upon his mortgage. That of Catherine was given to secure the payment of the loan to William. The interests of William and Catherine in the estate mortgaged, were separate and distinct, and the mortgages were separate conveyances. They were not joint mortgages of the grantors. The facts that it was the intention "of all parties that the whole property should be mortgaged to the bank originally for the loan," and that the money borrowed had been "expended with the knowledge of parties in the improvement of the common property," cannot affect the character of the mortgages actually executed. These facts have no tendency to make the mortgages different from what they actually are, and we cannot declare them to be the joint mortgages of William and Catherine.

The defendant Anthony, in 1877, purchased at a sheriff's sale all the right in equity which William Pool in 1875 had in the mortgaged premises, that being the time when they were attached on *mesne* process. What he purchased at this sale was the right of William Pool to redeem his mortgage given to the plaintiff. He did not purchase any right, interest or equity of Catherine. He contends that the agreement of defeasance given to Catherine by the bank, not having been recorded in the registry of deeds, and he having no actual notice of it, that his rights cannot be affected by it. This may be conceded. We fail to see what rights he has in the undivided half of Catherine. As already appears the mortgages were not joint. So far as Anthony was concerned, he was a stranger to the interests of Catherine in the estate. She was entitled, as of her own right, to one undivided half of the same. By the terms of the agreement with the savings bank, the balance of the proceeds of the sale, now in the hands of the bank, belong to Catherine and should be paid over to her.

The payment by the bank of the taxes,* was within the terms of the mortgage given by William, and was properly allowed in the account stated by the master. The payment of the water tax was waived at the argument by the defendants.

The defendant Catherine contends that she is entitled to interest

* Taxes for the years 1882 and 1883 were paid by the bank after the auction sale and on the day of the date of the deed given in pursuance of such sale. The master found that no special authority was given or request made either by Mr. or Mrs. Pool for the bank to pay the taxes, unless such authority or request is implied and given in the condition of the mortgage to the bank from William Pool, or his paper writing of assent to the provisions of the instrument given by the bank to Catherine Pool.

upon the money due her during the time she has been deprived of it. The bank has held the money as a stakeholder, ready to pay it to which one of the claimants was entitled to it, and the facts do not show that the bank should be compelled to pay interest.

Decree accordingly.

TOWNSEND v. WEBSTER FIVE CENT SAVINGS BANK.

January 4, 1887.

BANKS AND BANKING — WITHDRAWING DEPOSIT — WAIVER OF BY-LAWS AS TO NOTICE.

When a savings bank is applied to by a depositor for her deposit, and the officers of the bank refuse to pay, denying that she has any funds in the bank, the bank thereby waives its right to the three months' notice which it is entitled to under its by-laws.

Action of contract for money had and received. It appears from defendant's answer that the defendant held the funds, but claimed that a part was held and paid under trustee process against the plaintiff's husband, but that the plaintiff was not a party to the suit.

At the trial in the superior court there was evidence to show that more than three months before this suit was brought, the plaintiff went to the bank and asked the treasurer for the funds standing in her name, and that the treasurer replied that she had no funds in the bank, and the treasurer testified that he declined to pay the money to the plaintiff, because the funds claimed were held by trustee process and that, if the bank had not been trustee, he would pay her. The plaintiff testified that the money was her own, and did not belong to her husband, who was summoned and disclaimed the fund. There was evidence, not in the controversy, that the by-laws of the bank provided, that no funds should be withdrawn from the bank without ten days' notice of such intention to withdraw the same, in writing, and, when the sum was more than \$200, the notice should be three months. It was not claimed that any notice, in writing, had been given by the plaintiff, but there was evidence tending to show that the bank had paid, without notice, such sums as the plaintiff had demanded.

The defendant's counsel claimed that upon the evidence and pleadings, the action could not be maintained, and asked the court to direct a verdict for the defendant, which was done, and the plaintiff alleged exceptions.

W. A. Gile, for plaintiff. *T. G. Kent* and *G. T. Dewey*, for defendant.

HOLMES, J. There was evidence tending to show that the plaintiff went to the bank and asked for the funds standing in her name, and that the treasurer answered that she had no funds in the bank. If this evidence was true the bank waived its right to the three months' notice required by its by-law. For by denying that, that the plaintiff was a depositor in the bank, it repudiated the relation on which its right to notice was founded. See *Love v. Harwood*, 139 Mass. 133, 136. The answer also waives the notice by implication.

The answer admits a deposit in the name of the plaintiff. The plain-

tiff testified that the money was her own, and her husband, who seems to have been supposed by the bank to have been her principal, and the then depositor, disclaimed the funds. This evidence fully warranted a finding that the plaintiff was the creditor to the bank. It follows that the court erred in directing a verdict for the defendant.

Exceptions sustained.

CROACHER v. WILLIAM.

January 5, 1887.

PLEADING — NUL DISSEIZIN — EXECUTION — LEVY AND SALE — NOTICE.

The plea of *nul disseizin* puts the whole title of the property in issue, and under that plea the defendant can maintain the issue either upon the failure of the demandant to show title in himself, or upon evidence of title in the defendant. Delay of an officer to complete the sale of real property after seizure, where the rights of third parties have not intervened, is immaterial. Service of notice upon the owner, of the time and place appointed for the sale, is properly made by leaving the notice at his last and usual place of abode.

Writ of entry to recover a parcel of land in New Bedford. Plea *nul disseizin*. At the trial in the superior court the demandant offered evidence tending to show title in himself in fee-simple as heir at law and grantee of the other heir at law of Daniel B. Croacher, deceased, and rested his case. The tenant then offered evidence of title in himself under a sheriff's levy and sale of the same property, upon an execution against the goods and estate of said Daniel B. Croacher, issued January 6, 1885, on a judgment in favor of Elizabeth Gibbs for the sum of \$587.75. The demandant objected to the admission of said execution and the return of the officer, and claimed that under the tenant's plea he could not set up title in himself and that the levy and return did not pass any title to the tenant and was illegal and void. The tenant also offered, the demandant objecting, a deed from the sheriff to the tenant under the said levy.

The demandant asked the court to rule that the title thus offered by the tenant did not control demandant's title and was no defense under the pleadings nor under the sheriff's acts. The court declined so to rule, and did rule that the tenant was entitled to a verdict, and the jury, by direction of the court, returned a verdict for the tenant. The demandant alleged exceptions. Except as above given, the facts appear in the opinion.

E. L. Barney, for demandant. *W. C. Parker*, for tenant.

GARDNER, J. The plea of *nul disseizin* puts the whole title in issue. The tenant can maintain the issue either upon the failure of the demandant to show title in himself, or by evidence of the title in the tenant. *Swan v. Stevens*, 99 Mass. 7.

The demandant's title was through Daniel B. Croacher as heir and by deed from the other heirs. The tenant's title was under a sheriff's levy and sale upon an execution against the goods and estate of Daniel B. Croacher and a deed from the sheriff to the tenant.

We do not understand that the demandant makes any objection to the sale of the 16th of February, 1885, to Charles E. Hoard, or to the

proceedings of the sheriff under that sale. It appears from an examination of the sheriff's return upon the execution, that up to this time he had proceeded step by step in accordance with the requirements of the statute. After the estate was knocked down to Hoard by the officer acting as auctioneer, and after Hoard had made the deposit of \$125, required by the terms of the sale, he refused to complete the sale, pay the balance due and take the deed of the premises upon tender of the same by the sheriff.

The officer thereupon did not return the execution — Pub. Stats., chap. 172, § 53 — but treated the attempted sale as if it had not been made, and proceeded anew to give notice of the time and place appointed for a sale of the estate. He had already, on the 15th of January, 1885, seized the estate on the execution, and as it had not been attached on mesne process in the suit, he had in conformity with the Public Statutes, chapter 172, section 4, deposited in the office of the registry of deeds a copy of the execution, with a memorandum upon it of his seizure of the real estate. The statute directs that when land is taken on execution the officer shall give notice of the taking to the debtor, and that he shall complete the sale without unnecessary delay. Pub. Stats., chap. 172, § 3. The statute has fixed no definite time within which to limit his completion of the sale. He had proceeded without unnecessary delay to complete the levy begun. The seizure was of record. The rights of third persons have not been affected. A delay of the officer to complete the levy and sale was immaterial if no rights had been acquired during the delay. *Bell v. Walsh*, 130 Mass. 163. We do not think that the officer was required to make another seizure of the land and record it after the failure of the first attempt to sell. The officer has proceeded in all respects in accordance with the statute.

The service of notice to the demandant of the time and place appointed for the sale was properly made by leaving the notice at the last and usual place of abode of the demandant. *Welsh v. Macomber*, 130 Mass. 28, and note; Pub. Stats., chap. 172, § 46.

Exceptions overruled.

O'DAY v. BOWKER.

November 24, 1886.

TAX DEED — REDEMPTION — INFANCY — PARTIES DEFENDANT.

A tax deed regularly recorded given by the collector on a sale for taxes lawfully assessed, conveys to the purchaser a good unincumbered title in fee-simple to the land, which may be conveyed in the same manner as other real property.

The statute specifying the parties who may redeem should be construed liberally, but to entitle a party to redeem he must show some interest in the land; and where the plaintiff at the time of bringing the bill to redeem has lost by lapse of time all right to redeem from a purchaser at a prior tax sale of the premises, the bill will be dismissed.

The statute limiting the time to redeem to two and five years contains no exception in favor of infancy; and there is nothing in the Constitution requiring such an exception.

Where, since the sale to the defendant in a bill to redeem, there has been a subsequent tax sale of the land to another party who has received a deed thereof, the plaintiff is not entitled to redeem from the defendant, except in connection with a redemption from the subsequent purchaser; and the person who holds the estate under the subsequent tax sale and conveyance is an indispensable party to the bill to redeem.

H. Dunham, for plaintiff. *H. H. Winslow*, for defendant.

FIELD, J. These are appeals from final decrees in two suits in equity, heard upon issue joined and evidence. The evidence is not reported, and the only questions before us are whether the decree in each suit is warranted by the frame of the bill and is consistent with the facts found and recited in the decree. The first suit was brought on May 26, 1885, by Elizabeth O'Day, a minor, who sues by her guardian, John W. McDonald, against Edwin F. Bowker to redeem a lot of land from tax sales and conveyances, made to the defendant in 1881 and 1882 for the payment of taxes assessed in 1880 and 1881. The second suit was brought on December 5, 1885, by the same plaintiff against Sarah B. Bowker to redeem the same lot of land from a tax sale and conveyance made to the defendant in 1883, for the payment of a tax assessed in 1882.

The final decree entered in the second suit is as follows :

This cause came on to be heard at a sitting of this court, December 22, 1885, upon its merits, and it appearing that the parties to said cause were all before said court, evidence was then and there heard and duly considered by the court, after argument by counsel; and thereupon the following facts were found and determined upon by the court, to-wit, that one Margaret O'Day died November 29, A. D. 1871, owning the real estate described in the plaintiff's bill in fee-simple; that she left surviving as her heirs at law, three children, Mary, Catherine and Elizabeth O'Day, and also a husband, William O'Day; that the said Elizabeth O'Day is still a minor and is the plaintiff, bringing this bill by her guardian, John W. McDonald; that William O'Day was appointed guardian of his three children aforesaid March 25, 1872, and continued guardian of Mary and Catherine until their death, and of the survivor, to-wit, the plaintiff, until his own death, February 11, 1883; that said Mary O'Day died November 27, 1877, and said Catherine, February 21, 1880. In A. D. 1879 the estate described in the plaintiff's bill was duly assessed to the heirs of Margaret O'Day, and was duly sold for unpaid taxes and conveyed to one J. W. French by a deed of the collector of taxes of the city of Boston, September 3, and by said French conveyed to one Thomas Ellis, September 4, 1880. The tax of 1880 was duly assessed to the heirs of Margaret O'Day, and the said estate, being the estate described in the plaintiff's bill, was duly sold for non-payment thereof to Edwin F. Bowker by a deed of the collector of taxes of the city of Boston, September 4, A. D. 1881. The tax of A. D. 1881 was duly assessed to Thomas Ellis, and said estate was duly sold for non-payment thereof to Edwin F. Bowker by deed of the collector of taxes of the city of Boston, September 6, 1882. The tax of 1882 was duly assessed to Edwin F. Bowker, and said estate was duly sold for non-payment thereof to Sarah B. Bowker, the defendant, by deed of the collector of taxes for the city of Boston, September 5, 1883; that the tax sale of September 5, 1883, is the sale set forth in the plaintiff's bill, from which the plaintiff claims redemption. The plaintiff had no guardian from the death of her father, William O'Day, February 11, 1883, to the appointment of John W. McDonald, March 29, 1885; that the plaintiff's bill was filed December 5, 1885; that on the death

of his wife, Margaret O'Day, William O'Day had his curtesy in said estate until his death, and by death of his daughter Mary in 1877 inherited her third of the estate, and at time of assessment of tax of 1879, for which the estate was sold to Ellis, he and his surviving daughters owned each a third of the estate, he being guardian of the survivors. When the tax of A. D. 1880 was assessed, by the death of his daughter Catherine, William O'Day had become owner of another third estate; that said William O'Day had thus become owner of two-thirds of the estate described in plaintiff's bill and was guardian of plaintiff; and Thomas Ellis held under his deed, dated September 4, 1880, all the estate conveyed to French, September 3, 1880, when the estate was sold to Edwin F. Bowker, September 4, 1881, and September 6, 1882; that when the estate was sold to Sarah B. Bowker, defendant, September 5, 1883, for the tax of 1882, Thomas Ellis held under his deed dated September 4, 1880, and Edwin F. Bowker held by his deed dated September 6, 1882, and that said bill was brought within five years from said sale to her; that previous to the bill the plaintiff's guardian sold the said estate by virtue of a license of the probate court duly granted to one Conners, and made an agreement — not recorded — that he would return the purchase-money, and said estate should be reconveyed unless he should clear the premises from all tax sales theretofore made, and that Conners took possession under said deed; that no tender was made to defendant. Whereupon it is ordered, adjudged and decreed that the plaintiff pay to the defendant, Sarah B. Bowker, the original sum by her paid to the collector of taxes of the city of Boston, with interest to date of decree and lawful costs, amounting to \$60.55; that the defendant, Sarah B. Bowker, execute, acknowledge and deliver a deed of release of said estate from the tax sale in said plaintiff's bill set forth to the plaintiff; that the defendant pay to the plaintiff the costs of this suit, to be taxed by the clerk of this court.

The decree in the first suit is similar, except that this decree does not recite any facts concerning the tax sale to Sarah B. Bowker, as this was subsequent to the sales from which the first bill seeks to redeem the land; neither does it find that any conveyance had been made to "Conners" by the plaintiff's guardian. This suit was brought within five years of the tax sale and conveyance, in 1880, to J. W. French, who conveyed to Thomas Ellis, while the second suit was brought more than five years after that sale. The sale to French in 1880 is not set up in the answer to either bill, but the facts found and recited in the decrees, if material, cannot be disregarded, although they have not been pleaded. They are facts found by the court and incorporated into the decrees, and, although perhaps not all of the facts, they are a part of the foundation of the conclusion of law pronounced by the court, and if these facts are inconsistent with the conclusion, the decrees cannot be affirmed.

It appears by the decrees that every sale was made within two years of the time when the taxes were committed to the collector and while they were a lien upon the land — Pub. Stats., chap. 12, § 24; Gen. Stats., chap. 12, § 22; and, as it has been, in effect, found that the taxes were lawfully assessed and the land sold, the deeds given by the collector, in

accordance with the statutes, if recorded within thirty days, conveyed to the purchaser a good unincumbered title in fee-simple to the land, subject to the right of redemption. *Butler v. Stark*, 139 Mass. 19.

This right of redemption is an interest in land, which may be conveyed or devised, and which descends in the same manner as other real property. The title to the land, subject to any right of redemption that might exist, passed first to French, the purchaser at the tax sale in 1880, who, September 4, 1880, conveyed it to Ellis: second, to Edwin F. Bowker, the defendant in the first suit, who purchased at the tax sales in 1881 and 1882; and third, to Sarah B. Bowker, the defendant in the second suit, who purchased at the tax sale in 1883. When the second suit was brought, two years from the day of sale to Sarah B. Bowker, the defendant therein, had expired, but five years had not. See Pub. Stats., chap. 12, §§ 49, 66; Gen. Stats., chap. 12, §§ 36-42. When the first suit was brought two years had expired from the day of the last sale to Edwin F. Bowker, the defendant therein, but five years had not expired from the day of either sale to him. Five years from the day of the sale to French had not expired when the first, but had expired when the second suit was brought. It is plain, therefore, that the only statutory provisions under which the plaintiff can maintain her suits are Public Statutes, chapter 12, section 66; General Statutes, chapter 12, section 42, which were first enacted in Statutes 1856, chapter 239, section 4. See *Mitchell v. Green*, 10 Metc. 101; Stats. 1849, chap. 213, § 2.

These provisions were enacted not for the purpose of extending in every case the time of redemption from two to five years, but for the purpose of permitting the court to grant relief at any time within five years from the taking or sale of the land, if the circumstances rendered it equitable. When the father of the plaintiff, who was also her guardian, died, two years had not expired from the day of the first sale to Edwin F. Bowker, and when the sale was made to Sarah B. Bowker, the plaintiff had no guardian. The plaintiff was and still is a minor; both bills were brought without great delay after the present guardian was appointed, and if the facts found show that the plaintiff has such an interest in the land as to give her a standing in court for the purpose of bringing bills to redeem the land from these defendants, it cannot be held that the justice who heard the causes erred in finding and ruling that on the evidence before him, which is not reported to us, she was entitled to avail herself of these provisions of the statutes, extending the time to five years.

When there have been successive tax sales of land to different purchasers, whether all the different purchasers, or the persons holding their titles at the time the suit is brought, must be made parties defendant in a bill to redeem the land from these sales, and whether, if the right of redemption is gone, as against a purchaser at a prior sale it can be enforced against a person holding under a subsequent sale, are questions, which have not been determined in this Commonwealth. If this plaintiff has no right of redemption against Ellis, then the absolute title to the land as between her and Ellis is in him. If Ellis has no right of redemption against Edwin F. Bowker, then the absolute title as between them is in Edwin F. Bowker, and, if Edwin F. Bowker has no right of

redemption against Sarah B. Bowker, then the absolute title as between them is in Sarah B. Bowker. The relation of the parties is not precisely the same as if Ellis had conveyed his title to Edwin F. Bowker, and he to Sarah B. Bowker, and this was the only title which Edwin F. Bowker or Sarah B. Bowker ever held, yet if the plaintiff has no right to redeem from Ellis, and Ellis has no right to redeem from Sarah B. Bowker, the plaintiff, under a bill to redeem from Sarah B. Bowker, certainly ought not to be permitted to obtain Sarah B. Bowker's title which is good against Ellis, in order to set it up against him, and ultimately to obtain the land from him. If the plaintiff, claiming as sole owner, is permitted to redeem, and redeems from Sarah B. Bowker, its effect should be not to convey to her Sarah B. Bowker's existing title, but to destroy this title, and thus to leave discharged therefrom the plaintiff's title by descent from her father and mother, but if this title is destroyed, the next title in succession backwards is that of Edwin F. Bowker, and the next is that of Ellis. As Ellis is not a party to either of these suits, his rights against the plaintiff, or either of the defendants, cannot be determined. It might be argued that the different purchasers of land, at different tax sales, made in successive years for the payment of taxes, separately assessed for each year, need not be joined as parties defendant in a bill to redeem, brought by the original owner of the land. The sales are distinct and separate transactions, and may affect different interests. The different defendants do not derive titles by descent or conveyance each from the other; a defect in one sale does not affect the validity of subsequent sales; and each of the defendants may claim adversely to the other, or some claim rights of redemption against others.

In *Faxon v. Wallace*, 98 Mass. 44; S. C., 101 id. 444, the defendants were Wallace, to whom the tax sale was made; Bean, to whom Wallace made a deed of the pond; Kent, to whom Bean made a mortgage, and Emerson, to whom Kent assigned his mortgage, and the court say, that "as the defendants claim title under Wallace, they are properly made parties to the bill, in order that they may be concluded by the decree. The rule is that all parties having an apparent right in the subject should be made parties to a bill in equity." This was a bill to redeem from a single tax sale, under which all the defendants claimed. Still we think that the convenient and proper practice is to summon as defendants all persons who hold an interest in the land under the successive tax sales, even if it should be held that their rights, as against each other, could not be determined in the suit. The rights of the plaintiff against each and all can be determined, and it is necessary that they should be, in order to complete the title to the plaintiff. And the right to redeem against a prior purchaser may be of no avail, unless the plaintiff also has the right to redeem from the person who holds the land. However, no objection to the want of proper parties having been made, the court at this stage of the cases would, not of its own motion, require new parties, unless they were indispensable, and we think that the plaintiff's right to redeem from the sale to Sarah B. Bowker can be determined as between them, without additional parties. Pub. Stats., chap. 12, § 49.

General Statutes, chapter 12, section 36, give to the owner of real estate, his heirs and assigns, the right to redeem. Public Statutes, chapter 12, section 66, does not specify who may seek the relief which this court by this action is authorized to give in equity, but it must be held that they are in general the same persons as those who have the right to redeem under Public Statutes, chapter 12, section 49.

In *Rogers v. Rutter*, 11 Gray, 410, it was held that a person in possession during the continuance of the contract had a right to redeem under Statutes 1856, chapter 239, section 4, now Public Statutes, chapter 12, section 66, on the ground that he might be regarded "as the owner of the land within the meaning of the statute for the purpose of protecting his interest therein." This shows that the statute is to be construed liberally, but the plaintiff, to redeem, must show some title or interest in the land. It is competent for Sarah B. Bowker to show that the plaintiff has no title or interest in the land, as, for example, that she has conveyed her title to another person, and, if the plaintiff's right to redeem the land from Ellis is gone, she shows no title or interest in the land. The plaintiff claims no title except as heir to her father and mother, and that title she has, on the facts found, absolutely lost.

In *Gladwin v. French*, 112 Mass. 186, it was held that such a bill as this is must be filed within five years of the sale, and that this limitation is imperative. In Public Statutes, chapter 12, section 49, there is a provision that a person having the requisite title may redeem the land within two years "after he has actual notice of the sale," but the facts do not bring the plaintiff's case within this provision.

It is contended that as the plaintiff is an infant the limitations of two and five years in the statutes do not affect her, at least as to the one-third part of the land which she inherited from her mother. But there are no exceptions in favor of infancy in the statutes, and there is nothing in the Constitution of the Commonwealth that requires that the legislature should make any such exception in the exercise of its power to levy and collect taxes. The proceedings are wholly statutory, and we cannot read into the statute exceptions which are not in it and which we cannot find that the legislature intended. As the plaintiff, when she brought the second suit, had lost all right of redemption from the sale to French, she cannot maintain her bill in that suit, and it is unnecessary to consider the other objections made by the defendant in the second suit.

It is manifest that if by the decree in the second suit Sarah B. Bowker's absolute title is established, as against the plaintiff, the plaintiff can take nothing that will be of any benefit to her under the decree in the first suit, unless under that clause of the decree which directs Edwin Bowker, on receiving payment of what is due him, to execute and deliver to her "deeds of release of said estate," etc. It is suggested that if the plaintiff can obtain Edwin F. Bowker's title, whatever it is, the plaintiff can then use that as the foundation of proceedings against Sarah B. Bowker, or, in other words, if Edwin F. Bowker has a right to redeem from Sarah B. Bowker, the plaintiff, by obtaining Edwin F. Bowker's right, could then, perhaps, maintain a bill against Sarah B.

Bowker, because Edwin F. Bowker's title is superior to that of Ellis, and five years have not expired since the sale to Edwin F. Bowker, and whether there are such equitable circumstances that a court of equity would grant relief to him as against Sarah B. Bowker has never been determined.

In *Simonds v. Towne*, 4 Gray, 603, the court ordered the defendants to execute a deed of quit-claim and release to the plaintiff, but it did not appear that any intervening rights had been acquired by other persons. In the present case, the rights of French and his grantee Ellis have intervened, and, as we have said, the effect of redemption ought not to be to give to the plaintiff a new title, superior to the original title, which she could use against Ellis without redeeming from him, and could use against Sarah B. Bowker, although by her original title she has no right to redeem from her. The statutes give a right to redeem the "estates taken or sold," or the "real estate so taken or sold," and not a right to redeem a right of redemption. Pub. Stats., chap. 12, § 49. The estate in fee is vested in Sarah B. Bowker, and not in Edwin F. Bowker, and we must hold that the plaintiff cannot redeem from Edwin F. Bowker, except in connection with a redemption of the estate from Sarah B. Bowker, and that the person who holds the estate under a tax sale and conveyance is an indispensable party to a bill to redeem. The plaintiff ought not now to be permitted to make Sarah B. Bowker a party defendant in the first suit, because the plaintiff's rights against her have been foreclosed.

It is true that it is not established in the first suit that the estate is in Sarah B. Bowker, as in that suit there are no averments and no findings concerning the sale to her; but as the two suits were heard together and were argued together here, we ought not to ignore altogether the proceedings in the second suit. We cannot now use these proceedings to defeat the first suit, because they are not of record in it, but we can vacate the decree to enable the defendant in the first suit to amend his answer and set up the tax sale and conveyance to Sarah B. Bowker, the plaintiff's suit against her and the decree in that suit, and, if the plaintiff further prosecuted the suit, these facts can be found and the bill be dismissed. For these reasons, a majority of the court is of the opinion that the decree in the first suit should be vacated, and the cause remanded to the court sitting for the county for proceedings in accordance with this opinion, and that the second bill should be dismissed.

So ordered.

COMMONWEALTH v. MOORE.

December 2, 1886.

INTOXICATING LIQUORS — JUROR — QUALIFICATION.

A member of an association formed for the express purpose of prosecuting violations of the liquor law, and which employs agents for that purpose, is not a competent juror to sit on the trial of a defendant for such a violation, when the complainant and instigator of the prosecution is an agent of the association.

Complaint for a liquor nuisance. At the trial in the superior court, before the impaneling of the jury, the defendant objected to one of

the jurors as incompetent to sit in the case. The court overruled the objection, and held the juror competent. The jury returned a verdict of guilty, and the defendant alleged exceptions. The facts appear in the opinion.

E. J. Sherman, attorney-general, for Commonwealth. *E. L. Barney*, for defendant.

GARDNER, J. Jurors in this Commonwealth are required to be persons of good moral character, of sound judgment, and free from all legal exception. Pub. Stats., chap. 170, § 6. Upon motion of either party in a suit, the court is required to examine the person called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein. After the examination of the juror as above provided, the party objecting may introduce any other competent evidence in support of the objection, subject to the direction of the court. *Commonwealth v. Thrasher*, 11 Gray, 55; *Commonwealth v. Gee*, 6 Cush. 176. If it appears to the court that the juror does not stand indifferent in the cause, he shall stand aside, and another shall be called in his stead. Pub. Stats., chap. 1, § 35. All this must be done before the jury is impaneled. *Woodward v. Dean*, 113 Mass. 297. The word "suit" has in practice been considered as meaning criminal prosecutions as well as civil proceedings. *Commonwealth v. Abbott*, 13 Metc. 120; *Commonwealth v. Gee*, *ubi supra*; *Commonwealth v. Thrasher*, *ubi supra*; *Commonwealth v. O'Neil*, 6 Gray, 343; *Commonwealth v. Eagan*, 4 id. 18-20.

But few cases have arisen under this statute to which the attention of the court has been called. In *Commonwealth v. O'Neil*, *ubi supra*, which is strongly relied upon by the government in support of the ruling of the superior court, three of the jurors were members of "Carson League." The object of its members was the prosecution of the laws against the manufacture and sale of intoxicating liquors. They subscribed each a certain sum to the funds of the association for the purpose of defraying the expenses of such prosecutions; and each member was liable to be assessed his proportion of all expenses incurred in such prosecutions, and was liable to pay the same to the extent of his subscription. The court held that, as the exceptions were framed, they could not find enough to show that the trial judge was legally bound to set the jurors aside, and that it did not appear "that either of them had even the smallest pecuniary interest in the event of these prosecutions." The question whether they stood otherwise indifferent in the result of the trial does not appear to have been raised.

In *Commonwealth v. Eagan*, 4 Gray, 18, one of the jurors upon inquiry, stated that he was a member of the Carson League, the object of which society was to prosecute individuals for violation of the liquor law; that assessments were made upon the members for the purpose of carrying out the object of the society; that his membership consisted in subscribing for stock; that he had paid one assessment, and expected to pay more. The juror further said that the amount of his assessment would not be changed or affected by the result of this indictment, and

that there was nothing in the existence of his membership to prevent his giving a fair and impartial verdict, according to the evidence. The juror was permitted to remain upon the panel. It was held upon exception that the court had no knowledge of the assumed obligations of the members of the Carson League, besides what the juror stated to be his understanding of them, and that they were not prepared to decide that in this instance the ruling of the court of common pleas was wrong. Mr. Justice METCALF, in giving the opinion of the court, said: "We deem it to be our duty, however, to say that in our judgment the members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and, therefore, ought not to be permitted to sit as jurors in the trial of a cause in which the question is, whether the defendant shall be found guilty of violating that law."

Each one of these cases makes the point of pecuniary interest in the juror a prominent feature in determining whether he was indifferent or unfit to sit upon the trial. But this is not the only disqualification to the fitness of a person to sit as a juror. He may be entirely unaffected by the result of the trial, so far as any pecuniary interest is concerned, and yet he may have such ill-will against one of the parties, be so biased or prejudiced against him, that he could not be indifferent. A juror may also stand in such relation to witnesses to be produced at the trial, that he cannot fairly consider their testimony. In a criminal case he may be the instigator of the prosecution, and be absolutely unfit to act as a juror, in determining the guilt or innocence of the person accused.

The facts in the case at bar, as stated in the bill of exceptions, differ materially from those reported in the cases we have referred to. The juror was a member of the Law and Order League of New Bedford, where the offense charged in the complaint is alleged to have been committed. The league was a voluntary association, formed for the enforcement, in New Bedford, of the laws against the sale of intoxicating liquors, and for the prosecution of liquor sellers. The complainant, Jules Giguél, and one Partridge, both of whom were witnesses at the trial, were agents of the league, and furnished by it with money to pay expenses in carrying on their work, and were also paid for their services. The complainant, with Partridge and three sailors, went to the defendant's bar-room. There was evidence that Giguél paid for some of the liquor ordered, and furnished to them. That the complainant, Giguél, and Partridge were employed by the league to induce the defendant and others to sell liquor for the purpose of prosecuting them for the violation of the law is apparent from the evidence and the instruction given to the jury.

The presiding judge instructed the jury "that persons employed to induce the defendants and others to sell liquor for the purpose of prosecuting them for violation of their licenses should be regarded with great caution and distrust as witnesses. The considerations went to their credit as witnesses, but it was still for the jury to say how much credit should be given them." The juror was a member of a local association, which employed the complainant to induce the defendants

to violate the law, in the city of New Bedford, in order that he might prosecute the defendant for such violation. He was the agent of the juror for this special purpose. He, with his associates, had selected Giguel as a proper person to induce the defendant to violate the law, prosecute him for such violation and go before a jury as a witness worthy of belief. It is difficult to see that such a juror was so indifferent, so disinterested and unbiased that he could regard his agent, whom he had employed through his association, "with great caution and distrust," as a witness. These considerations as to his credit he had already passed upon and determined when Giguel had been selected as agent of the association, of which he was a member.

But it is not necessary to go to the extent that the agent of the association was appointed for the purpose of inducing the defendants and others to violate the law. It is sufficient that it appeared that the complainant, Giguel, was employed by the association, of which the juror was a member, to enforce the laws in New Bedford against the illegal sale of intoxicating liquor and to prosecute liquor sellers in that city. He thus became the agent of the juror, as well as of the other members of the association. Whether or not he was to appear as a witness at the trial is immaterial in the view we take of the case. The complaint which the juror was to try was originated by his agent, appointed for the purpose of making such complaints. He could not be indifferent as to the result of that prosecution. He could not sit unbiased in determining the guilt or innocence of the defendant upon a complaint instituted by the juror's authorized agent. We think that the juror was not competent to sit, and that the superior court erred in allowing him to remain upon the panel.

Exceptions sustained.

HILL v. CHASE.

November 26, 1886.

CONTRACT — LEX LOCI.

The defendant living in Salem, N. H., employed a Mrs. Shirley to borrow \$50 for her of her brother living at Salem, Mass. The brother refused to loan the money, but his wife, the plaintiff, gave \$50 of her own money to Mrs. Shirley, together with the following paper: "SALEM, July, 1864. Borrowed and received from Nancy D. Hill the sum of fifty dollars. Sign this and return it."

Mrs. Shirley delivered the money and paper to the defendant, who kept the money and signed the paper at Salem, N. H., and returned it to the plaintiff at Salem, Mass.

Held, a loan by plaintiff to defendant, and that the contract was made in Massachusetts.

On exceptions. The opinion states the case.

N. J. Holden, for plaintiff. *F. L. Evans*, for defendant.

MORTON, Ch. J. The only question presented by the bill of exceptions is whether the presiding justice of the superior court, who tried the case without a jury, was justified in finding that the contract sued on was made in this State.

It appears in evidence that the defendant, a married woman, living in Salem, in the State of New Hampshire, in the summer of the year

1864, employed her sister, Mrs. Shirley, to borrow for her \$50 of Mr. Hill, her brother, living in Salem, in the State of Massachusetts. Mr. Hill declined to lend the money, but his wife, out of her own money, delivered to Mrs. Shirley \$50, together with a paper, of which the following is a copy :

“SALEM, July 1864.

“Borrowed and received from Nancy D. Hill, the sum of fifty dollars.

“Sign this and return it.”

Mrs. Shirley carried the money and paper to the defendant, who took and kept the money, signed the paper, and returned it to the plaintiff at Salem, in this State. The presiding justice was justified in finding that, according to the understanding and purposes of the parties, the plaintiff lent to the defendant, through her agent, Mrs. Shirley, the sum of \$50, at Salem, in Massachusetts, and that the defendant ratified the acts of her agent.

There is no evidence which shows that the plaintiff employed Mrs. Shirley as her agent to lend money for her in New Hampshire. The justifiable inference from all the evidence is, that the parties intended that the transaction should be in form what it was in substance, a loan by the plaintiff to the defendant, the plaintiff assuming, what the evidence shows to have been true, that the defendant had no choice as to the person of whom she borrowed, and that she would ratify the act of her agent.

This being so, the fact that the note was signed in New Hampshire was immaterial. The contract of loan being made in this State, upon the condition that the note should be signed and returned to the plaintiff in this State, the note became operative as evidence of the contract, when it was delivered to the plaintiff in this State. *Lawrence v. Bassett*, 5 Allen, 140; *Milliken v. Pratt*, 125 Mass. 374.

We are, therefore, of opinion that the superior court was justified in refusing to rule that the contract sued on was made in New Hampshire, and in finding that it was made and to be performed in Massachusetts, and, therefore, it is to be governed by the laws of this State.

Exceptions overruled.

MURPHY v. GALLOUPE.

November 26, 1896.

CHATTEL MORTGAGE — ATTACHMENT — INTEREST OF PARTIES.

The interest of a mortgagee in personal property is not subject to attachment. The interest of the mortgagor may be attached, but unless the attaching creditor pays to the mortgagee the amount due him secured by the mortgage, within ten days after demand, the attachment becomes dissolved.

The interests of the mortgagor and mortgagee in the property are not joint, and a plaintiff cannot, by joining them as defendants in a suit upon a joint debt, enlarge the statutes of attachments and make the interest of the mortgagee attachable.

Action of tort for the conversion of machinery, tools and goods. The defendant, who is a deputy marshal of the United States, justified the

See 23 Eng. Rep. 501, note; 26 id. 801.

taking, on the ground that he attached and held the property on a writ, issued from the circuit court of the United States, against Daniel H. Murphy, Dennis T. Murphy and Patrick E. Burke, copartners and the plaintiff, all defendants in an action of tort for infringing a patent right. At the trial in the superior court it appeared that said Dennis, Daniel and Burke, as copartners, carried on the business of manufacturing jewelry at North Attleborough. On the 25th of September, 1885, they mortgaged said machinery, tools and goods to said Margaret Murphy to secure notes, which were payable on demand. At the time of said attachment the mortgagee had not foreclosed said mortgage, nor taken possession of said property, but the same was in possession of the mortgagors. On the twenty-third of December, the day after the attachment, the plaintiff made a demand in writing on the defendant, setting forth the amount of her claim. The defendant surrendered to the plaintiff no portion of said property and neither paid nor tendered any part of the sum claimed within ten days after said demand. The case was tried by the court without a jury. It was referred to an auditor, who found that the defendant was liable, and allowed the plaintiff the sum of \$1,446.63. The defendant offered no evidence, but upon the evidence introduced by the plaintiff, requested the court to rule that the defendant had a right to attach the goods, as he did and to hold them as he did by virtue of said attachment, and also moved for a nonsuit. The court declined so to rule and found for the plaintiff, and the defendant alleged exceptions.

H. J. Fuller and Chester A. Reed, for plaintiff. *B. Wadleigh and F. B. Byram*, for defendant.

MORTON, Ch. J. It is settled in this Commonwealth that the interest of a mortgagee in personal property mortgaged to him is not subject to attachment. *Prout v. Root*, 116 Mass. 410.

By our statutes the mortgagor's interest is liable to be attached and taken on execution, if the attaching creditor pays the mortgagee the amount for which the property is liable to him within ten days after due demand. Pub. Stats., chap. 161, § 74. If the same is not paid or tendered, the attachment is dissolved. *Id.*, § 75.

The interest of the mortgagor and of the mortgagee in the mortgaged property are not joint, like the interest of partners. They have separate and adverse interests, and a plaintiff cannot, by joining them as defendants in a suit upon a joint debt, enlarge the statutes of attachments and make the interest of the mortgagee attachable.

In the case at bar it follows that the attachment made by the defendant was a valid attachment of the interest of the mortgagors only. As the defendant, upon due demand being made, failed to pay or tender the debt due the mortgagee and reserved by the mortgage, his attachment was dissolved, and the mortgagee is entitled to maintain this action.

Exceptions overruled.

CURNOW v. LEE.

November 24, 1886.

MECHANIC'S LIEN — INCIDENTAL CHANGES IN BUILDING.

Work done in making slight changes in a building, which is merely incidental to work or personal property put up in the building, is not within the contemplation of the mechanic's lien act.

Petition to enforce a mechanic's lien.

The case was heard and determined by the superior court, without a jury, upon the following facts: The petitioner, a carpenter and builder, performed personally or by persons employed or paid by him, the labor stated in his petition, beginning on February 23, 1884, and ceasing on March 19, 1884, and the prices for such labor, stated in the petition, were reasonable. A certificate, containing a statement of said labor and the prices thereof, together with a just and true account of the same, and of all credits, was, in legal substance and form, duly filed in the registry of deeds of the northern district of Essex county, on April 18, 1884. The premises described in the petition upon which petitioner performed or caused to be performed said labor are situated in Methuen, and consisted of a building used by the partnership of Lee, Blackburn & Co., for the manufacture of chemicals and glue. Respondent was a member of said partnership and owner of the land on which said building is, and said land where said labor was performed was leased by respondent to Lee, Blackburn & Co. Prior to January, 1884, one Jennings was patentee of a machine and apparatus for drying glue by a quick process, and Lee, Blackburn & Co. had contracted with said Jennings to put into their factory one of his drying machines, but after the same had been put into said factory, in the summer of 1883, and applied to the drying of glue, it was not effective for the purpose, and Lee, Blackburn & Co., in January, 1884, sought to have that machine replaced by a machine more effective for the purpose. When Lee, Blackburn & Co. applied to said Jennings for a new drying machine, a corporation, the Jennings Machine Company, had become, by purchase, sole owner of said Jennings' rights as patentee of said drying machine. Said Jennings Machine Company having an interest in the success of the drying machine, agreed to sell to said Jennings castings and apparatus necessary for such a drying machine as Lee, Blackburn & Co. required of said Jennings, if he would put into said factory one of Jennings' patent drying machines, which would be satisfactory to said Lee, Blackburn & Co. Said Jennings agreed to put into said factory a drying machine satisfactory to said Lee, Blackburn & Co., and thereupon said Jennings procured of said Jennings Machine Company parts of a drying machine which was in a factory in Lawrence, and other castings from Boston, paid for the labor and cost of removing the same to said factory of Lee, Blackburn & Co., and through one Weeks, employed petitioner to do the carpenter's work and furnish stock necessary to put a satisfactory drying machine into said Lee, Blackburn & Co.'s factory, and petitioner's labor, stated in his petition, was all of it performed under an employment by said Weeks on behalf of said Jennings and under the supervision and direc-

tion of said Weeks, who was in no respect in the employment of respondent or of Lee, Blackburn & Co., and said Weeks took and kept a daily account of said labor. Said labor was performed by petitioner with the knowledge of respondent and said Lee, Blackburn & Co.; their consent to the same was not expressly asked or expressly given, but such knowledge did not extend to the terms, times or limits of such labor, or to any arrangement or contract of said Weeks with petitioner in relation to same. The labor of petitioner, as stated in his petition, was subject to the conditions and qualifications before stated, performed with the implied consent of respondent and of said Lee, Blackburn & Co. Said labor was performed in a shed attached to said Lee, Blackburn & Co.'s factory, on respondent's land, and said shed was constructed to cover machinery and to use as a drying room, the dimensions of which were forty by sixteen feet, had a tar and gravel roof, was clap-boarded, one side of the inside was sheathed, and the ceiling of it had been lathed and plastered to make it fit for said Jennings, previous machine.

The parts of said drying machine procured by said Jennings of said Jennings Machine Company and put by him into said shed under his contract with said Lee, Blackburn & Company, consisted of a blower, fans, pulleys, shafting and belting; and petitioner's labor in adjusting the same for the purpose of drying glue consisted in patching holes in sheathing, removing a false floor, such holes and false floor having been used in connection with the drying machine put into said shed in 1833 by said Jennings and which was discarded and taken out because it was not satisfactory to said Lee, Blackburn & Company, constructing wooden vertical exhaust pipes along the walls, wooden horizontal air pipes, double-sheathed with paper between the sheathing, materials of which were in part sheathing remaining from the former drier, and in part new sheathing furnished by petitioner, fastened and adjusted to the other machinery by nailed cleats, nailed shelves and nailed brackets. The horizontal air pipes ran beneath the center of the floor through which holes were cut, by which the air passed up to fans placed over it in the center of the room. The pipes were not otherwise connected with the fans or running machinery. The arrangement of the fans, shafting pipes, etc., was planned expressly for this building by a draughtsman, sent for the purpose by Jennings. If removed to another building of a different shape, the several parts would be rearranged therefor, the parts being increased or decreased in number as circumstances might require. Petitioner rendered a bill for his labor the same stated in his petition, and for material furnished by him and used in connection with said labor in said shed and upon said drying machine to said Jennings Machine Company, and was paid for said materials the value thereof, \$85, by some person or persons whose names were not disclosed at the trial. Said drying machine, in relation to which petitioner performed the labor stated in his petition, could have been taken out of said shed and factory without injury to the same, or the destruction of any part of these structures in their walls, roofs or frames; but not without injury to, and the substantial destruction to the wooden exhaust pipes, air pipes and their pipes and their supports, constructed by the labor stated in the petition.

Upon the facts the court found that the petition could not be maintained, and thereupon ordered judgment for the respondent, and the petitioner alleged exceptions.

E. J. Sherman and *C. U. Bell*, for petitioner. *J. P. Sweeney*, for respondent.

C. ALLEN, J. Upon the facts stated it might well be found that the drying machine was understood by all the parties to be personal property and removable; that the petitioner undertook his job as a job upon personal property; that any work done by him which in a literal sense would be an alteration of the building was merely casual and incidental to the principal work of putting in the machine, and that it was not separate work in the alteration or repair of the building, which could be distinguished from his work on the machine. His statement was not filed till the thirtieth day after he got through with the job. It does not appear that any such work which, literally considered, amounted to an alteration of the building, was done within thirty days before filing the statement. Certainly work done in making slight changes in a building, which work is merely incidental to work on personal property, even if itself protected by law, would not have the effect to make the lien available for the work on personal property. But we think such work does not of itself fall within the meaning of the statute. Pub. Stats., chap. 191, §§ 1-6.

Exceptions overruled.

COMMONWEALTH v. HOUSATONIC R. Co.

January 7, 1887.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE.

A statute authorizing railroad commissioners to fix the rates to be charged for freight upon a railroad between points outside of and points within this State, is invalid, being in violation of section 8 of article 1 of the Constitution of the United States which gives to congress the exclusive power to regulate the commerce between the several States.*

Action to recover penalties for violations of an order of the railroad commissioners. The opinion states the case.

G. F. Hoar, for Commonwealth. *J. Dewey*, for defendant.

MORTON, Ch. J. The statute of 1885, chapter 338, provides in the second section that the board of railroad commissioners "may fix a maximum charge and rate for any freight received in Massachusetts by said Housatonic Railroad Company for transportation to and delivery at any other point or place, and for any freight received by said company at any point or place for transportation to and delivery at any place in Massachusetts, and such orders shall be binding upon said company, and said Housatonic Railroad Company shall not receive or demand any greater sum for such transportation and delivery than the amount so fixed as a maximum." As the first section provides for fixing rates between any points in Massachusetts, we think it clear that the purpose of the section was to provide for fixing rates between points outside the State and points within the State. Otherwise it is useless. The

* See *Merrill v. Boston, etc., R. Co.*, 1 East. Rep'r, 825.

fourth section provides a penalty for any violation of the statute, to be recovered in an action of tort.

Acting under the authority of this statute the railroad commissioners on July 25, 1885, passed an order fixing the maximum rates which the Housatonic Railroad Company might charge for the transportation of certain kinds of freight between various points or places in the State of Massachusetts and other points or places in the State of Connecticut.

This action is brought to recover the penalties provided by the statute for several violations of this order by the defendant corporation, each count alleging that the defendant unlawfully charged and received more than the maximum rate fixed by the order for the transportation of the freight therein named, between Lee in the State of Massachusetts and Bridgeport in the State of Connecticut.

The defendant contends that the second section of the statute of this State, which we have quoted above, is invalid because it violates the eighth section of the first article of the Constitution of the United States, which provides that congress shall have the exclusive power to regulate "commerce among the several States." This question is conclusively settled by a recent decision of the supreme court of the United States, promulgated since the case at bar was argued. A statute of the State of Illinois enacts that if any railroad company shall charge or receive for the transportation of passengers or freight of the same class for any distance within the State the same or a greater sum than is at the same time charged for the transportation, in the same direction, of any passenger or like quantity of freight, of the same class over a greater distance of the same railroad, it shall be liable to a penalty. A suit was brought in Illinois to recover the penalty for violating this provision, the declaration alleging that the defendant charged certain parties fifteen cents per hundred pounds for carrying a load of freight from Peoria in the State of Illinois to New York, one hundred and nine miles of the distance being in Illinois, whilst at the same time it charged certain other parties twenty-five cents per hundred pounds for carrying a like load of the same class of freight from Gilman in the State of Illinois to New York, twenty-three miles of the distance being in Illinois, both places being on the line of the road.

The supreme court held that the provision of the Constitution giving congress the power to regulate "commerce among the several States" is exclusive, that no State has the power to pass laws regulating interstate commerce, although congress has not acted upon the subject, and that the law of Illinois, so far as it applies to the transportation of freight from places in the interior of Illinois to places in another State under one contract is unconstitutional and invalid, such transportation "being commerce among the several States." *Wabash, St. Louis and Pacific Railway Co. v. People of the State Illinois*, 34 Alb. L. J. 406. The principle of the case governs the case at bar. The statute of Massachusetts undertakes to fix the rates which the defendants shall charge for transportation of freight, not only within this State, but also within the State of Connecticut. It is a more clear and direct regulation of interstate transportation of commerce, than is the law of Illinois against unjust discrimination. We are, therefore, of opinion

that the second section of the statute we are considering, and the order of the railroad commissioners under it are invalid and of no force. It necessarily follows that the plaintiff cannot maintain this action.

Judgment for defendant.

COMMONWEALTH v. TEEVENS.

January 5, 1887.

CRIMINAL LAW — RECOGNIZANCE — SURETIES — INDICTMENT.

When the terms of the recognizance bind the principal to appear and answer a specific charge, and not to depart without leave of the court, failure to appear when regularly called constitutes a breach of the recognizance; and it is no defense to an action against his sureties on the recognizance, for his failure to appear, that he was not indicted for the same offense as that set forth in the complaint and for which the recognizance bound him to appear and answer.

Action of contract against the sureties on a recognizance, given by Silas F. Washburn as principal and the defendants John J. Teevens and Robert Bishop as sureties. Complaint was made to the municipal court of the south Boston district of the city of Boston, March 20, 1885, charging Washburn with the crime of adultery. The complaint and recognizance declared on were duly certified and transmitted to the superior court for the April term, and both entered of record in the superior court, and no formal action thereon appears, unless it is implied from what follows. At the same — April — term the grand jury found and on the eleventh of said April returned to said court an indictment against said Washburn and another jointly for "lewd and lascivious cohabitation." To this indictment, Washburn appeared April eleventh, and pleaded not guilty. On April thirtieth he again appeared and pleaded guilty, and on May twenty-second he was called for sentence on the same, and not appearing, both he and his sureties were solemnly called respectively to answer and bring in said Washburn according to the tenor of said recognizance, and not appearing, were defaulted severally on the record. Thereupon — May twenty-fifth — this suit was begun, made returnable to and entered at the July term, 1885, of said court, when the parties appeared and joined issue. The defendants objected that the action could not be maintained: First. Because the lower court, not having jurisdiction of the offense set forth in the complaint, had no authority to recognize the defendant, to answer to that complaint. Second. Because said complaint was abandoned by the government, whereby the defendant and sureties were discharged. Third. Because if said complaint was properly and in due time entered of record, no action or proceedings thereon were ever taken. The defendant has never had an opportunity to answer thereto; accordingly, there has as yet been no default, and, therefore, no breach of the recognizance. The court ruled that there was a breach, in that the recognizance bound the principal not only to appear and answer the specific complaint, but to appear and abide the final order of the court thereon, and not to depart without leave. It was admitted that the principal had gone out of the country. The court thereupon — November term, 1885 — made a formal finding against the defendants, that the penalty was adjudged to be forfeited, and at the request of the defend-

ants, and by agreement of parties, reported the case for the determination of this court. Subsequently, the report was dismissed by this court; and the case was further heard in the superior court to determine the amount for which the plaintiff may have judgment; and the court thereupon found for the plaintiff in the penal sum of the recognizance, viz., \$800 with costs; and by agreement of parties the case was reported to this court.

E. J. Sherman, attorney-general, for Commonwealth. *J. A. McGeough*, for defendant.

DEVENS, J. The recognizance bound the principal to appear before the superior court to answer to a complaint for the crime of adultery. He was not in fact indicted in the superior court for that crime, but for lewd and lascivious cohabitation. Had an indictment been substituted for the complaint for the same offense as that therein described, the argument of the defendant contends that as the principal could not have been tried in the superior court upon the complaint, the offense being one of an indictable character, the lower court had no authority to require the defendant to answer thereto, but should have required him to answer an indictment for the offense, and that the recognizance is, therefore, invalid. This contention cannot be maintained. The cases of *Commonwealth v. Slocum*, 14 Gray, 395, and *Commonwealth v. Butland*, 119 Mass. 317, are quite decisive that a recognizance in this form is valid and sufficient, and binds the defendant to appear and answer any indictment for the same offense charged in the complaint. Nor should we be prepared to say that if the recognizance was limited to appearing and answering to a specified offense, that it did not equally bind the defendant to appear and answer to any offense which might substantially be included in the offense described in the complaint, even if of less grade as in the case at bar, if the defendant were charged in the indictment with lewd and lascivious cohabitation with the same person with whom he was alleged in the complaint to have committed adultery. We do not find it necessary to consider the inquiry, as the breach of the recognizance claimed by the Commonwealth is that the defendant departed without leave of court, and that this is in itself a distinct breach of the recognizance. He and his sureties were called and defaulted upon his recognizance. The superior court ruled that the recognizance bound the principal defendant not merely to appear and answer the specific complaint, but to abide the final order of the court and not to depart without leave. The condition of the recognizance is in the form provided by Public Statutes, chapter 212, section 43, and the provision that the consors shall not depart without leave of court is very ancient and has been many times held to be separate and distinct from those which held him to answer to the specific charge or to all matters which may be alleged against him — a clause which is found in many recognizances — or to stand to and abide the final order and decree of the court thereon.

Even if the principal would be entitled to discharge on indictment being found against him, he has no right to decide the question for himself even if his decision is such as the court would have made. He

must apply to the court or wait until, by proclamation at the end of the term, which is the custom of some tribunals, or in some other mode, he is informed that he has leave to depart. Crown Cas. Camp. 46. To hold otherwise, as said by EWING, Ch. J., in *State v. Street*, 6 Halst. 125, "is to substitute cause for effect, a ground of discharge for the actual discharge, a reason for absolving him from the recognizance for the absolution itself." Again the object of the provision that the conusor shall not depart without leave of the court is that he may be held to answer any charge which may be alleged against him, even if it be different from the specific charge originally made. As bail is substituted for imprisonment, the court still retains over the party giving bail the same rights which it would have had even in actual custody.

It was formerly urged that if the conusor being brought into court should stand mute, his sureties were liable. In answer to this view it is said — Bacon Abr., tit. Bail — "If a man's bail, who are the gaolers of his own choosing, do as effectually secure his appearance and put him as much under the power of the court as if he had been in the custody of the proper officer, they seemed to have answered the end of the law." It is said by Mr. Chitty: "If, however, the sureties are bound by recognizance that a defendant shall appear the first day of such a term to answer to a particular information against him, and not to depart until he shall be discharged by the court, and afterward the attorney-general enters a *nolle prosequi* as to that information, and exhibits another, on which the defendant is convicted and refuses to appear in court after personal notice, the recognizance is forfeited by the default for being express that the party shall not depart till he be discharged by the court; it cannot be satisfied unless he be forthcoming and ready to answer to any information exhibited against him before he receives his discharge, as much as to that which he was particularly bound to answer." Chitty Crim. Law; 10 Mod. 152; Hawkins P. C., book 2, chap. 15, § 84; Bacon Abr., tit. Bail. This rule has been repeatedly followed. Indeed, it would seem that if the only object of the clause that defendant should not depart without leave was to detain a party, who had been properly held to bail to answer a specific charge, so far as that charge is concerned it would be unnecessary. It is necessary, because having been held to bail, the defendant is deemed to be as much in the custody of the court as if actually imprisoned. See, also, *People v. Stergor*, 10 Wend. 433; *People v. Clay*, 12 id. 374; *Kufham v. Commonwealth*, 2 Penn. St. 240; *Stoor v. Commonwealth*, 7 Dana, 243. If the provision that the conusor shall not depart without leave is a substantive part of the recognizance in an action upon it for forfeiture by reason of such departure, it is not an answer to say that defendant might have obtained his discharge from the court, either because nothing was alleged against him by indictment, or because he was not indicted for the same offense as that upon which he had been bound over. Certainly had the conusor been in actual imprisonment he would not have been released when other offenses were alleged against him by indictment, without recognizing to answer the same, nor under similar circumstances, when brought into court by his bail, or appearing there in person, would leave to depart have been given except upon similar

terms. We are, therefore, of opinion that the superior court correctly ruled that by the default of the conusor, the recognizance was forfeited, as he was bound not only to appear and answer the specific charge, but also not to depart without leave. The defendant further contends that it does not sufficiently appear that the municipal court of the South Boston district was authorized to take this recognizance as its authority, was only to do so in a case of which it did not have final jurisdiction, upon examination and the finding of probable cause to believe the prisoner guilty, neither of which appeared by the recognizance. Public Statutes, chapter 212, section 63, provides that no action upon a recognizance shall be defeated or barred "by reason of a defect in the form of the recognizance, if it sufficiently appears from the tenor thereof at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance." As we know judicially that the court by which the recognizance was taken, was one authorized upon proper proceedings to require and take recognizances for appearance before the superior court of those charged with crimes, those properly cognizable, it is not necessary, under this statute, that such a recognizance should recite in detail all the proceedings of the court. The act done was one clearly within its lawful authority. The strictness and nicety of the practice at common law, which was adopted in some of our earlier cases, was much altered and modified by the Revised Statutes, chapter 135, section 30, on which the existing statute is founded. *Commonwealth v. Nye*, 7 Gray, 316.

Judgment affirmed.

BOWERS v. WOOD.

January 5, 1887.

PLEADING — BASTARDY.

It is no longer necessary to allege in the complaint in a bastardy proceeding that the complainant accused the defendant of being the father of the child during travail and had persisted in such accusation.

Complaint under the bastardy act. The defendant demurred to the complaint. The superior court overruled the demurrer, and defendant excepted. The defendant also objected to the complainant's evidence, which was introduced to show that the complainant charged him with being the father of the child when she was in travail, and continued constant in said accusation, on the ground that there was no allegation in the complaint to sustain the evidence offered. The complainant then filed an amendment to the complaint, which the court allowed to be done, and admitted the evidence. The jury found for the complainant, and the defendant alleged exceptions.

C. A. Merrill, for complainant. *W. A. Gile* and *A. M. Taft*, for defendant.

GARDNER, J. In the superior court, the defendant demurred to the complaint, and assigned for causes of demurrer that the "complaint does not allege that the complainant Bowers accused the defendant Wood of being the father of the child mentioned in said complaint

during travail; that said complaint does not allege that complainant had persisted in accusing the defendant of being the father of said child."

Under the statutes from 1786 to 1860 it has been held that a complaint, upon which a respondent charged with being the father of a bastard child is to be tried before a jury, must allege particularly not only that the complainant had been delivered of a bastard child, of which she alleged the respondent to be the father, but that she had accused him, in the time of her travail, of being the father of the child of which she was about to be delivered, and that she had continued constant in such accusation. As no prosecution, under the statutes, could be supported without proof of these facts, they should be distinctly alleged. *Drowne v. Stimson*, 2 Mass. 440; *Stiles v. Eastman*, 21 Pick. 132; *Rice v. Chapin*, 10 Metc. 5.

The statutes to which we have referred were enacted before the passage of the act making parties in civil proceedings competent witnesses.

The bastardy process is a civil proceeding, and the complainant is a competent witness under the statute of 1857, chapter 305, which provided that parties in civil proceedings may be witnesses. *Murphy v. Spence*, 9 Gray, 399. In 1860 the general statute was passed, and the law regulating bastardy proceedings was materially changed, and has remained substantially as then enacted. The Public Statutes, chapter 85, section 16, provide that the mother of the child shall be admitted as a witness in support of the complaint. It also provides that if, when she makes her accusation under oath, she accuses any man of being the father of such bastard child, and if, in the time of her travail, she accuses the same man of being the father of the child of which she is about to be delivered, and has continued constant in such accusation, "the fact of such accusation in time of travail may be put in evidence upon the trial to corroborate her testimony."

Under this section the complaint does not depend upon the accusation made in time of travail and the continued constancy in such accusation. It, therefore, becomes unnecessary to allege it in the complaint. The allegations, if otherwise good, are sufficient without it. The proof may satisfy the jury of the defendant's guilt without this evidence. The statute makes it evidence to corroborate the testimony of the complainant. It is not required to allege such corroborative facts in the complaint. The demurrer was properly overruled, and the amendment was not necessary.

The evidence of the complainant's accusation of the defendant, in the time of her travail, and of her constancy in such accusation, if otherwise competent, could be shown at the trial, without an allegation of such facts in the complaint. She was a competent witness for all purposes. Pub. Stats., chap. 85, § 16; *Murphy v. Spence*, *ubi supra*. This disposes of all the exceptions taken at the trial.

Exceptions overruled.

NEW BEDFORD AND FAIRHAVEN STREET RAILWAY CO. v. ACUSHNET STREET RAILWAY CO.

January 7, 1887.

RIGHT OF STREET RAILWAY TO USE TRACKS OF ANOTHER COMPANY—CONTRACT BETWEEN RAILWAY COMPANY AND CITY FOR EXCLUSIVE USE OF STREETS—CONSTRUCTION OF STATUTE.

Bill in equity for an injunction to restrain the Acushnet Street Railway Company from running its cars over a piece of track on Williams street between Purchase street and Acushnet avenue in the city of New Bedford, on the ground that the plaintiff has the exclusive right to the use of its tracks therein for twenty-five years, from February 6, 1872, and this exclusive right to the use of its tracks was secured to it by virtue of the contract with the city of New Bedford, dated May 16, 1872. The defendant claimed the right to use said tracks by virtue of a license from the board of aldermen of the city of New Bedford, under the provisions of Public Statutes, chapter 113, section 48.

The case was reserved by a single justice, upon bill, answer and agreed facts for the consideration of this court. The case is stated in the opinion.

C. W. Clifford and *H. H. Crapo*, for plaintiff. *H. M. Knowlton*, *G. F. Tucker* and *A. E. Perry*, for defendant.

HOLMES, J. 1. The first question in this case is, whether a contract of the city of New Bedford, giving the plaintiff the exclusive right to the use of its tracks for a term of years, would override the subsequent general law of 1874, embodied in Public Statutes, chapter 113, section 48, under which the defendant justifies. If such a contract would not have that effect, we need not consider whether the contract actually made purports to grant such an exclusive right. The plaintiff contends that the proviso in its charter authorizes such a contract, and makes it paramount to all general laws. The proviso is as follows: "That said city — of New Bedford — or town — of Fairhaven — is hereby authorized and empowered to contract with said railway corporation concerning the construction, maintenance and operation of said railway, upon such terms as it may agree with said railway corporation, any laws now existing to the contrary notwithstanding. Stat. 1872, chap. 11, § 1.

Taking this language apart from the restrictions of the same section, to which we shall refer in a moment, we should have great difficulty in saying that it authorized the contract supposed. The word which must be relied on is "operation," as "construction," and "maintenance" clearly do not go far enough. See *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 20 N. J. Eq. 61, 77. But in a legislative grant of this nature we should be disposed to think that authority to contract concerning the operation of a road which may be operated none the less that its tracks are used by another company, did not extend to a contract excluding use by another road, previously or subsequently authorized by the legislature.

Again, when we take into account the words just preceding the proviso, viz.: "Subject to all the duties, restrictions and liabilities set forth in all general laws which now are or may hereafter be in force, applicable to street railway corporations," we are inclined to assent to the defendant's argument that the last words of the proviso, "any laws now existing to the contrary notwithstanding," are to be read as referring simply to laws limiting the authority of the city, and certainly are not to be construed to mean that any general laws to which the company had just been declared subject may be overridden by contract.

But in any possible view the dispensation only extends to "laws now existing," and the subjection of the company to future general laws remains untouched. For the words, "any laws now existing to the contrary notwithstanding," cannot be taken to include the charter itself, and to mean "notwithstanding the provision in this charter that the corporation shall be subject to all the duties and liabilities set forth in all general laws hereafter to be passed." If this is not their meaning, then whether the contract was valid or not when made, and whatever its scope, the corporation by making it could not exempt itself from the operation of general laws passed subsequently, and Public Statutes, chapter 113, section 48, gave the power to the board of aldermen of New Bedford to authorize the defendant to use the plaintiff corporation's tracks.

2. The defendant justifies under a license from the mayor and aldermen of New Bedford alone, and the portion of the plaintiff's tracks which the defendant is authorized to enter upon and use lies wholly in New Bedford. Another portion of its track, however, extends into Fairhaven, and the plaintiff suggests that the license is void because there has been no application to or action by the selectmen of Fairhaven. The point is not much pressed. We are of opinion, that Public Statutes, chapter 113, section 49, making provision for a disagreement between two cities or towns "if the track of either company is in two or more cities or towns," does not require concurrent action when all the track of the petitioning company and all the track of the other company sought to be used are in the same city. So far as the latter company is concerned, the track sought to be used must be what is meant by the word "track."

Bill dismissed.

BANCROFT v. SAWIN.

January 5, 1887.

MORTGAGE — REDEMPTION — LACHES.

A party entitled to redeem under a mortgage may, after filing his bill for that purpose, lose his right to redeem by delay in prosecuting the suit.

Bill in equity to redeem a certain tract of land with the buildings thereon, situated in Worcester, from a mortgage held by the defendant upon the same. The bill was dismissed by the court and the plaintiff filed a motion to have the order dismissing the bill annulled. In this motion the plaintiff alleged that the defendant entered under his mortgage and has been enjoying the rents and profits ever since;

that the estate mortgaged is large and valuable, and the plaintiff has a large interest therein; that the time has elapsed for commencing a new bill to redeem and, if the order was allowed to stand, the plaintiff is without remedy, and that to annul said order would do no injustice to the defendant. The motion further alleges that the plaintiff's attorney went to the clerk's office of the supreme judicial court, on Monday, April 11, 1886, and called the attention of the assistant clerk to the case, and informed him that he desired a subpoena thereon, and the assistant clerk said he would make it. The counsel for plaintiff, thinking, from appearances, that the assistant clerk was busy, said he was in no immediate hurry, saw the assistant clerk place the papers in a pigeon-hole for the purpose of making said subpoena and went away, expecting, though not so told, that the subpoena would be ready on Tuesday morning, April 12, 1886, and informed the counsel for defendant that the subpoena would be ready on Tuesday morning. That on Tuesday morning the counsel for the plaintiff, expecting the subpoena was ready, called at the clerk's office and the clerk was then in the court-room and the assistant clerk was on his way there; that counsel for plaintiff went to the assistant clerk in the court-room and inquired for the subpoena and was informed that it had not been made; the counsel for the plaintiff then inquired if he would make it, and he replied he would. The counsel for plaintiff then remained in attendance upon the court, and immediately after the calling of the docket, the counsel for the defendant made the motion to dismiss. The plaintiff further alleged that he always has been ready and willing to redeem said mortgage, and intended to redeem said mortgage, and is in equity entitled to do so. The court disallowed the plaintiff's motion to have the order for dismissing the bill annulled, and the plaintiff appealed.

J. H. Bancroft, for plaintiff. *A. S. Pinkerton*, for defendant.

C. ALLEN, J. We have no doubt that in case of gross or improper delay between the time of filing the bill and of the taking out of service of the subpoena, a court of equity, in the exercise of the judicial discretion belonging to it, may refuse its assistance to the plaintiff, and direct the bill to be taken off the file. Such also is the plain intimation of several English and Irish decisions. *Coppin v. Gray*, 1 Younge & Coll. Ch. 205, 209; *Boyd v. Higginson*, 1 Flan. & Kelly, 603, 613; *Forster v. Thompson*, 4 Drury & War. 303, 318. The plaintiff does not dispute this as a general doctrine, but contends that under the statutes applicable to bills to redeem, the plaintiff, after filing his bill, is in court and is entitled as of right to have the court proceed and ascertain and determine whether any and what sum not in dispute is due on the mortgage. Pub. Stats., chap. 181, § 28. It was not, however, the intention of this statute to provide that a mortgagor shall be entitled to his remedy of a bill in equity to redeem, if by the application of legal or equitable rules, he is cut off therefrom, but rather to define the method of proceeding in cases where the plaintiff has a right to proceed. It was long since held in *Fay v. Valentine*, 12 Pick. 40, that a mortgagor might be debarred by estoppel from his right to

redeem; and on similar grounds it may well be held that the plaintiff in the present case had lost his right by his delay to prosecute his suit after commencing it. To hold otherwise would be to sanction a gross abuse of the equitable remedy provided for those who act in good faith and with reasonable promptness.

Bill dismissed.

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INDEX.

ACTION.

1. **Abatement — death of plaintiff.]** Plaintiff's intestate was a creditor of a mining corporation whose officers in making their annual report were alleged to have stated falsely the amount of capital paid in. For this cause of action conjoined with one for conspiracy, suit was brought, pending which and before verdict and judgment, plaintiff died. *Held*, that the cause of action for the penalty abated; but that for conspiracy survived. *Brackett v. Griswold*, N. Y., 297.
2. **Parties — joinder — decedent — debts — real estate — charging — judgment — validity — return — conclusiveness — contradiction — sale — decree.]** A., who was indebted to B., devised his real estate to certain of his relatives. After the death of A., B. instituted an action against the administrator of A., *c. t. a.*, to recover the amount of his claim, and joined, as defendants, the devisees under the will. Judgment was eventually entered in the action in favor of B., and execution issued thereon, and the real estate of A. was sold. *Held*, that while the correct practice under the act of 1884 to charge the real estate of A. with the payment of his debt would have been to have followed the channel set out in the case of *Atherton v. Atherton*, 2 B. 112, yet, the course pursued, being but an error in practice, which might have been corrected, but which passed unnoticed, did not affect the validity of the judgment. In ejectment brought by certain of the devisees under the will of A., against vendees holding through title from the sheriff's vendee, it was offered to be shown that the return of the sheriff made in the action brought by B. against A.'s administrator, and which purported to return a service on the guardian of one of the defendants, was invalid, as no such trustee existed. *Held*, the conclusiveness of the sheriff's return could not be thus contradicted. *Levan v. Millholland*, Penn., 822.
3. **Equitable owner.]** The assignee of a note, without any conveyance to him of the security, except such as the sale of the note effected, cannot maintain an action at law in his own name for the conversion of the security. *Batchelder v. Jenness*, Vt., 718.

AGENCY.

1. **Exceeding authority — municipal claim — paving — petition — per foot frontage rule — rural property — estoppel.]** If an agent exceeds his authority, and, as a result, a third person lays out his time and money, all of which the principal has knowledge of, yet keeps silent and does not promptly disavow the act of his agent, the principal is bound as having ratified the transaction. A. an owner of real estate on Sixty-third street, Philadelphia, told B., his son, to sign for *macadamizing* the cart-way in front of his property; B. signed a paper in the nature of a petition for the *paving* of it, which paper was draughted in general terms and without specifying the character of paving. B. then told A. he had signed for *paving*. In course of time the cart-way mentioned was paved with rubble pavement. A. remained silent and suffered the work to go on; in proceeding to enforce a municipal paving claim, filed against the property of A. by the contractors
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who did the work, the defense was set up that the property being rural, the per foot frontage rule could not be resorted to as a means of measuring the liability of the abutting properties. *Held*, the action of B. in signing the petition had been ratified by the silence of A., and that having petitioned for the paving and remained silent he was estopped from raising the defense that the property was rural. *Brown v. City of Philadelphia*, Penn., 744.

2. **Implied power.**] An attorney authorized to receive the interest on a bond and mortgage has no implied authority to receive the principal. *Brewster v. Carnes*, N. Y., 438.
3. **Signed lease as "agent" without authority.**] A. owned a lot of ground with a building thereon; B., by a written instrument in which he styled himself agent without naming his principal, and which he signed as agent of A., affixing a seal to her name, leased the premises to C. for three years; B. had no written authority to execute the lease, nor did A. accept or ratify it in writing. *Held*, (1) that C. had an estate at will only; (2) that as no certain term had been vested in C., the consideration for his covenant to pay rent had failed, but that he was liable in *assumpsit* for the rental value of the premises, and that the written instrument was admissible in evidence on the question of value. *Jennings v. McComb*, Penn., 73.

See CONTRACT; RAILROAD, 714.

AMENDMENT.

Defective levy.] An officer may be permitted to amend his return of levy upon real estate by signing the same, when it states only facts, and the rights of innocent third parties have not intervened. *Briggs v. Hodgdon*, Me., 655.

APPEAL.

1. **Bond of trustee—approval of.**] Plaintiff moved to dismiss the trustee's appeal from the district to the superior court upon the ground that the trustee had not filed a bond approved either by the court or the plaintiff. The clerk's record, as finally amended, stated that the trustee had "filed a bond not approved or disapproved by said court, as no motion was made by either party requesting approval or disapproval." *Held*, that the clerk's record must be taken to mean that there was no formal action by the judge, but that the sureties were deemed by him to be sufficient, and as thus construed, there was a sufficient compliance with the statute to give the superior court jurisdiction. *Rawson v. Dwyer*, Mass., 441.
2. **None from discretionary order.**] It is within the discretion of the supreme court to set aside on motion a void order entered in that court, or to leave the party to set up its invalidity whenever an attempt should be made to enforce it against him. No appeal, therefore, lies to this court from a refusal of the court below to set aside such an order on motion. *People, ex rel. Brush, v. Brown*, N. Y., 574.
3. **—objection—reversal on the law.**] When the general term reverses a decision upon questions of law alone, and the party appeals to this court, if it appears from the record that any errors of law were committed on the trial which called for a reversal, whether such errors were considered by the general term or not, the judgment will be affirmed. *Holcombe v. Munson*, N. Y., 563.
4. **From probate.**] An appeal from probate does not of itself vacate a decree appealed from; the decree remains in full force until the appellate court otherwise determines; but the probate court ought properly to be advised as to the action of the appellate court, although a judgment of the court below affirming the decree is unnecessary. *Dickinson's Appeal*, Conn., 511.

See EVIDENCE, 629; WAYS, 661.

APPROPRIATION OF PAYMENTS.

See COLLATERAL SECURITY.

ASSESSMENT.

New York city—suit in equity to vacate illegal assessment—money

paid on, may be recovered — assessment act, 1874, chapter 312.] The act of 1858, chapter 338, as amended by the act of 1874, chapter 312 — Consolidation Act, § 897 — relating to assessments for local improvements in the city of New York, provides as follows: "Hereafter no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended." *Held*, that the statute only applied where an existing lien was created by the assessment, and that a suit in equity was maintainable to vacate an illegal assessment, and to recover back the money paid thereon. The money may be recovered back although the assessment has not been formally vacated. If such vacation is necessary, the relief may be granted in an action like the present. *Jea v. Mayor, etc.*, N. Y., 552.

ASSESSMENTS.

See RELIEF SOCIETIES, 669.

ASSIGNMENT.

Wage claim — referred claim — payment.] Certain employees of C., a bankrupt coal and iron company, received from D. goods and money, and, in return, assigned to D. their claims for wages against C., who assigned the claims to E. *Held*, the assignment of the claims for valuable consideration was not such a payment of them as would prevent E. from successfully claiming statutory priority of payment out of a fund raised by a sale under execution of personal property of C. *Appeal of Huntingdon & Broad Top R. Co.*, Penn., 783.

See INSURANCE, 575; RELIEF SOCIETIES, 669.

ATTACHMENT.

Money had and received — attorney at law.] An attachment of real estate creates no lien when made on a writ containing a count for money had and received without any specification of the claim. When an attorney at law is employed to bring suit, attach real estate, procure a judgment and levy the same on the land attached, he can never afterward contest the validity of any of these proceedings. If he take a deed from the judgment debtor of the land levied upon, any title thus acquired will inure to the benefit of his client, the judgment creditor. The record that discloses the relation of attorney and client touching a levy upon real estate is a sufficient notice to a subsequent purchaser from the attorney. *Briggs v. Hodgdon*, Me., 655.

See CHATTEL MORTGAGE.

ATTORNEY.

See ATTACHMENT.

BANKS AND BANKING.

1. Verbal directions to agent making deposit — custom.] Plaintiff's testator delivered to one Crowell his check on the People's Bank of N. Y., payable to the order of the defendant for \$5,000, with verbal instructions to Crowell to deposit the same to his credit with the defendant. Instead of doing so, Crowell delivered the check to the defendant, and, at his request, received from it a certificate of deposit payable to himself as trustee, and afterward drew the money and converted it to his own use. In an action by the executor to recover of defendant the amount of the deposit, *held*, that the defendant, after receiving the testator's money, represented in the check payable to its order, had no right to pay it out except upon his direction, and that payment to Crowell as trustee, without any authority from the testator upon which the defendant was justified in acting, and in the absence of any custom of the kind among banks, did not relieve the defendant from

liability for the amount of the deposit. *Sims v. U. S. Trust Co.*, N. Y., 333.

2. **Withdrawing deposit—waiver of by-laws as to notice.]** When a savings bank is applied to by a depositor for her deposit, and the officers of the bank refuse to pay, denying that she has any funds in the bank, the bank thereby waives its right to the three months' notice which it is entitled to under its by-laws. *Townsend v. Webster Five Cent Savings Bank*, Mass., 869.

BASTARDY.

1. **Intercourse with others.]** No act of sexual intercourse between the complainant in a bastardy proceeding and any other man than the defendant is admissible in evidence, unless it is so near in time as to afford some evidence that it resulted in begetting the child named in the complaint. *Eastdale v. Reynolds*, Mass., 628.
2. **Pleading.]** It is no longer necessary to allege in the complaint in a bastardy proceeding that the complainant accused the defendant of being the father of the child during travail and had persisted in such accusation. *Bowers v. Wood*, Mass., 890.

BILL OF REVIEW.

See ORPHANS' COURT.

BOUNDARY.

A grant of lands upon a public street as a boundary will be referred to such street as opened and used. *O'Brien v. King*, N. J., 422.

See HIGHWAY.

BOND.

Indemnity against judgments—sureties—judgment by consent presumptive only.] An indemnity bond was given to a sheriff conditioned to save, keep, and bear harmless, and indemnifying him of and from all harm, let, trouble, damage, judgments, etc., which might be brought against him for or by reason of the levying, making sale, etc., under an execution issued to him. *Held*, that it could not be said, as matter of law, that the condition of the bond only covered judgments obtained upon hostile and adverse litigation, but that a judgment entered by consent, in the absence of proof of fraud or collusion, was covered thereby. Such judgment, however, is but presumptive evidence as against the sureties, and they are at liberty to show that it was not founded upon any legal liability to the plaintiff in the action. *Connor v. Reeves*, N. Y., 555.

BUILDING ASSOCIATION.

L., being the owner of building loan stock, purchased loans, and used the money in purchasing a lot and erecting a dwelling thereon, taking the title in the name of his wife, and she gave a bond and mortgage on the lot for the amount loaned, he not joining therein; after this, both L. and his wife joined in a mortgage to the present complainants; then the association, the present defendants, filed a bill against Mrs. L. and these complainants, for relief, in which, amongst other things, it alleged that said loan was made to Mrs. L.; it was held, in this court, that the loan was an equitable lien on the land, and prior to the lien of the mortgage given to these complainants; the sale of the land did not produce enough to satisfy the amount due the association; in the meantime the association had taken a bond from L. and his wife for the whole amount of the loan, and about the time of the filing of the bill had taken an assignment of the stock, through the wife, to itself as collateral; after the determination of that suit in behalf of the association, the present complainants obtained a judgment at law against L., and have filed this bill in which they attack that assignment, insisting that it was fraudulent because voluntary, and that it was in legal effect voluntary, because the association had, in their bill, alleged that the debt was the debt of Mrs. L., by which allegation it was bound; and *held*, that the decree in that case did not rest on that allegation, and, therefore, that such allegation was not conclusive; and *held*, also, that the debt being the debt of the hus-

band, he had a right to secure its payment, and that the assignment for that purpose, though first made to the wife, and by her to the association, was not a badge of fraud; and *held*, likewise, that the bills in chancery are, ordinarily, but slight evidence without more of the statements contained in them, and that advantage cannot be taken of such statements unless it is shown that the party relying upon them has been misled to his prejudice. *Vanneman v. Swedesboro L. & B. Association*, N. J., 844.

BUILDING INSPECTORS.

Philadelphia—supreme court—common pleas—jurisdiction—injunction—breach of the peace.] The common pleas of Philadelphia has no power to review upon the merits the action of the building inspectors taken under the act of May 20, 1857—P. L. 590—entitled “An act in relation to party walls;” its jurisdiction extends no farther than to enforce the decision of the inspectors. The supreme court has no power to reverse a decision of the building inspectors rendered under the act of 1857, unless, perhaps, for a shown irregularity in condemning a wall. The decision of the building inspectors under the act of 1857 is a finality, and if one building is, in the taking down of a condemned wall, interfered with the common pleas may extend its equity power, and restrain such interference by injunction, or should the interference amount to a breach of the peace, the quarter sessions may bind the offending party over. *Childs v. Napheys*, Penn., 85.

CARRIER.

Removal of passenger without arrest.] A railroad company may, for proper cause, remove a passenger from a train at any regular passenger station without arresting him or delivering him to an officer at the station. *Beckwith v. Cheshire Railroad Co.*, Mass., 440.

CERTIORARI.

Under the act constituting a State board of assessors to value the property of railroads and canals the case to be reviewed on *certiorari* by the supreme court should be made by the proofs and exceptions on the appeal before such board and not on a rule to take testimony granted by the supreme court. *Central, etc., Railroad v. State Board of Assessors*, N. J., 698.

CHATTEL MORTGAGE.

1. **Attachment—interest of parties.]** The interest of a mortgagee in personal property is not subject to attachment. The interest of the mortgagor may be attached, but unless the attaching creditor pays to the mortgagee the amount due him secured by the mortgage, within ten days after demand, the attachment becomes dissolved. The interests of the mortgagor and mortgagee in the property are not joint, and a plaintiff cannot, by joining them as defendants in a suit upon a joint debt, enlarge the statutes of attachments and make the interest of the mortgagee attachable. *Murphy v. Galloupe*, Mass., 881.
2. **Title.]** The execution and delivery of a mortgage on personal property not in the possession of either mortgagor or mortgagee is no evidence of title as against a stranger in possession. *Gibbs v. Childs*, Mass., 683.

COLLATERAL SECURITY.

Appropriation of payment.] Personal property pledged specifically as security for a certain loan cannot be held as security for subsequent advances without an agreement to that effect. One who owes money upon several distinct securities or accounts has a right to apply his payment to either as he pleases; but if he makes a payment generally and without specifically appropriating it, the creditor may apply it as he pleases. If neither debtor nor creditor makes any specific application of the money so paid, the law will appropriate it according to the equity and justice of the case. But this principle applies only in cases of voluntary payments. It has no place in payments where the money to be applied is the proceeds of a judicial sale of real estate. In such cases the law applies the proceeds in order of their

priority to such liens as are divested by the sale. *Appeal of the Pennsylvania Co. for Insurance on Lives, etc.*, Penn., 381.

COMMON AND UNDIVIDED LANDS.

Warrant for meeting — title.] Calls or warrants for meetings of the proprietors of common and undivided lands rest upon the same footing as warrants for town meetings. Such meetings may lawfully act upon any subject, the nature of which the warrant gave substantial and intelligent notice. When a meeting is called for the purpose of setting apart a portion of the common land, it is sufficient to authorize it to take action on the same if the call or warrant for the meeting states generally the object of the meeting without giving the boundaries of the land which it is proposed to convey. *Coffin v. Lawrence*, Mass., 626.

COMPROMISE.

When court will sustain.] When a court of equity is satisfied that a compromise among parties interested in an estate, entered into to avoid the expense and delay incident to litigation, is for the interest of all concerned, it has power, under act 1868, chapter 278, to ratify the same and decree a sale of so much of the property as may be necessary to carry it into effect. *Caldwell v. Brown*, Md., 856.

See DEBTOR AND CREDITOR, 454.

CONDITIONAL SALE.

Growing crops — lien — deed.] A reservation, in a deed of real estate, of crops to be grown thereon, as security for the purchase-money of the land is not a conditional sale, within the meaning of the statute. R. L., § 1992. *Batchelder v. Jenness*, Vt., 718.

CONSTITUTIONAL LAW.

1. The supreme court will not declare a revenue law of the Commonwealth unconstitutional, except in a clear case. *Appeal of Fox*, Penn., 98.
2. **Changing matters of procedure.]** The first section of the statute of 1880 — P. L. 255 — declaring that no decree for deficiency shall be made in a foreclosure suit, is valid. Notwithstanding the constitutional provision that the legislature shall not pass any law depriving a party of any remedy for enforcing a contract which existed when the contract was made, it is competent for the legislature to change the practice of the courts, and any legislation which merely affects the pursuit of remedies for enforcing contracts is not within the constitutional prohibition. *Toffey v. Atchason*, N. J., 42.
3. **"Emolument" — sheriff boarding prisoners.]** The compensation ordered by authority of law to be paid to the sheriff for the boarding of prisoners in the county jail, if fixed when he entered upon the term of his office, is an "emolument" within section 13, article 3 of the Constitution. *Peeling v. County of York*, Penn., 261.
4. **Interstate commerce.]** A statute authorizing railroad commissioners to fix the rates to be charged for freight upon a railroad between points outside of and points within this State, is invalid, being in violation of section 8 of article 1 of the Constitution of the United States which gives to congress the exclusive power to regulate the commerce between the several States. *Commonwealth v. Housatonic R. Co.*, Mass., 385.
5. **Legislation — primary election — "candidate" — election law.]** The Constitution of 1874 provides for the future, as well as the present, therefore, when it speaks of a violation of any election laws, it does not mean merely such election laws as were in force when it was adopted, but also such as might lawfully be passed in the future by the legislature. The act of June 8, 1881 — P. L. 70 — entitled "An act to prevent bribery and fraud at nominating elections, nominating conventions, returning boards, county or executive committees, and at the election of delegates to nominating conventions in the several counties of the Commonwealth," is a constitutional election law within the intent of section 9, article 8, of the Constitution. The word

"*candidate*" in the Constitution is to be understood in its ordinary popular meaning, and one seeking official preferment is within the meaning of the term, whether he is an aspirant for a party nomination or for an election. The words "any election" law, in the Constitution, means any law relating to popular elections, inclusive of primary elections. *Leonard v. Commonwealth*, Penn., 144.

6. **Municipal law — election of municipal officers.]** A law is to be regarded as general, within the provisions of article 4, section 7, part 11 of the Constitution of 1875, when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class. The practice in this State of employing general titles in public laws regulating municipal government has come to be so established that they ought not on this ground to be held invalid. The act of February 20, 1888, entitled "An act concerning cities of the third class," and adjusting the terms of office of members of the common council in such cities so that one member shall be elected in each ward each year, is not in violation of the provision of the Constitution requiring legislation concerning municipal government to be by general laws. *State, ex rel. Randolph, v. Wood*, N. J., 409.
7. **Taxing foreign railroads — interstate commerce.]** See *Cent., etc., R. Co. v. Board*, etc., N. J., 693.

See NEGOTIABLE INSTRUMENT, 388.

CONTRACT.

1. Defendant gave to complainant a bond and mortgage on certain real estate.
 - The bond was conditioned for the payment of a certain sum with interest, payable semi-annually, and if the interest was not paid within thirty days after it became due, principal and interest should be forfeited at complainant's option. On the same day and contemporaneous therewith, the said parties entered into a written agreement, in which the said complainant agreed to take pay for said installments and interest in good and salable lager beer, at the market price. By the same instrument the said defendant agreed not to sell, either directly or indirectly, "to any other person in Egg Harbor city lager beer for bottling purposes but to said Henry Schmitz, until the whole of the said principal, money and interest due upon said bond and mortgage is paid in full." April 1, 1885, there remained due for interest \$67.88, which remained unpaid for over thirty days. The complainant elected to take advantage of the legal right secured by the bond, and declared the whole amount due. He filed his bill to foreclose. The defendant answered and insisted that no forfeiture has taken place; claiming that the true meaning of the agreement respecting payment in beer was that the defendant would furnish good and salable beer, which he was always ready to do and which he did, and that it did not require him to furnish beer for bottling purposes; the complainant insisted that, under the agreement, he was entitled to all the beer for bottling purposes that he desired. *Held*, on consideration of the evidence, that the defense was not established; the forfeiture contemplated by the parties was complete and complainant justified in filing his bill. Defendant having failed to establish a tender his case was fatally defective. *Schmitz v. Scheifele*, N. J., 837.
2. **Restraint of trade.]** Contracts in restraint of trade are invalid; and this is so even when the restraint imposed is partial, unless the restraint be reasonable. And the test to be applied, in determining whether a restraint is reasonable or not, is to consider whether the restraint is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public. The question whether a restraint which is to endure during the life of the promisor or covenantor, is reasonable or not, is an undecided question in this State, and such a restraint is not, therefore, enforceable by injunction. *Mandeville v. Harman*, N. J., 752.

3. **Effect of enlarging the time of performance by vendor.]** A deed for a tract of oil land was left on May ninth with a third party as an escrow, with an agreement that it should be delivered to the purchaser upon his payment of \$500 within ten days; subsequently the vendor agreed to several postponements, and on May twenty-eighth when the purchaser gave reasons for his failure to pay, said "let it rest a few days, and if I need the money I will come and see you." *Held*, that the condition was well performed by a tender on June second, and on failure to get the deed the purchaser's remedy was by a bill in equity. *Baum's Appeal*, Penn., 231.
4. **Gambling contracts — "buyer's option" — evidence — custom.]** A. entered into a written contract whereby he sold to B. a quantity of oil at a fixed price "to be delivered at buyer's option" within a specified time. The price of oil declined and B. refused to accept and pay. In a suit by A. against B. to recover damages, *held*, that it was not error to refuse to admit evidence to prove that at the date of the contract the price of oil was lower than that mentioned in the contract, nor evidence to prove that the custom in contracts to deliver oil at a future day was not to deliver the oil but to settle the differences. *Scotfield v. Blackmarr*, Penn., 208.
5. **Lex loci.]** The defendant living in Salem, N. H., employed a Mrs. Shirley to borrow \$50 for her of her brother living at Salem, Mass. The brother refused to loan the money, but his wife, the plaintiff, gave \$50 of her own money to Mrs. Shirley, together with the following paper: "SALEM, July, 1864. Borrowed and received from Nancy D. Hill the sum of fifty dollars. Sign this and return it." Mrs. Shirley delivered the money and paper to the defendant, who kept the money and signed the paper at Salem, N. H., and returned it to the plaintiff at Salem, Mass. *Held* a loan by plaintiff to defendant, and that the contract was made in Massachusetts. *Hill v. Chase*, Mass.; 880.
6. **Quantum meruit — services — ticket agent of one company selling for another.]** A. and B., two railroad companies operating competing lines, entered into an agreement, by which A. was for a specified compensation to give to B. a right of way over a portion of its tracks and also the right to use the station in Wilkesbarre; further, A. was to look after the freight and baggage of B. and sell tickets for B. at that point. C. was the ticket agent of A. at Wilkesbarre. In course of time, leaving that employment, he brought suit against B., claiming compensation for selling its tickets whilst serving A. *Held*, that without distinct proof of an actual promise by B. to pay, as also satisfactory proof of the consent of A. that C. should receive such payment, there could be no recovery. *Pennsylvania R. R. Co. v. Flanigan*, Penn., 197.
7. **Reformation — mistake — parol evidence.]** A written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it. A. sold to B., by articles, a tract of land for the consideration of \$6,000 cash, one million five hundred thousand feet of hemlock boards, to be manufactured from the timber on the tract, and to be delivered; later A. brought ejectment against B., to enforce the payment of the value of the one million five hundred thousand feet of manufactured lumber; on the trial B. proved that the written contract did not embrace the entire agreement of the parties, and that he had been induced to sign it under the false representation of A. that there was on the property one million feet of hemlock timber, and that a saw-mill upon the premises had power and was in condition to cut at least two thousand feet of boards on any day of the year, and one thousand feet for every hour when a certain upper mill was not withholding the water. In point of fact there was but three million feet of hemlock lumber on the tract; and the mill, owing to dilapidation, and also deficiency of water power, would not perform as warranted. The common pleas proposed a solution of the question of what was due; A., by finding the difference between the value of three million feet of hemlock timber and ten million feet, and as to the mill by finding what was the cus-

tomary value of the earnings of such a mill, per thousand, after deducting all expenses, and by comparison arriving at the difference of the value of the mill as warranted, and as it was when delivered to B. *Held*, there was no error in the method of solution adopted by the court. *Walker v. France*, Penn., 47.

8. **Rescission for fraud — offer to restore — evidence.**] Defendant subscribed for one copy of the plaintiff's "Art Treasures of America," in ten portfolios of \$15 each, the portfolios to be issued at intervals of about two months, and payments to be made for each portfolio upon delivery. Plaintiff delivered to defendant two portfolios, which were paid for; but defendant refused to accept or pay for any further deliveries, claiming that his signature to the contract was obtained by fraud. In an action by plaintiff to recover of defendant the price of the remaining eight numbers, *held*, that the contract was one entire agreement, and not a contract containing ten distinct agreements; and that the defendant could not avoid the contract, or give evidence tending to show the fraud alleged until he had returned, or offered to return, the two portfolios which he had received and paid for. *Barrie v. Earle*, Mass., 6.
9. A. entered into articles of agreement with B. whereby he was to sell B. his one undivided half of a grist-mill and two hundred acres of land connected therewith, for a certain sum. B. was to let A. have all the timber on the land down to twelve inches at the stump. *Held*, that under this agreement A. was only entitled to B.'s undivided half of the timber, and that B. was not obliged to procure the timber for A. from the owner of the other undivided half. *Eberts v. Thompson*, Penn., 210.
10. The construction of written instruments is for the court. *Fisher v. Moyer*, Penn., 182.

See EQUITY, 793; EXECUTOR AND ADMINISTRATOR, 358.

CONTRACTOR.

See MUNICIPAL CORPORATION, 57.

CONVERSION.

See ACTION, 718; PLEDGE, 848; WILL, 71.

CORPORATION.

See MANDAMUS.

COSTS.

1. **Attachment bond — counsel fees.**] An indemnity bond, in the usual form, given on an attachment to save harmless the plaintiff "of and from all suits, damages and costs whatsoever which he might be liable or obliged by law to pay any person or persons by reason of said attachment," includes counsel fees reasonably incurred in the defense of a suit occasioned by the attachment. *Lindsey v. Parker*, Mass., 11.
2. **Claim against estate — additional allowance.**] An order granting an additional allowance to plaintiff in an action on a claim against a decedent's estate in which he was successful, will be reversed if payment of the claim was not unreasonably resisted or refused. *Johnson v. Myers*, N. Y., 280.
3. **Disbursements — Code Proc., § 317.**] By subdivision 8 of section 8 of the repealing act of 1880, the right to disbursements, given by section 317 of the old Code upon the reference of a claim against a deceased person, was preserved. *Larkins v. Mazon*, N. Y., 288.

CRIMINAL LAW.

1. **Homicide — rape — verdict.**] When a statute in defining a crime refers by name to another well-known crime, and makes such named crime a constituent of the defined crime, in an indictment for the latter it is not sufficient to use the mere statutory language, but the particulars constituting the named crime must be shown. In an indictment for murder, when the fact that the killing was in the commission of a rape is relied on to make such killing

- murder in the first degree, a count in the general form authorized by the forty-fifth section of the criminal procedure act is sufficient. A verdict on a capital case will not be set aside unless the irregularities committed by the jury are of a nature to raise a suspicion that they may have prejudiced the prisoner. *Titus v. State*, N. J., 710.
2. **Arson — evidence of other fires.]** On a trial for arson defendant offered to prove that there were other incendiary fires in the same neighborhood, and at about the same time as the one in question, claiming that they were all set by the same person, and by some one other than the defendant. *Held*, that the evidence was rightly rejected. *Commonwealth v. Gauvin*, Mass., 631.
 3. **— indictment — “feloniously.”]** A. was tried for an attempt to burn a stable, parcel of and belonging to a dwelling-house; there were two counts in the indictment, the first properly charging the offense under the one hundred and thirty-seventh section of the Penal Code as having been committed feloniously; the second differing from the first only in this, that the word “feloniously” was not used. A. was acquitted upon the first count, but convicted upon the second. A motion was made for a new trial and in arrest of judgment. The new trial the court declared it needless to grant, and the motion in arrest of judgment it made absolute. *Held*, no error. *Com. v. Weiderhold*, Penn., 86.
 4. **Disorderly house.]** Whether an act is illegal and what constitutes a disorderly house is a question of law to be settled by the court, but it must be left to the jury to find as a question of fact whether satisfactory evidence is produced to show that the defendant is guilty of habitually permitting such acts upon his premises as are declared to be illegal. *Brown v. State*, N. J., 703.
 5. **Manslaughter — indictment — juror — evidence — photographs — exceptions.]** Imperfections in the form of an indictment which do not tend to prejudice the rights of the defendant upon the merits cannot affect the indictment or the judgment thereunder. Code Crim. Pro., § 285. On examination by the district attorney a juror testified that he knew of no reason why he could not render an impartial verdict upon the evidence. In answer to the prisoner's counsel he stated that he had read in the newspapers about the occurrence, but had formed no opinion as to the guilt or innocence of the prisoner; that his mind was free from any impression in regard thereto, but that he was of the opinion from what he had read that the catastrophe was the result of culpable negligence on the part of some one, and that it would require evidence to remove the impression. *Held*, a competent juror. Another juror testified that from reading the papers he had formed an opinion as to the guilt or innocence of the prisoner which would require evidence to remove; but in substance that he could go into the jury box and render an impartial verdict upon the evidence without being influenced by such opinion. *Held*, a competent juror. Defendant was indicted for manslaughter in the second degree, for negligently constructing a building with inferior materials, causing it to fall and producing the death of a human being. Upon the trial the court admitted in evidence, against defendant's objection, portions of the brick and mortar taken from the fallen building. *Held*, that the evidence was competent. A new trial ought not to be granted where an exception is well taken unless the jury could have been unfavorably influenced by the evidence admitted under it, nor when the party excepting has by his own course of examination destroyed the force of his objection. Photographic scenes of a fallen building are admissible in evidence to aid a jury in applying the evidence in reference to it. The court may, in its discretion, allow the jury to visit and view the premises, but it is not bound to do so. A stipulation between counsel to the effect that a general exception should give the defendant the benefit of a particular exception to any part of the charge will not avail. *People v. Buddensieck*, N. Y., 324.
 6. **Penal Code, § 87 — death following attempt to procure abortion.]** Section 87 of the Penal Code took the crime of causing death by an attempt to procure abortion out of the class designated as murder, and made it a felony of lesser grade, and prescribed the punishment of it. Hence, no penalty therefor can be inflicted, or any thing be done in punishment thereof.

otherwise than as directed by that section. *Commonwealth of Pennsylvania v. Railing*, Penn., 163.

7. **Indictment — place — game law.]** An indictment for killing deer in violation of the game law alleged the place of killing to be "at a gore north of numbers two and three in range six in said county of Franklin." *Held* sufficient. *State v. Libby*, Me., 671.
8. **Plea in abatement — duplicity — general demurrer.]** A plea in abatement must be certain to every intent; and it must stand or fall on its own allegations, unless there be an express reference to the indictment; thus it was *held*, on general demurrer to a plea purporting to raise the disqualification of one of the grand jurors, and the illegality of the organization of the grand jury, that the plea was bad, in that it was not properly alleged that the objectionable grand juror acted with the panel in finding the indictment; in that the allegation, that he was not "a legal voter of the county," was lacking in certainty as to what county; in that the allegation, that he was not one of the "judicious men of the county," that the panel did not constitute a legal grand jury, present conclusions of law; that the mere reference in plea to "said indictment" did not show, except by inference, what indictment had been pleaded to; and that duplicity could be reached by general demurrer. *State v. Emery*, Vt., 525.
9. **Jeopardy.]** The trial had commenced and the evidence nearly in, when one of the jurors was taken sick and the panel was thereupon discharged. *Held*, that the prisoner had not been in jeopardy. *Id.*
10. **Circumstantial evidence.]** The respondent was charged with burning a barn; and it was claimed that he was hostile to the husband of the owner of the barn. *Held*, that circumstantial evidence was admissible to show that the respondent knew that the husband had cattle in the barn when it was burned — to prove a motive. *Id.*
11. **Good character.]** Proof of good character, by the rules of evidence, is limited to general reputation, and more is matter of favor. *Id.*
12. **Pleading — perjury — voter.]** An indictment, charging the respondent with perjury committed before the board of civil authority in his attempt to get his name on the check-list of voters, is fatally defective, if the jurisdiction of the board is not set forth with certainty; and, if it is not alleged that he was not legally entitled to vote, nor to have his name on the list; thus where the allegations were that the board was in session to hear challenges to the qualifications of persons whose names were on the list, and all alterations to be made in the list, and that the respondent appeared and requested to have his name added to the list, it was *held* that there was no sufficient allegation that the board had authority. *State v. McCone*, Vt., 716.
13. **Polygamy — evidence.]** On the trial of the husband for polygamy, evidence of lewd conduct of the alleged wife is not admissible to contradict her testimony as to the marriage. Some time after the alleged marriage the wife, while on the street with a companion, was requested by the defendant's sister to come into the house, when she answered, "I will not; I have a right to do as I have a mind to," and the defendant offered to prove that her companion, at the time she made the remark, was a lewd woman, but the evidence was excluded. *Held* error; that the character of her companion was competent as aiding in the construction of the ambiguous answer. *Commonwealth v. Lee*, Mass., 681.
14. **Charging rape and assault with intent to commit rape — verdict on one count.]** An indictment contained two counts, the first charging the commission of the crime of rape, and the other charging an assault with intent to commit a rape; the jury found a verdict of "guilty of the charge in the first count." *Held*, that a motion in arrest would not be granted on the ground that the jury had not found on both counts in the indictment. *Stevens v. State*, Md., 859.
15. **Rape.]** Under an indictment charging the defendant with an assault upon a female child under the age of ten years, with the intent feloniously to unlawfully and carnally know and abuse the said child, it is no defense that the acts done by the defendant were done without force or violence, or with

- the consent of the child. In Massachusetts the offense of unlawfully and carnally knowing and abusing a female child under the age of ten years is rape. Where the crime of rape upon a female child under the age of ten years is charged, by carnally knowing and abusing her, it is not necessary to aver or prove that the acts were done against her will or without her consent. *Commonwealth v. Roosenell*, Mass., 456.
16. **Recognizance — sureties — indictment.]** When the terms of the recognizance bind the principal to appear and answer a specific charge, and not to depart without leave of the court, failure to appear when regularly called constitutes a breach of the recognizance; and it is no defense to an action against his sureties on the recognizance, for his failure to appear, that he was not indicted for the same offense as that set forth in the complaint and for which the recognizance bound him to appear and answer. *Commonwealth v. Teebens*, Mass., 887.
17. **Sale of liquor to minor as agent.]** A contract for a sale of intoxicating liquor made with a minor, as the agent of a disclosed principal, is a sale to the minor, for the use of another person, within the meaning of Public Statutes, chapter 100, section 9, and it may be so alleged in the complaint. The person for whose use the sale was made need not be alleged. *Commonwealth v. O'Leary*, Mass., 442.
18. **Venire — juror.]** There is no express statutory requirement in this State that the town clerk or selectmen should certify in writing the names of the jurors drawn by them. The court, therefore, will not set aside a verdict on the ground that the venire contained no certificate of such officers that the persons summoned by the constable had been drawn as jurors. *Commonwealth v. Besse*, Mass., 461.
19. **Validity of complaint for violation of fish laws, act 1885, chapter 468.** *State v. Adams*, Me., 635.
20. **Sunday — "work of necessity" — barber shop.]** Keeping open a shop or work-house on Sunday for the purpose of doing business with the public indiscriminately is an offense in itself. Pub. Stats., chap. 98, § 2. The fact that the business performed therein is "work of necessity or charity" does not justify the keeping open of a shop or work-house on the Lord's day. So held in reference to a barber shop. *Commonwealth v. Dextra*, Mass., 350.

See BASTARDY; INTOXICATING LIQUORS.

CUSTOM.

See BANKS AND BANKING; CONTRACT.

DAMAGES.

Proximate and remote — when question for court.] In an action for damages, the question of proximate and remote cause is for the jury, but when the facts are not disputed the court may determine it. Two horses and a sleigh, belonging to A., were being driven along a public road by a servant of A., the sleigh being dragged upon a pile of ashes was overturned, the horses ran off, and the following day were found five miles distant from the place of accident, upon a railway track, dead. A. brought suit against the township for damages, alleging the proximate cause of the accident to be the negligent maintenance of the highway. On the trial A. did not show that the flight of the horses was continuous from the time of the overturning of the sleigh till their death. On behalf of the township a point as follows was submitted: "It being an admitted fact in this case, that the horses were killed, not on the township road, but on the Lehigh Valley railroad by a moving locomotive — not owned or controlled by the township — which ran upon and killed them, the negligence of the township, if any, was not the proximate, but the remote cause of the killing of the horses, and the plaintiff cannot recover their value in this action." *Held*, the point should have been affirmed without qualification. *Township of West Mahanoy v. Watson*, Penn., 76.

See NEGLIGENCE, 768; TRESPASS, 28.

DEBTOR AND CREDITOR.

1. A consideration, sufficient to support a contract, may be defined to be, either

a benefit accruing to the promisor, or a loss or disadvantage sustained by the promisee. A promise by a creditor to forgive or relinquish part of his debt, on the payment of the other part in money, is without consideration and void. But if a creditor agrees to relinquish a part of his debt, on receiving a new or an additional security on the balance, or if he agrees to receive a chattel, of less value than his debt, in satisfaction of his debt, his promise will have the support of a good consideration, and will be held to be valid. The payment of taxes which are a lien on mortgaged premises, by a mortgagor, may be a good consideration for a promise by a mortgagee holding a mortgage standing subsequent to the taxes, to relinquish part of his mortgage debt. *Day v. Gardner*, N. J., 749.

2. **Compromise agreement — promissory note — illegal contract.]** An agreement of compromise for a certain percentage, in case all other unsecured creditors would sign the agreement, has no binding effect upon the signers in case of failure of all unsecured creditors to sign. When there is an indebtedness existing between two parties growing out of a valid agreement, and they enter into a new and unlawful agreement in respect to the same, to carry out which the debtor gives to the creditor his promissory note, and the debtor afterward repudiates the note as illegal, the creditor may still maintain an action against the debtor upon the original agreement. *Walker v. Mayo*, Mass., 454.

DEED.

1. **Parol evidence to show mortgage — trust.]** To convert a deed absolute on its face into a mortgage by parol testimony, such testimony must be clear and specific, of a character such as will leave in the mind of a chancellor no hesitation or doubt, and failing this, the effort to impeach the legal character of the deed must be regarded as abortive. A mortgage is essentially a pledge or security, and is distinguishable from a trust in this only, that the property described in it is to revert to the mortgagor on the discharge of the obligation for the performance of which it was pledged. *Appeal of Lance*, Penn., 202.
2. **Answer and proofs — attorney and client — fraud.]** Mr. E. as solicitor agreed with Mrs. C. to defend certain suits, for which she agreed to give him half of all the property or money that should be recovered; the defense entered failed, and the property was all rescued from Mrs. C. by judgment; Mr. E. procured Mrs. C. to execute and deliver to him a deed for one-half of other property which she owned, without question, representing to her that it was for his compensation under the agreement. *Held*, that such deed is fraudulent and void both in law and in fact. *Cleine v. Englebrecht*, N. J., 406.
3. **Evidence — subsequent declarations of grantor.]** After a conveyance of real estate, the declarations of the grantor in disparagement of his grant, made in the absence of the grantee, are not admissible in evidence against the grantee. *Chase v. Horton*, Mass., 865.
4. **Mortgage — equity of redemption — ejectment — innocent purchaser for value — improvements — notice — estoppel.]** A., by a deed absolute upon its face, conveyed to B. certain real estate, and paid B. rent for it whilst he held the title; three years later B. conveyed the same premises to C., who notified the occupying tenant to leave, which notice was complied with; C. then received the key of the purchased property from A., who resided in the adjoining house, and moved in; for twenty years C. resided on the premises, and, during that time, with the knowledge of A., made valuable improvements; pending all that period A. and C. were visiting acquaintances; and A. knew of the sale to C., but at no time laid claim to the property. After the expiration of twenty years from C.'s entering into possession, A., alleging the deed to B. was but a mortgage, brought an action of ejectment to enforce her equity of redemption. *Held*, the circumstances called for the trial judge to give binding instructions to find for the defendant. *Pancake v. Cauffman*, Penn., 802.
5. **Name of grantee — presumption.]** The production of a deed by *Melissa A. Andrews*, from her deceased husband and running to *Mercy A. Andrews*,

raises no presumption that it was delivered to her as her deed by the grantor. *Andrews v. Dyer, Me.*, 855.

DEFAULT.

Writs of error — petition for review — practice.] A default admits all facts well pleaded in a declaration. Where judgment is rendered on default, if the defendant would deny the facts declared his remedy is by petition for review and not by writ of error. To sustain a writ of error for an error in law, the error must appear by an examination of the record. Where judgment on default has been rendered in an action in the name of an assignee, a writ of error to reverse the same will not be granted on the ground that no assignment of the claim sued was filed in the action. *Hanson v. Wood, Me.*, 356.

See PRACTICE, 356.

DELIVERY.

See NEGOTIABLE INSTRUMENT, 18.

DEVISE.

See WILL, 650.

DISTRIBUTION.

A division of an intestate estate made in writing among the heirs and next of kin, all being of age and all joining, but not "made, executed and acknowledged like a deed of land," as required by General Statutes, page 372, section 5, and not filed and recorded in the probate court, does not supersede or preclude a regular probate decree ordering a distribution of the estate. A distribution will not be set aside where the only objection thereto is that the amount was not large enough; the distribution may be good so far as it goes, and a further order of distribution made of the remainder. *Dickinson's Appeal, Conn.*, 511.

DURESS.

Threats of prosecution.] It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the rule includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. *Hilborn v. Bucknam, Me.*, 642.

EJECTMENT.

1. **Fraud, actual and constructive.]** Judgment creditors pressing the owner of an equitable title — part of the purchase-money being paid — he confessed a judgment to the legal owner in an amicable action of ejectment, and the latter obtained possession under an *habere facias*. The equitable owner's interest was sold and bought in by his judgment creditor, who brought ejectment, alleging that the confession was fraudulent and void as to him. *Held*, that there being no actual fraud in the case, fraud would not be presumed from the above circumstances. *Stevens v. Brown, Penn.*, 221.
2. **Nonsuit — possession in defendant must be shown.]** It is proper to nonsuit a plaintiff in an action of ejectment, who, on the trial, fails to show the defendant in possession. *McIntyre v. Wing et al., Penn.*, 228.

See DEED, 802.

EMINENT DOMAIN.

See EVIDENCE.

EQUITY.

1. **Ejectment — title — purchase-money — tender — fraud — vendee — contract.]** In an ejectment founded on an equity only, the plaintiff to be entitled to recover must not only tender the money before action is instituted, but must have it in court to be paid in the event of a verdict in his favor; this rule, however, does not apply when the equitable owner by the terms of his contract is entitled to, or by consent is once fairly put into, the possession under his title, and by force, fraud or other illegal means is ousted therefrom. A. and C. agreed in writing to purchase together certain lands, the legal title

to be vested in A., one-half for his own use and the other half for the use of C., A. to convey the one-half in trust to each person as C. might designate, provided the purchase-money for the interest of C. be paid to A., his heirs and assigns before the execution of a deed. D., a coal company, became invested with the absolute title to A.'s half and the legal title to C.'s half according to the terms and conditions of the contract; later, E., who as a purchaser claimed title to the undivided interest of C., brought an action of ejectment against D. to recover that interest. On the trial the plaintiff consented that the purchase-money had been paid over by C. to A. in the shape of notes, which had been paid, and that, therefore, the plaintiff was entitled to a conveyance and to possession. On the part of the defendant it was contended C. had in the making of the settlement, upon which the notes were founded, been guilty of a gross fraud. *Held*, that D. stood in the place of A. invested with his rights. *Held*, also, that, if the fraud of C. had entered into the contract itself at its execution by A. and C., a court of equity would not afford a remedy for its enforcement in favor of E., if it affected only the performance D. could not be compelled to yield the possession until the purchase-money had been paid. *Orne v. Kittanning Coal Co.*, Penn., 793.

2. **Judgment creditor — concealed property — title of real estate in daughter's name.]** A judgment creditor may maintain a suit in equity against the debtor, and any person holding the title to the debtor's real estate in order to reach such property for the satisfaction of the judgment debt. Where the person holding the title is the daughter of the debtor, she may be allowed a lien for the money advanced by her to her father, but not for her wages when laboring for her father from fourteen to twenty-one years of age. *Augusta Savings Bank v. Crossman*, Me., 678.

ESTOPPEL.

See AGENCY, 744; DEED, 802; LANDLORD AND TENANT, 764; PARTITION, 115.

EVIDENCE.

1. Parol evidence is admissible to show that the cause of action of a pending suit is the same as that of a suit subsequently begun for the purpose of abating the same. *Damon v. Denny*, Conn., 503.
2. In an action by a wife as administratrix of her husband's estate to recover for services rendered, plaintiff was asked what proportion of her husband's time was devoted to the defendant's business. The question was objected to as calling for an opinion. *Held*, that the question was competent as calling for a fact. *Johnson v. Myers*, N. Y., 294.
3. **Corporate records — as against stockholders.]** Corporate books are not only evidence of the corporate acts when those need to be proved, but are to some extent evidence against the stockholders who are chargeable with a knowledge of their contents. *Blake v. Griswold*, N. Y., 330.
4. **Declarations — how accident happened.]** In an action to recover for personal injuries to an employee of defendant, resulting in death. Under objection and exception plaintiff was allowed to prove that after deceased had been taken out from under the car by which he had been injured, and while he was being conveyed to the switch-house by his [fellow employees, some one asked him how the accident had happened, and he said: "I pulled the pin and made a grab for the car, and there was nothing there for me to grab." Another version given by the witness was that the deceased said he cut off the car and made a grab for the handle of the car, and there was nothing there for him. *Held*, that the declarations of the injured party were incompetent, and the admission thereof was error. *Martin v. New York, etc., R. Co.*, N. Y., 615.
5. **Mistake.]** A paper which has been voluntarily produced and put in evidence by a defendant at the hearing in the police court cannot afterward be withdrawn upon the claim that it was put in by mistake. It then becomes part of the case, and the superior court has a right to use it on appeal. *Commonwealth v. Corbin*, Mass., 629.
6. **Pauper supplies — account book of deceased physician.]** In a suit

- for supplies furnished to a pauper of the defendant town, a selectman of the latter testified to having employed a physician to attend upon the pauper, and to his having been afterward paid by the town, but he could not fix the date of the attendance, which became important. *Held*, that entries upon the account-book of the physician — who has since become mentally incompetent — made in the regular course of his business, charging the town for his attendance upon the pauper, with the date, and crediting the town with payment, were admissible, (1) for the purpose of showing the time when the service was rendered; (2) to corroborate the testimony of the selectman, and (3) as evidence of the fact that medical service was rendered. *Town of Bridgewater v. Town of Roxbury, Conn.*, 494.
7. **Pleading — amendment — foreclosure — rents and profits.**] When evidence has been introduced without objection upon a matter necessarily involved in taking an account between the parties, and there is nothing to indicate that either party has been taken by surprise, or that the matter has not been fully and fairly tried, there ought not to be a new trial, because the pleadings were not in every particular so specific as they ought to have been. Under Public Statutes, chapter 167, amendments to pleadings may be made at any time before final judgment. In an action upon a mortgage note, where the plaintiff had previously foreclosed the mortgage by making entry for condition broken, the defendant is entitled to have deducted from the principal and interest due on the note the annual rents and profits of the premises for three years after the plaintiff took possession. *Aldrich v. Aldrich, Mass.*, 452.
8. **Relevancy of deposition.**] A. purchased property from B. upon his representation that it was clear of incumbrances, giving him therefor a series of judgment notes; subsequently A. had to pay off a lien against this property. After B. assigned several of these notes to C., who in turn assigned the one in suit to D. In a suit by D. against A., *held*, that the deposition of a witness who was present at a conversation between A. and C. at the time C. bought two of the notes, but not the one in suit, to the effect that he had no defense against these notes, was properly admitted in evidence. *Scott v. Hart, Penn.*, 226.
9. **Witness shown incompetent — evidence struck out — witness — title — trust.**] A. was offered as a witness on a trial and his testimony was heard; in the progress of the case and before the testimony was finished, the incompetency of A. was disclosed, whereupon the trial judge ordered his testimony to be stricken out, and in the charge instructed the jury to disregard it. *Held*, the court had committed no error in not excluding the testimony of A. till his incompetency appeared. *Warren v. Steer, Penn.*, 131.
10. **— one party dead.**] The rule that where one of the parties to a contract in litigation is by death denied the privilege of testifying in relation to it, the policy of the law will close the mouth of the other, does not apply to actions involving the title to real estate. B., the husband of C., bid off real estate at a public sale; the purchase-money was applied by D., who was the brother of C.; the deed was made out in the name of C. as grantee; D. took possession and retained it till his death. *Held*, that whether or not a trust resulted to D. depended upon a presumption of an intention to that effect arising from the payment of the purchase-money by him, and as the facts to raise the presumption were shown by parol, of course the presumption might be overcome by parol evidence of an actual intention otherwise. *Id.*
11. **Witness — specific performance — unreasonable contract.**] The defendant in a suit in equity was made a party as heir to the plaintiff's wife. *Held*, that the plaintiff was incompetent as a witness. Where the evidence in support of a contract is conflicting and unsatisfactory and the contract itself unreasonable equity will not decree specific performance. *Higgins v. Butler, Me.*, 657.
12. **Eminent domain — U. S. senate documents.**] United States senate documents, containing chief engineer's reports, transmitted to the senate by the secretary of war, and ordered by that body printed, are not admissible in evidence in a proceeding to assess damages for land taken by a railroad com-

pany for the purpose of showing that the petitioners were benefited by the building of the defendant's road. *Cushing v. Nantasket Beach R. R. Co.*, Mass., 868.

13. When a written contract is complete in all its parts, requiring nothing more to make it plain and intelligent, parol evidence is inadmissible to add to, contradict or vary its terms. An objection to a conversation offered for such a purpose as immaterial and improper, and calling for a conclusion of the witness, is sufficient to raise the question of its admissibility. When the objection to evidence could not be obviated by any means within the power of the party offering it, a general objection is sufficient to raise the question of its admissibility. The fact that a written contract is unenforceable by reason of some vice expressed in it does not authorize the introduction of parol evidence to eliminate such objection. It is only where the contract is obviously incomplete and imperfect by reason of the absence of some provision which it is apparent that the parties must have contemplated as a part thereof, that parol evidence may be admitted to supply the defect. *Holcombe v. Munson*, N. Y., 568.

EXECUTION.

Time to return — proceedings stayed.] An injunction issued by a United States court, staying a sheriff's proceedings under an execution, operates to extend the time in which he is bound to make return thereto by as many days as he is under stay. *Ansonia Brass and Copper Co. v. Conner*, N. Y., 300.

EXECUTOR AND ADMINISTRATOR.

1. **Laches on part of beneficiaries in asking to have funds turned over to.]** *Lockwood v. Brantly*, N. Y., 292.
2. **Nominal party — trover — contract.]** In an action of trover by an executor for the value of certain personal property belonging to the estate of the testator, the fact that the plaintiff is a nominal party only can be shown by the probate records. After a demand and refusal trover may be maintained, though the defendant had given the plaintiff a written agreement to keep the property in controversy free of expense, "and to deliver to him on demand such . . . as I admit to be" his property, and to keep the balance "until such time as the question of title is settled." *Buck v. Rich*, Me., 358.
3. **Removal — improvidence and drunkenness.]** *Matter of Cady's Estate*, N. Y., 558.
4. **Trustee — accounting — surrogate's decree.]** The rule that an executor or trustee residing in this State and deriving his authority from a will executed and admitted to probate here cannot invest trust funds in mortgages on real estate situated out of the State has some exceptions. The trustees sold land belonging to the estate situated in the State of New Jersey. Not being able to obtain cash they took a first mortgage upon the property and invested the trust funds in the mortgage which was supposed at the time to be ample security. It turned out that owing to a defect in the title of the property the mortgage, upon foreclosure thereof, realized less than the amount of the trust. *Held*, that the case came within an exception to the rule above stated, and that the trustees could not be held personally liable for the deficiency for having invested the trust funds in a mortgage on property out of the State. The decree of a surrogate upon a final accounting, after citations personally served upon all the parties interested, is conclusive upon such parties so long as it remains unreversed. *Denton v. Stanford*, N. Y., 677.
5. **Acting executor — compensation — onus probandi.]** When a sum of money is decreed to two persons jointly and one of them claims more than a moiety thereof, he takes on himself the burden of proving in some manner his right thereto. A., B. and C. were executors of the last will of D. A. was the acting executor; upon a settlement \$2,700 commission was allowed, whereupon the representatives of B., deceased, brought *assumpsit* against A. to recover one-third thereof. A. claimed that, as he had performed all the

labor incident to the executorship, he was entitled to a greater compensation than either of his co-executors. *Held*, the burden of proof rested upon him to establish his position. *Shaw v. Betts*, Penn., 174.

Verbal promise to pay legacy.] See STATUTE OF FRAUDS, 60.

EXEMPTION.

1. **Widow's \$300.]** A widow is not entitled out of the proceeds of a sheriff's sale of mortgaged premises to the \$300 exemption given by the act of 14th April, 1851, in preference to her husband's mortgage. A. recovered judgment against B. who owned a piece of land; later B. gave to C. a mortgage upon the land; B. died leaving a widow, who elected to take for the use of herself and children \$300 of real estate; the land bound by the judgment and mortgage was accordingly set apart for her. In course of time the land was sold under proceedings upon the mortgage. *Held*, that C. took the fund realized from the sale. *Kauffman v. Susquehanna Building and Loan Association*, Penn., 119.
2. **Widow's exemption.]** When a widow in her claim of exemption has in her life-time specified the particular property which she elected to retain, her legal representatives, in the distribution of the husband's estate, will be restricted to the designation made by the widow. A. died seized of an estate of \$109.34 in cash, as also bonds, notes, mortgages, household goods, etc.; B., his widow, elected to retain \$300 out of his estate *in cash*; before any of the securities or household goods were converted into money B. died. *Held*, that her legal representatives, in their claim for payment of the sum elected to be retained by B., should be restricted to the \$109.34. A will must be construed so that every clause may take effect, if such be possible. No part will be rejected as repugnant if any fair and reasonable construction can be given to the whole which will render every part effective. Where a will leaves the mode of distribution doubtful, the court will apply the principle of the statute of distribution. A will contained bequests as follows: "Item. — I give and bequeath to my beloved wife, Elizabeth Housel, all my household furniture or goods during the term of her natural life, and direct that no security be required from her for the same, and I also give and bequeath unto my said wife, Elizabeth Housel (after my just debts and funeral expenses shall have been paid and fully settled by my executor), the one-third of my personal estate to her own use and benefit absolutely; the household furniture shall not be included in the appraisement of my personal estate as aforesaid." "Item. — As I hold judgments against my said wife, Elizabeth Housel, which are entered up in the court of common pleas of Northumberland county against the property which I now occupy, it is my will and I so direct that no part of said judgments shall be collected by my executor or heirs from my said wife, Elizabeth Housel, during the term of her natural life, but the same shall be kept revived as a lien against her property aforesaid, until after her decease, and after her death the proceeds thereof shall be divided equally among my surviving children and the children of such as are deceased, the said children of such of my children as are deceased to take the share of their respective parents." *Held*, the testator had intended an appraisement of his estate, except as specifically provided, and a distribution upon the basis of the appraisement, the widow taking her full share. *Appeal of Finney, Executor, Etc.*, Penn., 157.

FALSE REPRESENTATIONS.

Husband and wife.] The plaintiff while riding with her husband was injured by the horse running away and throwing her from the carriage. The horse had eighteen days before been purchased by the husband of the defendant as a gentle and kind animal and good family horse. It appeared that the defendant understood that the horse was to be used by the husband in his business, and did not know that it was being purchased for the plaintiff, or for the use of the plaintiff. *Held*, that the defendant was not liable for the injuries to the plaintiff because of his false representations to her husband. *Carter v. Harden*, Me., 661.

FORECLOSURE.

See EVIDENCE, 452; RECEIVER, 624.

FOREIGN ATTACHMENT.

Quashing writ.] The power of quashing writs is limited to proceedings that are irregular, defective or improper. If it appears on the face of the record that foreign attachment proceedings are void or grossly irregular, or if it can be clearly shown that a valid cause of action does not exist in that form, the court may, on motion of the defendant or of the garnishee in his behalf, quash the writ. *Steel v. Goodwin*, Penn., 578.

FRAUD.

In purchase of goods.] The inability of the officer to discover goods which had been fraudulently obtained by the defendant justifies the further inference that they had been fraudulently concealed or disposed of by him for the purpose of preventing the true owner from recovering their possession. *Fitch v. McMahon*, N. Y., 691.

See DEED, 406; PRACTICE, 817; MARRIAGE, 224.

GAMING.

Playing cards for beer to be purchased and paid for by the [loser is gaming. *Brown v. State*, N. J., 708.

GRANTOR AND GRANTEE.

1. **Mortgagor and mortgagee — landlord and tenant.]** Plaintiff's grantor had acquired his title to the premises in question by entry under a mortgage which had been assigned to him as collateral security. The defendants claimed that this sale was invalid on the ground that the holder of a mortgage as collateral security could not alone execute the power of entry and sale thereunder. *Held*, that as against the defendants, who were tenants and showed no title, it was immaterial whether the sale was good or not inasmuch as the deed to the plaintiff operated as an assignment to him of the mortgage under which the entry was made. When a line runs across a road and then runs "by the said road on the easterly and northerly side thereof," the boundary is the easterly and northerly side of the road, unless a contrary intention appears on the face of the deed. The relation of landlord and tenant is not created between a mortgagee and the lessee of the mortgagor by the mortgagee entering under his mortgage for condition broken; and the rule that a tenant cannot dispute his landlord's title does not, therefore, apply in such a case. *Holmes v. Turner's Falls Lumber Co.*, Mass., 341.
2. **Public way — shade trees — license.]** Grants of land bounding on a way of which the grantor is the owner will not be held to extend to the center of the way when a clear intention to the contrary is to be gathered from the language of the deed construed in the light of existing circumstances. The fact that shade trees planted by the plaintiff in a public way in front of her premises had remained there sixteen or seventeen years without objection, and that plaintiff had mowed the grass there for nearly thirty years, does not raise a conclusive legal presumption that the trees were planted pursuant to a license from the municipal officers. *Gaylord v. King*, Mass., 345.

GIFT.

1. **Causa mortis.]** To make a valid gift *causa mortis* it must be made during some illness or peril, and in expectation of death therefrom, which must take place. *Parcher v. Saco and Biddeford Savings Bank*, Me., 637.
2. **Mere intention to make not sufficient.]** A mere vote taken by the trustees of a trust fund to make a gift to a party of his promissory note which they held — which in their discretion they were authorized to do — would not alone amount to a gift of the note. In order in such a case to constitute a present valid gift there must have been not only an intention to make the gift but something must have been done to execute and carry out such intention. *Hayden v. Hayden*, Mass., 1.

GUARDIAN AND WARD.

1. **Allowance — surcharge — step-father — support.]** A guardian — of children residing in humble circumstances in the country with their mother during her life and after her death with their step-father — under the advice of counsel, but without an order of court for an allowance, paid from pension money for the clothing, maintenance, and education of each of his wards, at the rate of \$1.85 per week. *Held*, under all the circumstances, the guardian should not have been surcharged with the pension-money so paid out. *Appeal of Brown*, Penn., 51.
2. **Improvements — new erections — order of court — approval by court — surcharge.]** A guardian judiciously and in good faith but without a previous order of the court, erected upon premises of his wards a shed to protect the barn-yard from winds; he also erected an ice-house. The shed was necessary and the ice-house was a great convenience. After the guardian had filed his account exceptions were filed thereto and an effort was made to surcharge him with the amounts expended by him for the improvements mentioned; the orphans' court approved of the expenditures. *Held*, that this subsequent approval by the court relieved the guardian of liability. *Appeal of Killpatrick*, Penn., 93.

HEIRS.

- Distribution of personal estate — Alabama claims.]** Personal estate of an intestate, after the payment of debts, expenses and allowances, should be distributed among the heirs living at the time of the death of the intestate. The decree of distribution of the personal estate of an intestate among the heirs should name each one and his share, and, if any have died, the share of each one so deceased should be decreed to be paid to the executor or administrator of such deceased heir. Money received upon an Alabama claim by an administrator becomes assets in his hands to be administered and distributed by him as a part of his intestate's estate; and where it is thus distributed to an executor of an heir, it would pass to the residuary legatee under the clause giving to the son of the testator "all the residue and remainder of my estate, real and personal and mixed, wherever found and however situated." *Grant v. Bodwell*, Me., 521.

HIGHWAY.

1. **Boundary line -- monuments.]** Plaintiff claimed title to the middle of an old highway which had been relocated by the county commissioners. The description in plaintiff's title deeds began as follows: "Beginning at a stake and stones on the county road," and then continued by courses and distances back to the road, and thence on the said road to the point of beginning. The location of the stake and stone was in dispute. The court charged the jury that if the land in question was a part of the old highway, and they found that the stake and stones were upon the side of the road, on the side line, then the plaintiff's deeds included no part of the highway; but if they were unable to locate the stake and stones, then that the language of the deeds was sufficient to give plaintiff title to the middle of the road. *Held* no error. *Chadwick v. Davis*, Mass., 4.
2. **Laying out of — grade — road viewers — entertaining of.]** In the absence of the record showing to the contrary, it will be presumed that, whenever practicable, a public road was laid out at proper grade. In the absence of a rule of court prohibiting road viewers from being entertained at the expense of interested land-owners; and where the proper court finds that road viewers were so entertained, but under circumstances evincing no sinister purpose or effort to unduly influence them, the proceedings will not, because of such entertaining, be set aside. *In Re Road in Denmore Township*, Penn., 271.

HUSBAND AND WIFE.

1. **Non-joinder — amendment.]** It is not error to allow an amendment by which a husband is joined with his wife in prosecuting a probate bond when the defendant has merely moved to dismiss for non-joinder. *Probate Court v. Sawyer*, Vt., 720.

2. **Separate property of married woman—onus probandi.]** When a creditor seizes property in the possession of a husband for his debt, the presumption is that it belongs to him and not to his wife; if the wife interposes a claim to the property she must, to sustain her position, establish, by clear and satisfactory evidence, that it is her property. A married woman putting money of her separate estate into the money drawer used in the management of her husband's business, does not thereby forfeit her right to receive it again either in the identical coin or notes, or in other of equal value. *Kingsbury v. Davidson*, Penn., 186.

See FALSE REPRESENTATIONS, 661; WILL, 787.

ICE.

See WATER AND WATER COURSE.

ILLEGALITY.

See CONTRACT.

INJUNCTION.

1. **Bond—fee paid to counsel.]** An injunction bond, *inter alia*, contained the following: "Shall indemnify the said . . . for all damages that may be sustained by reason of such injunction." *Held*, this did not include a fee paid to counsel. *Sensenig v. Parry*, Penn., 273.
2. **Encroaching on town common.]** Plaintiffs and defendant were adjoining owners of lands and dwelling-houses fronting on a town common. Defendant undertook to inclose a large part of the common for his own use. The common added greatly to plaintiffs' property. *Held*, that plaintiffs were entitled to an injunction restraining defendant from proceeding. *Wheeler v. Bedford*, Conn., 508.
3. **Levy on wife's separate estate for husband's debt.]** A court of equity will not restrain by injunction a creditor from levying on land in which he avers that his debtor has an interest, but a sale of the wife's land by the husband's creditor may be enjoined where the title of the wife is clear. *Appeal of Walker*, Penn., 68.
4. **Sale of good-will—soliciting old customers.]** Where one of two partners sells out to the other the good-will merely of the business, the vendee only secures the right to conduct the old business at the old stand. In the absence of express agreement, one who sells out his interest in a business, and its good-will, may lawfully establish a similar business where he chooses, and by advertisement, circular, card and personal solicitation, invite all, including customers of the old firm, to trade with him. But he should not lead any one to believe that what he offers for sale is manufactured by the old firm, or that he is the successor of the old firm, or that his vendee is not carrying on the business formerly conducted by the old firm. *Cottrell v. Babcock Printing Press Manuf. Co.*, Conn., 463.
5. **A complainant is not entitled to a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled.** *Mandeville v. Harman*, N. J., 752.

INNKEEPER.

Injury to mare.] An innkeeper is, like a common carrier, an insurer of the goods of his guest. An innkeeper is liable in damages for injury to the beast brought by a traveler, and provided with stabling in the stables attached to his inn, even though the traveler had no personal entertainment at the inn, but lodged and supped elsewhere. Such traveler is a guest of the inn. Livery-stable-keepers are under different and less weighty responsibilities than innkeepers, as persons residing near to and using the former are not entitled to the same protection as are travelers on a journey. *Russell v. Fagan*, Del., 828.

INSANE PERSON.

Maintenance of—remedy—repeal—liability—discharge.] The act of April 8, 1861, providing that the city or county from which an indigent insane person is sent to the State Lunatic Hospital shall be liable to the trustees

of that institution for the maintenance of such poor person, and shall have remedy over against the proper township, etc., in so far as it gives a remedy for the county over against the district, is not repealed by the act of June 18, 1883 — Pamph. Law, 92. Where the county is liable with remedy over under the act of 1861, the release of it in part by the act of 1883 is a discharge *pro tanto* of the liability of the district. *Directors, etc., v. Trustees of State Hospital for Insane, Penn.*, 107.

INSOLVENCY.

1. **Equity court.]** The supreme judicial court has full equity jurisdiction, in all insolvent matters, to revise the proceedings, orders and decrees of the insolvent court where no other remedy is given by the statute. *Bird v. Cleveland, Me.*, 658.
2. —.] Its jurisdiction, however, is supervisory rather than concurrent with the insolvent court. *Id.*
3. **Assignee — dividend.]** For the neglect of an assignee to declare a dividend where it is his duty so to do, application should be made in the first instance to the court having original jurisdiction of the insolvent proceedings. *Id.*

INSURANCE.

1. **Insurable interest — debtor and creditor — speculative insurance — wagering policy.]** Although a policy of life insurance is not like a fire or marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of the death, yet the assured is not entitled to his action on the policy unless he had as the basis of his contract an interest in the subject-matter insured. An insurable interest is not necessarily a definite pecuniary interest, such as is recognized and protected at law, it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, such as will reasonably justify a well-grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life. A wife has an insurable interest in the life of her husband, and the husband in the life of his wife, a single woman under contract to marry in the life of her intended husband, a parent in the life of a child, and a child in the life of a parent, a brother in the life of a young unmarried sister whom he supports and stands *in loco parentis* to, a brother in the life of an unmarried sister whom he maintains in his family under circumstances tending to constitute the relation between them of debtor and creditor, and a creditor in the life of his debtor. Where A. has an insurable interest at the time an insurance is effected upon the life of B. for his benefit, the fact that such interest ceases to exist at or prior to the death of B., will not, as against the personal representatives of B., deprive A. of the right to receive the insurance money. If the amount of insurance placed upon the life of a debtor be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, the transaction is open to the imputation of being a speculation or wager upon the hazard of a life. *Appeal of Corson, Penn.*, 731.
2. **Life — new policy — forfeiture.]** Defendant issued a policy containing the words conspicuously printed thereon: "Non-forfeiture policy." One of the provisions of the policy was that if, after two annual premiums had been paid, default was made in the payment of premiums, the company, upon surrender of the policy, would issue to the assured a new policy for the value acquired under the old one at the time of the default, "subject to any notes that might have been received on account of premiums;" and further, that the holder of the new policy should not be subject "to any subsequent charge except the interest annually on all premium notes remaining unpaid on this policy." *Held*, that default in the payment of interest on the premium notes by the holder of the new policy forfeited all claim under said policy. *People v. Knickerbocker Life Ins. Co., N. Y.*, 289.
3. **Non-forfeitable policy.]** A non-forfeitable life policy for a term of ten

years, for \$1,000, was issued to plaintiff and contained a provision that the policy should lapse upon the non-payment of any annual premium and of interest annually in advance on any outstanding premium notes which might be given; but that, after the payment of two annual premiums, in case of default, the company would convert the policy into a paid-up one for as many tenth parts of the sum originally insured as there had been annual premiums paid when the default was made, provided application for such conversion was made within one year after the default. In an action to recover the amount due on the policy, defendant answered that the plaintiff had paid two annual premiums, part in cash and the remainder in premium notes which were outstanding; that he had made default in the payment of the next premium and applied to the company for a paid-up policy; that the company thereupon indorsed upon the policy that it was to pay \$200, "subject to the terms and conditions expressed in the policy;" that thereafter plaintiff paid the interest on the outstanding premium notes annually in advance for two years, but no longer. *Held*, (1) that the indorsement upon the policy was equivalent to a paid-up policy; (2) that the policy as thus indorsed was to be construed as forfeitable upon the non-payment of the interest on the outstanding premium notes. *Holman v. Continental Life Ins. Co., Conn.*, 18.

4. **Payment of premium.]** The policies issued by a fire insurance company contained the following stipulation: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." A., an agent of the company, by an arrangement with it, had power on receipt of a policy to deliver it and collect the premiums, the company looking to him for the premium or the return of the policy; upon delivery of the policy he was obligated to pay the premium as his own debt; he kept an account with the company and charged himself with the premiums as the policies were delivered, and took credit with any remittance he might make. *Held*, the implication would arise, that the absolute requirement of the policy as to the actual prepayments of the premiums by assured receiving policies through A. had been dispensed with, and the obligation of A. to pay the premium was in effect the payment of it by the assured. *Elkins v. Susquehanna Mutual Life Ins. Co., Penn.*, 586.
5. **Wife's policy — assignability.]** A policy issued to a wife on her husband's life provided that in case of the death of the wife before her husband the amount should be payable after her death to her children The wife, her husband uniting therein, assigned the policy. In an action by the assignee to recover the amount due on the policy the wife was made a party and she resisted payment on the ground that she being a married woman, having children who had an interest in the policy, the assignment thereof was void, and further that the assignment was not executed in conformity with the statute. *Held*, that under the statute — act 1879, chap. 248 — the assignment was valid. Under the act 1879, chapter 248, the joining in of the husband in an assignment of the policy by the wife is a sufficient consent in writing thereto; she having survived her husband, the contingent interest of the children had not vested and she was absolute owner. *Anderson v. Goldsmith, N. Y.*, 575.

INTOXICATING LIQUORS.

1. Under Public Statutes, chapter 100, forbidding the sale of liquor to an intoxicated person, it is no defense that the seller did not know, at the time of making the sale, that the buyer was intoxicated. *Commonwealth v. Julius, Mass.*, 487.
2. **Juror — qualification.]** A member of an association formed for the express purpose of prosecuting violations of the liquor law, and which employs agents for that purpose, is not a competent juror to sit on the trial of a defendant for such a violation, when the complainant and instigator of the prosecution is an agent of the association. *Commonwealth v. Moore, Mass.*, 877.
3. **Intoxicating liquors — evidence.]** A complaint charging defendant, who had a license of the first class, with selling intoxicating liquors "with-

- out any authority of law," is sufficient where the sale was made after eleven o'clock at night, or over a public bar. Defendant's admission that he was the proprietor of the place where the liquor was sold and had a license of the first class to do business there is evidence for the jury that the sales were made by him or by his authority. *Com. v. Chadwick*, Mass., 10.
4. **Evidence.]** The application made by the defendant for a license to sell liquors at the place described in the complaint is competent evidence to show that he kept the place. *Commonwealth v. Andrews*, Mass., 849.
 5. **Evidence of threats to burn building — practice — alibi — verdict — new trial.]** On the trial of an indictment for arson, evidence of threats by the accused to burn the same building he is charged with burning is admissible. When the presiding justice in his charge misstates a fact, or that it was not controverted when in truth it was, his attention should be called to the mistake before the jury retire. An *alibi* is completely established only when it is shown that the defendant was so far from the scene of action as to render it impossible that he could have participated. Sending blank forms of a verdict to the jury after twelve o'clock Saturday night, with instructions to seal up their verdict when agreed, is not a sufficient cause for a new trial. Nor is any irregularity in receiving, recording and affirming the verdict a cause for setting it aside, when the parties were present and made no objections at the time. *State v. Fenlason*, Me., 644.
 6. **Indictment — nuisance — intoxicating liquors.]** An indictment for liquor nuisance, under a statute declaring places "used" for illegal sale common nuisances, is not sufficient when it charges the defendant with keeping a building "resorted to" for illegal sale. *State v. Dodge*, Me., 366.
 7. **Pleadings.]** A complaint which charges a person with transporting intoxicating liquors from place to place in this State, but does not allege an intent that the same are to be sold in this State, is bad. *State v. Murch*, Me., 648.

JOINT-STOCK COMPANIES.

Actions between members.] *Assumpsit* cannot be maintained by one member of a joint-stock company against another member of the same company who is in possession of the company property for the use of his proportional part of such property. *Whitehouse v. Sprague*, Me., 649.

JUDGMENT.

1. **Scire facias to revive — defense — married woman — coverture — affidavit of defense.]** On a *scire facias* to revive a judgment, the merits of the original judgment cannot be inquired into so as to admit a defense which might have been set up in the original suit. A judgment was entered upon a judgment bond signed by A. and also by B., the latter a married woman; the fact of her coverture was not, however, placed upon the record; later, the defendants signed an *amicable scire facias* to revive; later, the husband of B. died, and, later, a *scire facias* was issued to revive the judgment again; to which B. filed an affidavit of defense, alleging that she was a married woman at the time of executing the judgment bond, and she also entered a plea of coverture, whereupon a motion was made to strike off the plea and enter judgment for want of a sufficient affidavit of defense; this the court ordered to be done. *Held*, no error. *Conlyn v. Parker*, Penn., 188.
2. **Where a justice of the peace has jurisdiction of the subject-matter, and of the parties, and no party to the record makes any objection, the regularity of his judgment cannot be questioned in a collateral proceeding.** *County of Cumberland v. Boyd*, Penn., 218.

JUDICIAL SALE.

1. **Judicial sales fairly carried into execution should be sustained when made under the decrees of courts possessing general jurisdiction of the subject.** *Levan v. Millholland*, Penn., 822.
2. **Setting aside for inadequacy of price — revoking decree.]** Mere inadequacy of price is not a good cause for which to set aside a sheriff's sale. A court, after the acknowledgment of a sheriff's deed, upon application, and

upon sustained allegations of inadequacy of price, and an offer of a responsible bidder to bid twenty-five per cent more, decreed that a sheriff's sale of real estate be opened, the acknowledgment of the sheriff's deed be rescinded, the deed be canceled and the purchase-money be returned, etc.; later, being doubtful as to whether it could open the sale after the acknowledgment of the deed for the mere purpose of receiving additional bids, or for any other cause than fraud, especially as no application had been made until after the expiration of the six days, within which the sheriff could legally sell under the execution in his hands, it ordered a reargument, after which it revoked its former decree. *Held*, no error. *Weaver v. Lyon*, Penn., 122.

JURISDICTION.

- Debt or damages demanded.]** A statute giving trial justices exclusive jurisdiction in civil actions "when the debt or damages demanded do not exceed \$20" does not preclude the supreme judicial court from taking jurisdiction of an action on a promissory note for \$12, the *ad damnum* being stated at \$25. *Cole v. Hayes*, Me., 669.

See INSOLVENCY.

JUROR.

See CRIMINAL LAW, 324, 461.

LANDLORD AND TENANT.

1. **Distress — claim.]** A landlord accepted drafts on his tenant in satisfaction of rent due; the accounts between them were closed and receipts given. *Held*, the right to distrain no longer existing, the landlord could not successfully claim rent out of the proceeds of a judicial sale of the tenant's property. *Appeal of Cambria Iron Co.*, Penn., 781.
2. **Lease — title — onus.]** A lessee as a general rule cannot impeach or in any way call into question the title of his landlord, except he has been guilty of fraud, misrepresentation or unfair dealing, and the exception is more stringently applicable where a tenant in possession takes the lease. If one in possession takes a lease for the occupied premises from one having no title or right of possession, he may resist proceedings to turn him out, but it rests upon him to show that he accepted the lease in mistake, or was induced to accept it by some fraud or misrepresentation. *Ward v. City of Philadelphia*, Penn., 764.
3. **Terre-tenant — deed — mortgage — notice — record — title — defense — evidence — mortgagee — notice.]** A terre-tenant in a general sense is one who is seized or actually possessed of lands as the owner thereof. In a *scire facias sur mortgage* or judgment, a terre-tenant is in a more restricted sense one other than the debtor who becomes seized or possessed of the debtor's lands, subject to the lien thereof. Those only are terre-tenants therefore in a technical sense, whose title is subsequent to the incumbrance. A. conveyed on February 12, 1878, to E., who conveyed to B., the wife of A., certain real estate, but the deeds were not recorded until April 4, 1881, the possession remaining unchanged; on January 21, 1881, A. gave a mortgage upon the so conveyed premises to C., who, without notice of the deed from A. and the deed to B., had the mortgage upon the day of its delivery recorded. *Held*, as to C., the deed to B. was fraudulent and void under the act of March 18, 1775. A. and B. on May 22, 1883, by a deed which upon its face purported to convey the title of B., conveyed the premises to D. *Held*, D. took title subject to the mortgage, and further the deed carried all the title of A. in the premises. In a *scire facias* upon the mortgage, *held*, that it was proper to name D. as a terre-tenant. *Held*, also, that under the plea that the mortgage was not then and never was a lien upon his land, it was competent for him to show that although the deed to B. was not recorded, the mortgagee either had actual notice or was somehow affected with notice of it. *Hulett et al. v. Mutual Life Insurance Co.*, Penn., 775.
4. **Varying contract for rent — consideration.]** It is competent for a landlord and tenant to vary the contract for rent, and the use and occupation by

the tenant under the modified contract makes a good consideration for it. *Hanson v. Hellen, Me.*, 357.

5. **Operating for oil—diligence.]** A. leased to B. at one-eighth royalty the right to sink oil wells on a certain farm; the writing between the parties contained the following: "The party of the second part covenants and agrees at all times to permit the party of the first part, or his agent, to enter the premises for the purpose of inspecting the operations, examining the books, and ascertaining how much oil has been pumped, or other product obtained, and also to continue with due diligence, and without delay, to prosecute the business to success or abandonment, and if successful, to prosecute the same without interruption for the common benefit of the parties aforesaid." *Held*, the agreement imposed on the assigns of B. an obligation to use due diligence in operating on the premises. *Bradford Oil Co. v. Blair, Penn.*, 265.
6. **Tenancy from year to year—tenancy at will.]** A., by a lease under sale, acknowledged and recorded, demised to B. an iron furnace; the writing, *inter alia*, contained the following: "The lease or grant to continue as long as the said party of the first part receives a revenue of no less than \$1,000 a year royalty on account of iron made or on account of iron to be made, and the said party of the first part further agrees that he will at any time within three years of this date sell and convey . . . and the party of the first part further agrees that he will allow one-half of the expense of putting the furnace in working condition, provided, however, that his half shall not exceed \$1,250. In consideration whereof the said party of the second part promises, agrees and binds himself to pay to the party of the first part the sum of fifty cents per ton of two thousand two hundred and sixty-eight pounds for each and every ton he may make at said furnace. Payments to be made at the furnace office on or before the fifteenth day of each month. . . . The amount to be expended in putting the furnace in working order, the half of which as heretofore stated is not to exceed \$1,250, is to be paid out of the first accruing rent. It is expressly understood that in case the party of the second part fail to pay to the party of the first part a royalty of at least \$1,000 a year, that this lease shall, at the option of the party of the first part, become null and void. . . . Should this lease terminate from any cause, the said party of the second part agrees to leave the property in as good condition as when put in blast, wear and tear excepted. In case of destruction by fire or storm, necessitating the stoppage of the furnace, the repairs of the same will be a matter of mutual agreement. In case of stoppage, the party of the second part agrees to furnish a watchman, or protect the property by insurance." *Held*, a lease from year to year. *Heck v. Borda, Penn.*, 728.
7. **Wages—preference—notice—landlord—sheriff.]** Under the act of April 9, 1872, and the supplement of June 12, 1878, wages have a preference of payment over the claim of the landlord for rent, provided notice is given of the nature and amount of the claim before actual sale of the property levied upon. Such notice to be given to the landlord in case he has proceeded by distress and made a levy; or to the sheriff when he has levied by virtue of a writ directed to him. *Appeal of the Riddelsburg Coal and Iron Co., Penn.*, 778.

See GRANTOR AND GRANTEE, 341.

LEGACY.

See WILL, 376.

LEVY.

Land sold at sheriff's sale—description.] Land was levied upon and sold at sheriff's sale. *Held*, that what was covered by the levy was to be ascertained by the language used and by the adjoiners called for, points of the compass specified yielding to adjoiners actually intended and called for. *Stroup v. McCloskey, Penn.*, 170.

LIBEL AND SLANDER.

1. **Whether libelous per se — when question for court.]** Ordinarily in actions for libel it is for the jury to say whether or not there has been a publication referring to the plaintiff, whether or not it is malicious and false, and whether or not the sense and meaning are as charged. But if the publication is expressed in terms so clear and unambiguous that no circumstances are required to make it clearer than it is of itself, the question of libel or no libel is one of law for the court. The publication in this case — set out in the opinion — *held* not to be libelous *per se*; and no special damage having been shown, plaintiff was not entitled to recover. *Donaghue v. Gaffy*, Conn., 883.
2. **Evidence.]** On the trial of the defendants for libel in charging the misappropriation of moneys in connection with the comptroller's office of the city of Troy, the evidence tended to show that the libelous article was written by one L.; that it was published in the first edition of the defendants' newspaper; that immediately after a question arose as to the truthfulness, and thereupon L. and one H. were sent to the comptroller's office to ascertain if the charges were true; that they returned and reported them false, but that defendants refused to publish a retraction. The testimony of L. and H. in regard to going to the comptroller's office was contradicted by the defendants, and they denied any knowledge of the article until it had been published in the second edition. The prosecution then called one D., who was a clerk in the comptroller's office at the time, and proved by him that, on the day testified to by L. and H., they came to the comptroller's office and looked over the books. The testimony of D. was objected to by defendants as incompetent, and as an attempt on the part of the people to corroborate their own witnesses. *Held*, that the evidence was properly received as bearing upon the main issue, and as constituting a part of the *res gesta*. *People v. Sherman*, N. Y., 429.
3. **A. circulated a report about B., a single woman, to the effect that she had vermin upon her person which she had contracted from her lover. Held,** the words used in circulating the report were actionable. *Stoke v. Miller*, Penn., 275.

LICENSE.

1. **Nuisance not maintainable under.]** A license from a county board of health and vital statistics authorizing the licensees to carry on the business of manufacturing fertilizers will not protect the manufacturers from prosecution for maintaining a public nuisance growing out of the business. *Garrett v. State*, N. J., 414.
2. **Use of fire plugs — revocation.]** A water company for supplying the citizens of a borough with water permitted the municipality to draw gratuitously from fire plugs attached to the mains of the company; this privilege was exercised for a long time. *Held*, that the permission granted was not rendered irrevocable by such exercise thereof. *Borough of Carlisle v. Carlisle Gas and Water Co.*, Penn., 154.

LIEN.

1. **Priority — mortgage or judgment.]** By the common law the priority of liens, whether by mortgage or judgment, is governed exclusively by the date of their acquisition, the first in order of time standing first in order of rank. An unregistered mortgage executed by an ancestor, though prior in date to a judgment recovered against his lien in the ancestor's life-time, does not, on the ancestor's death, become void under the twenty-second section of the statute concerning mortgages. A mortgage and judgment, in order to stand in the relation of being prior and subsequent to each other, must embrace or cover the same land. *Westervelt v. Voorhis*, N. J., 45.
2. **Preferred labor claim — notice.]** A notice was served upon the sheriff of Schuylkill county that the party notifying claimed a preferred lien upon certain property levied upon under execution, and that the amount of such lien was payable out of the proceeds arising from the sale of the property. The

notice, which was intended to secure payment of a labor claim, failed to set forth any business that would come within the enactment; or what was the nature or kind of labor or service for which a preference was claimed; or that the property levied upon was such as was used in or about or in connection with the business of the defendant in the execution. *Held*, that the notice was of no validity under the acts of 1873 and 1883 against the plaintiff in the execution. *Appeals of Zealberg and Mayer*, Penn., 112.

See PARTITION, 771.

LOGS.

See TROVER, 515.

LOST RECORDS.

Secondary evidence.] When the original complaint and warrant, after being transmitted from the police court to the superior court, have been lost, secondary evidence of their contents may be given on the trial in the superior court. *Easdale v. Reynolds*, Mass., 628.

MANDAMUS.

Corporation — stockholder — books — inspection — practice.] B., who was a stockholder to a considerable amount in a corporation that was prosperous, but that had declared no dividend for nine years, was desirous of making a reasonable personal inspection of the books and papers of the establishment, in order that, with the aid of a disinterested expert, he might make extracts such as would be required in preparation of a bill in equity, he proposed filing for relief. The privilege was denied him. *Held*, that he could successfully invoke the aid of a *mandamus* to examine such books and papers of the company as were in existence, and contained the desired information. *Phania Iron Co. v. Com., ex rel. Sellers*, Penn., 601.

See MUNICIPAL CORPORATION.

MARRIAGE. •

1. **Deed of separation — when not set aside.]** A husband found that his wife's affections had been alienated, and a deed of separation was drawn up and executed. Afterward the wife filed a bill in equity against the husband, alleging that she had been unfairly treated as to the amount of money settled upon her by the deed of separation, and praying for a decree that the deed be declared void and delivered up to her to be destroyed. *Held*, that the court had committed no error in refusing the relief prayed, as by her misconduct the wife had forfeited all right to consideration at the hands of her husband. *Borckman's Appeal*, Penn., 218.
2. **Evidence — reputation and cohabitation — illicit relation.]** Cohabitation and reputation alone are not equivalent to a marriage, they are merely circumstances from which it may sometimes be presumed, and this presumption may be rebutted by other facts and circumstances. When the relation between a man and woman has been of an illicit character in its commencement, cohabitation and reputation are not sufficient to establish a marriage, there must be proof of subsequent actual marriage; this, because the unlawful relation is presumed to have been continued. Where a woman lives with B. as his mistress, and subsequently and during the life of B. lives with C. in the same manner, and upon the death of C. endeavors to establish with him the relation of husband and wife, because of reputation and cohabitation, reputation of marriage with B. based upon cohabitation with him and upon statements made by him, would tend to strengthen the possibility that her relations with C. had been formed meretriciously. *Reading Fire Ins. and Trust Co., Guardian, etc., v. Riegel*, Penn., 818.
3. **Separate estate of wife — fraud.]** A. carried on business, became insolvent, and was sold out by the sheriff. B., his wife, then continued the business in the same shop and with his name still on the sign. She gave him a sum of money out of her separate estate with which he bought a horse to be used in the business. C., a constable, levied on and sold the horse as the property of A. in pursuance of an execution against him. In an action for

damages by B. against C., *held*, that B.'s method of conducting her business did not constitute a legal fraud and that she was entitled to recover. *Tibbins v. Jones et al.*, Penn., 324.

4. **Suing wife for services — act 1872, chap. 270.]** A husband and his wife by power of attorney duly executed, appointed appellant their attorney to represent them in the settlement of an estate. *Held*, that *assumpsit* would not lie against the wife — under act 1872, chap. 270 — to recover a reasonable compensation for services rendered, the remedy, if any, is by proceeding in equity against her separate estate. *Duckett v. Jenkins*, Md., 853.
5. **Interpleader — proof — feme sole trader — act of 1872 — services — evidence.]** Where a married woman, who has under the act of 1872 had secured to her her separate earnings, purchases property after her husband has become insolvent, and makes the purchase on the credit of her separate estate, or pays for the property with her separate funds not derived from her husband, if she would, in a feigned issue under the sheriff's interpleader act, successfully prosecute her claim to the property, she must prove her right by evidence free from uncertainty and doubt. Although the act of 1872 does not confer on a married woman all the privileges of a *feme sole* trader, it, nevertheless, gives her the right to engage in business, and for indebtedness contracted therein gives her creditors the right to sue her without joining her husband in the suit. While it stops short of making her a *feme sole* trader in all respects, it protects her separate earnings and property from liability for the debts of her husband. It does not permit her to buy property for him under cover of her name, nor to fraudulently conceal his property to the injury of his creditors, yet it empowers her to protect her own property against them when not acquired in fraud of their rights. The fact that a husband assists in managing and conducting the business of the wife carried on in her name is, on the trial of a feigned issue under the sheriff's interpleader act in which the wife is plaintiff, evidence proper for the jury to consider in determining the good faith of the wife's claim of property; if, however, her separate right to the property be found to exist, his services in conducting her business cannot defeat or destroy her title to the property. Known integrity and business qualifications of a wife may be recognized as an element in obtaining credit, yet in the absence of separate property of the wife they are insufficient in themselves alone to protect against the creditors of her husband property which she may claim to have purchased. In civil cases, a fact need not necessarily be proven beyond a reasonable doubt. It may generally be established by preponderating evidence; Therefore, were a married woman plaintiff in a feigned issue under the sheriff's interpleader act to try the right to property levied upon as the property of the husband, to show by clear and satisfactory preponderating evidence that she purchased the property in contention on the credit of her separate estate, she would be entitled to recover. *Spring v. Laughlin*, Penn., 396.
6. **Probate bond — plea in abatement.]** When a married woman prosecutes a probate bond, the defect, if any, arising from the fact that the husband's name is not indorsed with hers upon the writ as prosecutor, can be reached only by plea in abatement, not by motion to dismiss. *Probate Court v. Sawyer*, Vt., 720.

MASTER AND SERVANT.

1. **Claim for services — statute of limitations.]** Plaintiff's claim against the estate of the deceased was for wages for housework or as house-keeper for deceased, covering a period of about forty years. Plaintiff proved two payments on account of such services, one in the spring and one in the fall of 1879. There was no proof of an express agreement as to the time or measure of compensation, or of any usage in such a case. *Held*, that it was to be taken as a general hiring, but that the law would not imply that payment was to be postponed until the end of the service; and that the statute of limitations precluded a recovery for any services rendered more than six years before the payment made in the spring of 1879. *In re Application of Gardner*, N. Y., 822.

2. **Duty as to rules for protection of employees.]** It is the duty of a railroad company to make and promulgate rules, which, if faithfully observed, will give reasonable protection to its employees, and whether it is negligent in that respect in a given case is a question for the jury. *Abel v. Prae, etc., of Delaware and Hudson Canal Co.*, N. Y., 481.
3. **"Fellow servant" — liability of master for injury to servant.]** To constitute one a fellow servant within the meaning of the law that precludes a recovery from the employer in damages for a personal injury inflicted through the negligence of a fellow servant, it is not necessary that the person occasioning the injury and the one injured be at the time engaged in the same particular work; it is sufficient if they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes. A master is liable for the negligence of his agent or subordinate only when the master has placed the entire charge of his business, or a distinct branch of it, in the hands of such agent or subordinate, exercising no discretion or oversight of his own; the agent or subordinate must have a general power and control over the business, not a mere authority to superintend a certain class of work or a certain gang of men. *New York, Lake Erie, etc., Railroad Co. v. Bell*, Penn., 124.
4. **Usual risks.]** The rule that where an employee serves with full knowledge and appreciation of the danger, he takes upon himself the risk of injury, from neglect of the master to suitably protect machinery, applied. *Shaw v. Sheldon*, N. Y., 281.

See MUNICIPAL CORPORATION.

MECHANIC'S LIEN.

1. **Incidental changes in building.]** Work done in making slight changes in a building, which is merely incidental to work or personal property put up in the building, is not within the contemplation of the mechanics' lien act. *Curneo v. Lee*, Mass., 888.
2. **Locality of the building — description.]** A building against which a mechanic's lien was filed was described in the claim as being "on a lot or piece of ground situate in Delaware township, Northumberland county, State of Pennsylvania, on the south side of public road leading from McEwensville to Watsonstown." In point of fact the building was erected upon a road, by way of which the distance from McEwensville to Watsonstown was about ten miles, whereas there was another highway running between the two towns by way of which their distance apart was but two and one-half miles. *Held*, there could be no recovery upon the claim filed that would bind the building sought to be bound. The claim was filed for material furnished for and about the erection and construction of a building. "Size of house of brick 28x24 feet, two stories high, with kitchen attached 16x16 feet and with L used for bedrooms 9x16 feet, with curtilage appurtenance about one acre of ground." The brick house was an old structure, the roof of which was renewed; the kitchen was new. *Held*, the lien should have been filed against the new addition. *Linck v. Wolf*, Penn., 141.

MINES AND MINING.

1. T. held a lease of a mine for a term of thirty years; he agreed with H. and his assigns to furnish ore therefrom, to him or them in certain quantities, monthly, and in case of his failure so to do, he or they might enter and secure the ore, charging T. with all costs, until T.'s inability or failure should be satisfactorily removed. T. failed to deliver ore; H. and his assigns threatened to enter; T. filed a bill to enjoin them, and for an account; the court let H. and his assigns into possession; now T. files supplemental bill and asks to be restored to possession, alleging that he can now furnish ore under the contract; he also asks for an account for waste, and for a manager; defendants insist that T. forfeited his right to re-enter by his misconduct and bad faith; also insists that this court has not jurisdiction; *held*, that T. is entitled to the possession, no bad faith appearing; *held*, also, that he is not entitled to an account for waste, nor to a manager; and *held*, that this

court has jurisdiction. *Trotter v. Heckscher and Lehigh Zinc and Iron Co.*, N. J., 757.

2. The complainant agreed to mine and deliver to the defendants ore containing twenty-six per cent of oxide of zinc, which he did, and which they accepted, without objections on account of moisture in the zinc produced therefrom by the defendant, until after the expiration of three years. *Held*, that the defendants are estopped. *Held*, also, that the complainant was not accountable for the moisture which might appear in the zinc, as assayed by defendants, since he only agreed to deliver ore containing a certain percentage of zinc, no other condition being agreed upon by the contract. *Trotter v. Heckscher*, N. J., 550.

See TRESPASS.

MORTGAGE.

1. **Interest — stakeholder not chargeable with.**] The defendant and his wife were each seized of an undivided half of certain premises. The husband executed a mortgage on the same to the plaintiff in which he covenanted that he was seized in fee of the entire premises. In this mortgage the wife joined only in releasing her dower. Some years after, the plaintiff, discovering that the wife owned a one-half interest in the premises, procured from her a quit-claim deed of her interest, and, at the same time, gave her back an agreement or instrument of defeasance by which it agreed that in case the premises were sold to pay the husband's mortgage, it would pay to her the surplus. *Held*, that the quit-claim deed and the agreement back constituted a mortgage of the wife's undivided half of the estate; that the two mortgages were separate and distinct conveyances of their respective interests, and that the fact that it was the intention of all parties that the whole property should be included in the mortgage given by the husband, and that the money borrowed thereon had been expended in improving the common property, did not tend to make them joint mortgages. A mere stakeholder who stands ready to pay to whichever one of the claimants is legally entitled to the money is not, unless special circumstances require it, chargeable with interest. *Savings Bank v. Pool*, Mass., 867.
2. **Payment.**] A mortgagee held two mortgages, one of real and the other of personal estate, to secure the payment of the same debt. He foreclosed the chattel mortgage and took possession of the property converting it to his own use. The property so converted exceeded the amount of the debt. *Held*, that there was no longer an existing debt to uphold the mortgage on real estate. *Androsoggin Savings Bank v. McKenney*, Me., 362.
3. **Power of sale — foreclosure — redemption — tender.**] The mortgagor of a "power of sale mortgage" may bring a bill in equity to redeem after the mortgagee has commenced advertising the premises for sale for condition broken, and before the sale actually takes place, notwithstanding that up to that time he has made no tender of the amount due on the mortgage. *Way v. Mullett*, Mass., 445.
4. **Priority of lien — latent equity.**] The lien of a mortgage in the hands of an assignee thereof, who has taken the same without notice of an unrecorded lien upon the premises for the purchase-price thereof, is prior to the latent equity, notwithstanding his assignor, the mortgagee, had knowledge of the lien, and a large part of the consideration for the assignment was an existing indebtedness. *Sprague v. Drew*, N. J., 402.
5. **Redemption — laches.**] A party entitled to redeem under a mortgage may, after filing his bill for that purpose, lose his right to redeem by delay in prosecuting the suit. *Bancroft v. Sawin*, Mass., 893.

See CONTRACT, 387; EXEMPTION, 119; RAILROAD, 241.

MUNICIPAL CORPORATIONS.

1. **Comptroller — countersigning warrant — discretionary powers — mandamus — contract — bills of assessment — payment.**] Where a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers according to his or its discretion,

mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though in fact the decision may have been wrong. *Dechert v. Commonwealth, ex rel. Smart*, Penn., 590.

2. Employees — negligence of insurance patrol — respondeat superior.]

The Insurance Patrol of the City of Philadelphia, an incorporated body acting as a salvage corps in conjunction with the regular city fire department, sent A. and B., two of its employees, to take away a number of tarpaulins left on the upper floor of a building that had been damaged by fire. They took with them a patrol wagon, which A., the driver, backed against the curb in front of the injured building, then stationing himself at the horse's head. B. in the meanwhile went up to throw the tarpaulins out of the windows to the sidewalk. Whilst engaged throwing them out in bundles, one lot struck C., a passer-by, and caused such bodily injury as to result in his death, whereupon his widow and child brought suit against the Insurance Patrol and A. and B., to recover damages. On the trial there was no evidence that A. had been stationed below to give notice of the danger to passers-by, or that A. and B. had divided the danger between them. Neither was there any proof that the Insurance Patrol had been invested with a public function which it exercised for the public good as a public agent, and not for private gain. The lower court entered a nonsuit as to A. and also as to the Insurance Patrol, and the jury rendered a verdict in \$25,000 against B. The court refused to take off the nonsuits entered, whereupon the case was carried to the supreme court, and the refusal to take off the nonsuits was assigned for error. *Held*, the lower court was right in refusing the motion as to A. *Held*, also, that if the Insurance Patrol claimed to be such a public agent as was exempt from liability for the negligence of its servants, it was bound to exhibit and establish the ground of its exemption. *Boyd v. "Insurance Patrol of the City of Philadelphia,"* Penn., 886.

3. Negligence — contractor.] A property-owner obtained the consent of a municipality to his digging a trench and laying water-pipe in one of the public streets to supply his premises with water; he then contracted with C. to do the work for a gross sum; D. fell into the trench dug by C. and was injured. *Held*, the remedy of D., if any, was against C. *Borough of Susquehanna Depot v. Simmons*, Penn., 57.

4. Paving — rural property — estoppel — verdict — mistake — bill of assessment — contractor — property-owner — defense.] A. who owned property in Philadelphia, fronting on Sixty-third street, with other owners, signed a writing expressive of a desire to have the cart-way of the street in front of his property paved. After councils had commenced taking action, the property-owners presented protests against any legislation authorizing the paving, on the ground that it was premature, inexpedient and unnecessary, and because they did not want the character of pavement it was proposed to put down. Later and after the legislation had been effected, the contract awarded, and the work of paving commenced, some of the owners warned the contractors that as protests had been presented, and as the roadway was private property, they would do the work at their own risk. After the paving had been completed the contractors endeavored to collect the cost of placing it in front of the property of A., by proceedings upon a municipal claim filed therefor. Upon the trial A. set up for the first time the defense that his property was rural and not subject to a *per foot* frontage assessment such as had been resorted to in order to establish the proportion due from it for the paving. *Held*, he was estopped from making the defense. A contractor for paving a street, who received from the municipality payment in the shape of bills or assessment against abutting properties, and who performs his work so defectively as to be worthless, has no right to recover in an action against the property-owner, and the latter is not precluded from defending, because he is not a nominal party to the contract. If the work has been substantially done as contracted for, answers the intended purposes, but in some minor particulars which do not materially affect its usefulness the contractor has failed, then the property-owner may have deduction for such failure. A mistake in the amount of a verdict may be corrected before

the verdict is recorded and the jury discharged. *Pepper v. City of Philadelphia*, Penn., 738.

NEGLIGENCE.

1. **Contributory — attempting to board moving train.]** One of the defendant's trains, on its elevated railway, had reached and was about leaving the Chatham square station, on the Second avenue line, on the evening of December 9, 1881, when the deceased, with other persons, hastened from another train to get on board. As they came up running for that purpose, the gate of the car was closed, and the train started to leave the station. It was moving very slow, but with constantly accelerated speed, when two persons, running in advance of the deceased, pushed open the closed gate and boarded the car. The deceased also attempted to get on, but at that moment the conductor, while the deceased having one foot on the platform and his hands grasping the stanchions of the car platform was stepping on the car, again closed the gate. Deceased's foot was caught by the gate so that he was carried along by the moving car, until struck by a projecting water-pipe, at the north end of the station, by which he was knocked from the car upon the track below and fatally injured. *Held*, that plaintiff was guilty of contributory negligence, and a nonsuit was properly directed. *Solomon v. Manhattan Railway Company*, N. Y., 276.
2. **Damages — railway company — nonsuit — law and fact.]** A female passenger in a street car in attempting to get out whilst carrying upon one arm a sleeping child, slipped upon some ice that had formed upon the step, and falling received serious injuries. In an action against the company for damages it was shown that the quantity of ice upon the step was "more than would be caused by persons getting in and out," and further, that it had not stormed upon the day of the accident, but on the immediately preceding one it had; further, that whilst there was ample seating room in the car for more passengers, yet two were allowed to stand upon the rear platform beside the conductor, the presence of one of whom prevented B. from taking hold of the handle to be used as an assistance for persons getting on and off. The common pleas entered a nonsuit, and refused to take it off. *Held*, this was error, as the evidence of negligence was sufficient to send the case to the jury. *Nestle v. Second, etc., Passenger Railway Co.*, Penn., 768.
3. **Railroad accident — what evidence must show to justify recovery.]** In order to sustain an action against a railroad company for negligently causing the death of plaintiff's intestate, the evidence must show, not only that the defendant was negligent, but that such negligence was the cause of the accident. *Gardiner v. N. Y. C., etc., R. Co.*, N. Y., 329.
See MUNICIPAL CORPORATION, 57; RAILROAD, 639

NEGOTIABLE INSTRUMENT.

1. **Delivery — parol evidence to qualify.]** A note may be delivered upon condition, and the annexing of a condition to the delivery thereof is not an oral contradiction of the written instrument. In an action by the payee of a note, parol evidence is admissible to show that at the time of its delivery, it was agreed that it should be returned to the maker if demanded. *McFarland v. Sikes*, Conn., 18.
2. **Note given for subscription — consideration.]** A promissory note executed in pursuance of a promise to subscribe \$2,500 toward the payment of a church debt, on condition that the church would raise the balance by voluntary subscriptions, which condition is performed, is founded upon a sufficient consideration and binding upon the maker. *Roberts v. Cobb*, N. Y., 622.
3. **Extinguishment of debt — book account — former recovery.]** A promissory note taken for the whole or part of a debt will only operate as an extinguishment of it if so intended by the parties. A debt due upon a continuous account of book entries made in the ordinary course of dealing is entire, and cannot, in the absence of an agreement to that effect, be split up into separate and distinct demands so as to form the basis of several suits. It is against the policy of the law to permit a party to recover in an action

what was included in and might have been recovered in a former one. *Buck v. Wilson*, Penn., 812.

4. **Promissory note not in Kentucky — defenses — constitutional law.]** Promissory notes made and signed by the makers in Kentucky, where they resided, were made payable at the Kentucky National Bank, in that State, and then sent by mail to the payees in Massachusetts. *Held*, that they were Kentucky contracts, to be governed by the laws of that Commonwealth. By the laws of Kentucky promissory notes are not negotiable paper, and such contracts are subject to any defense, discount or offset that the makers might have against the original payees or any intermediate assignor before notice of the assignment. There appears to be no constitutional provision forbidding such a statute. *Shoe and Leather Bank v. Wood*, Mass., 338.

NEW YORK CITY.

- Action by police justice for salary.]** A police justice in New York city had been paid an unauthorized salary for several years, and thereafter paid a salary which was legal in amount. In an action to recover the balance between the amount paid and the sum claimed, *held*, that the complaint was properly dismissed. The city was given a judgment on its counter-claim setting up over-payments. *Held*, that the decision at general term disallowing the same, on the ground that they were voluntary, was right. *Cor v. Mayor, etc., of New York*, N. Y., 284.

See ASSESSMENT.

NEW TRIAL.

- Juror was constable.]** The fact that one of the jurors was a constable, and was thus exempt by statute from jury duty, does not entitle a party to a new trial, as of right. *Moeb v. Walffsohn*, Mass., 439.

NOTICE.

See ATTACHMENT.

OFFICE AND OFFICER.

- Jersey City fire department — transfer with less pay.]** The transfer of an employee in the Jersey City Fire Department from his position of engineer to that of stoker, which last position is attended with different duties and decreased pay, is invalid under the act — Pamph. L. 1885, p. 130 — regulating the terms of officers and men in fire departments. Such employee is protected, although he was appointed without filing an application sworn to and having a physician's certificate showing his physical condition, according to the requirements of a rule adopted by a preceding board of fire commissioners. *Michaelis v. Board of Com. of Jersey City*, N. J., 417.

ORPHANS' COURT.

1. **Jurisdiction — common pleas.]** An auditor was appointed by the orphans' court to distribute a fund in the hands of A., administrator *de bonis non* of the estate of B. The auditor found there was due from the estate of B. to the estate of C., who had been the administrator of the estate of B., the sum of \$206.01. The finding of the auditor was confirmed by the court, and from that action no appeal was taken. In course of time suit was brought in the common pleas to recover the sum found by the auditor to be due to the estate of C. In that action an attempt was made to prove that the actual indebtedness was on the part of the estate of C. to that of B. *Held*, that under the circumstances this could not be successfully done. *Miller v. Commonwealth*, Penn., 54.
2. **Bill of review — laches.]** Where interested parties who reside abroad have notice of an adjudication in the orphans' court, and are urged to look after their interests either in person or by counsel, and neglect so to do, their laches destroys their right to relief. An account in the orphans' court settled and confirmed can only be reviewed as a matter of right, for error of law apparent upon the face of the record, or for a matter which has arisen after the decree. It may be reviewed as a matter of grace for new proof discovered

after the decree, which proof could not possibly have been used at the time when the decree was made. *Appeal of Scott*, Penn., 63.

8. A bill of review in the orphans' court is a matter of right. Where a proper case is set forth in the petition for a review, and the facts are verified by affidavit, it is the duty of the court under the acts of October 13, 1840, to grant a rehearing, unless the case falls within the *proviso* of the statute. *Meckel's Appeal*, Penn., 91.

PARENT AND CHILD.

- A step-father is under no obligation to support his step-children after the death of their mother. In the absence of a contract between a guardian and a step-father of the guardian's ward for the support of the ward, the step-father is not entitled to compensation. *Appeal of Brown*, Penn., 51.

PAROL EVIDENCE.

See CONTRACT; EVIDENCE; NEGOTIABLE INSTRUMENT.

PARTITION.

1. **Allegations in bill—sufficiency to confer jurisdiction.]** A bill was filed, under section 99 of article 16 of the Code, for sale of the real estate described, for the purpose of partition among the parties entitled; it being alleged that such real estate was not susceptible of division in kind without loss and injury to the parties concerned. The bill alleged that S. was, in his life-time, seized and possessed of seven-fifteenths undivided parts of a tract of land of one hundred and twenty acres; and that, being so seized, entitled, or possessed of such undivided interest, he died intestate, leaving the complainant, J., his only child and heir at law, and also his widow, surviving him. It is also alleged that the other part of said tract of land, being eight-fifteenths thereof, was owned by the appellant. It was further alleged that if it be found, as your orators charge, that said real estate is not susceptible of division, and that no division can be made except by greatly injuring and depreciating the value of said real estate, then they are entitled to a decree for sale for the purposes of partition. *Held*, that there was enough alleged on the face of the bill to give the court jurisdiction. Courts have no power, under exceptions to a sale in partition made under a decree, to review and decide upon the merits of the decree; as between the parties to the suit, the decree is conclusive of the subject-matter involved; and, if the court had jurisdiction to pass the decree, that decree must be executed, unless it be reversed by regular proceeding had for the purpose. *Slingluff v. Stanley*, Md., 854.
2. **Offer to take property in proceedings.]** The offer to take property in partition proceedings must be in writing. A. made oral bids upon several properties in partition proceedings, one purporting being allotted to him; later he interposed objection to the title of other persons, obtained in the same manner. *Held*, that having assented to the form of bidding and received and retained some of the benefits therefrom, he could not successfully so object. *Appeal of William Henry Sutton*, Penn., 115.
3. **Tenant in common — improvements — repairs — new erection — liability.]** Where a co-tenant in common undertakes to improve the whole estate, the improvement inures to the benefit of all. A tenant in common is liable to his co-tenant for repairs absolutely necessary to buildings already erected, and which have fallen into decay, but he is not liable for new and permanent erections which the latter may have set up on the premises. A., B., C. and D. were tenants in common of certain land. A. and B., being in actual possession, set up certain new structures upon a portion of the land in order to obtain a more complete enjoyment of their interests. *Held*, that in partition proceedings C. and D. were not, under the circumstances, entitled to a share of the improvements set up by A. and B. *Appeal of Kelsey*, Penn., 263.
4. **Tenant in common — lien.]** It is the duty of a tenant in common who in partition proceedings in the common pleas takes the land divested of a lien

against his co-tenant, either to make application to pay the money into court because of the lien or pay the lien itself; he holds the money subject to the lien. *Reed v. Fidelity Ins., etc., Deposit Co., Penn.*, 771.

PARTNERSHIP.

See PAYMENT.

PATENT.

Equity.] A. owned a patent upon drilling jars for artesian wells; he granted to B. a license to make and sell the character of jars patented, B. to render monthly accounts, pay a royalty on each set made, and keep a book containing a list of the work done, to whom sold and the dates, which book was to be open to the inspection of A. *Held*, that B. was obliged to pay so long as he continued to manufacture within the running of the patent, and that he was bound to account. *Held*, also, that A. could enforce his rights through the aid of the equity side of the court. *Appeal of Bovaird & Seyfang, Penn.*, 258.

PAUPER.

Settlement.] A. was born in Penn's township, in May, 1854; at nine years of age she became insane; in March, 1883, B., her father, who had settlement in Penn's township, made complaint and she became a charge upon the township, and was placed by the overseers of the poor in the State Hospital for the Insane, at Danville; in September, 1883, B. entered into an agreement with the overseers of the poor to take A. back into his household; the overseers of the poor to pay any resident physician employed by B. to attend A. for her insanity, and to have the right to remove her again to the hospital, if in their judgment proper; in March, 1884, and whilst A. was an inmate of the home of B., the latter moved his family to a house he had purchased in Selinsgrove; in July, 1885, A. again became chargeable; up until near this time, Penn's township had furnished her relief. *Held*, A. had not acquired a new settlement in Selinsgrove, and further, that she remained a charge upon Penn's township. *Overseers of the Poor of Penn's Township v. Overseers of the Poor of the Borough of Selinsgrove, Penn.*, 176.

PAYMENT.

A payment by a partner on the partnership account, in the regular course of the partnership business, cannot be made the basis of a legal claim for contribution against his copartner before the partnership accounts are settled. *Bishop v. Bishop, Conn.*, 506.

See MORTGAGE, 362; REFPLEVIN, 238; STATUTE OF LIMITATIONS, 640.

PLEADING.

1. When charges showing the condition of institution and the unlawful management of it, prior to the time when the act was committed from which loss resulted, are not impertinent or scandalous. *Wilkinson v. Dodd, N. J.*, 539.
2. **Declaration.]** A declaration will not be adjudged bad on demurrer which is sufficiently formal to make known to the defendant and the court the claim set up by the plaintiff. *Burnham v. Peck, Me.*, 524.
3. **Demurrer — traverse.]** In an action on a probate bond where the defendant pleaded that no person injured by the breach of the bond ever applied to the probate court for leave to prosecute, and that said court never granted such leave to any person injured or claiming to be injured, the plaintiff should traverse the plea instead of demurring. *Probate Court v. Sawyer, Vt.*, 720.
4. **Nul disseisin — execution — levy and sale — notice.]** The plea of *nul disseisin* puts the whole title of the property in issue, and under that plea the defendant can maintain the issue either upon the failure of the demandant to show title in himself, or upon evidence of title in the defendant. Delay of an officer to complete the sale of real property after seizure, where the rights of third parties have not intervened, is immaterial. Service of notice upon the owner, of the time and place appointed for the sale, is properly made by

leaving the notice at his last and usual place of abode. *Croacher v. William*, Mass., 870.

See CRIMINAL LAW, 716; EVIDENCE, 452.

PLEDGE.

1. **Set-off—recoupment.**] A pledgor cannot recover from the pledgee in *assumpsit*, as money had and received, nor by set-off, the value of securities pledged, when they have been voluntarily surrendered by the pledgee to a third person. The contract between pledgor and pledgee is collateral, and damages for its breach cannot be allowed by way of recoupment in defense of a suit to recover the debt. *Fletcher v. Harmon*, Me., 520.
2. **Conversion.**] In an action by the pledgee for the debt for which the pledge was made, the defendant may set up a wrongful conversion of the pledge by way of a defense and be allowed the value of the pledge as payment of the debt *pro tanto*. Stock of a mining corporation was pledged as collateral security for a loan. The company by legislative authority afterward reduced its capital and proportionately reduced the nominal value of the shares of the capital stock. *Held*, that the surrender by the pledgee of the original certificate of stock and the acceptance of a new certificate for the same number of shares was not a wrongful conversion. *Donnell, Lawson & Co. v. Wyckoff*, N. J., 848.

PRACTICE.

1. **Amending verdict after judgment—no point of law reserved—articles of agreement construed.**] Where the action is ejectment, and no question of law is reserved, it is not in the power of the court to hold, after verdict, that it was wrong to have submitted the case to the jury and then alter the judgment. *Eberts v. Thompson*, Penn., 210.
2. **Appeal from surrogate's decree—no exceptions.**] A surrogate on finding that a will was the testator's free act, unaffected by any improper agency, admitted the same to probate. No exception was taken to any finding, but there was an exception to each and every portion of the decree. *Held*, that the exception was useless as it indicated no specific error. The surrogate refused to make certain findings on request; no exception was taken to such refusal. The general term reversed the surrogate's decree, and ordered issues to be tried by a jury. *Held*, that the reversal was unauthorized. The practice is governed by Code Civ. Pro., § 2545. *Angerine v. Jackson*, N. Y., 299.
3. **Appearance and plea.**] An appearance and plea may lead to a verdict and judgment against defendants, yet in the trial of an action of ejectment, it is necessary to prove that the defendants were in possession of the premises. *McIntyre v. Wing*, Penn., 228.
4. **Attorney.**] When leave is granted to the attorney of several heirs to prosecute a probate bond, it is not necessary that his name be indorsed on the writ. *Probate Court v. Sawyer*, Vt., 720.
5. **Commenting on the fact that accused does not testify.**] The prosecuting attorney in a criminal action is not authorized by the statutes of the State to comment, in his argument to the jury, upon the fact that the defendant did not testify in his own behalf. *State v. Banks*, Me., 634.
6. **Compulsory reference—substantial issue fraud.**] Plaintiff's assignor bought upon an execution against G. his individual interest in the firm property of T. & H., of which firm G. was a member. Thereafter upon a sale upon executions, upon judgments against the firm, the firm property was sold to W. for a sum less than sufficient to pay the firm debts. The complaint charged that the price obtained upon the sale of the firm property to W. was much less than the value of the property, and was brought about by the fraudulent practices and representations of W., and that but for these the property would have realized enough to have resulted in a substantial advantage to plaintiff's assignor. The plaintiff asks to have the sale declared void, and that an accounting be had. *Held*, that the substantial

- issue was the fraud, and that a compulsory reference ought not to have been ordered. *Morrison v. Van Benthuysen, etc.*, N. Y., 317.
7. **Exception.]** A party excepting to the admission of testimony is not bound to concede its truth or to refrain from combatting it in order to retain his exception. *Id.*
 8. **Joint action — parties.]** A policy of insurance was assigned to B. and C. jointly; they received the money thereon and executed a joint receipt therefor; later a joint action was brought against them by the person in whose interest the policy was originally issued, for money had and received to his use. *Held*, that it was proper to proceed against B. and C. jointly, as they had received the money jointly. *Speck v. Hettinger*, Penn., 187.
 9. **Reference—exceptions—agreement of parties.]** When exceptions are taken to the ruling of the court in overruling objections to the acceptance of a report of referees, they should show that the facts upon which the objections were based—if they do not appear of record—were proved to the court. An agreement between the parties to a reference, as to the manner and place of a hearing by referees to be appointed under a rule of court, will not be binding if it is entered of record and made a part of the rule of reference. The referee may determine the time and place of hearing when the parties disagree. The determination of referees, as to the necessity of a view, is final when honestly made. Referees are not authorized to allow the charges of a surveyor appointed by the court, but their report will not be rejected on that account when there is no suggestion that the allowance was unreasonable in amount. *Nutter v. Taylor*, Me., 353.
 10. **Parties—administrator non-resident—filed in pleadings evidence.]** *Hamilton v. Lamphear*, Conn., 590.

RAILROAD.

1. **Bonds — mortgage — proceedings of foreclosure — territorial effect — title Constitution.]** Bonds were issued and a mortgage executed by a railroad company operating a line of road located partly in New York and partly in Pennsylvania. The issuing of the bonds and execution of the mortgage were in contravention of the policy of Pennsylvania as declared in her Constitution and laws. *Held*, the property of the company situate in Pennsylvania was not bound by the mortgage. Proceedings were instituted in a New York court to foreclose the mortgage. *Held*, they were local and without extra-territorial effect, and that a sale thereunder did not pass title to the property of the company situate in Pennsylvania. *Appeal of State Line Railroad Company*, Penn., 241.
2. **Crossing highway — duty to keep in repair.]** Where the charter of a railroad gives the corporation the right to cross highways, but makes it the duty of the corporation to construct and keep in repair good and sufficient bridges or passages over or under the railroad, so that travel over the highway shall not be impeded, an obligation is thereby imposed, which requires the corporation to keep the highway, where it is crossed by the railroad, at all times and under all circumstances, in a condition fit for safe and convenient use. Nothing short of legislative authority can deprive the public of their right in a highway, and no legislation will be understood to take away public rights unless such purpose be plainly expressed. *Mayor, etc., of Newark v. Del., Lack. & West. R. Co.*, N. J., 537.
3. **Parties.]** When the mayor and common council of a city are charged with the duty of keeping the streets of the city in a condition fit for safe and convenient use, they are the proper persons to file a bill to prevent either the obstruction or destruction of a street. *Id.*
4. **Crossing highway — extent of grant.]** Public grants are to be strictly construed. The grantee can take nothing except what his grant plainly gives. Where a right to cross or occupy a highway is granted by implication, the corporation can only occupy so much as may be reasonably necessary; in case of dispute the extent of the grant must be settled by the courts. Where the charter of a canal company gives them a right to cross public highways wherever it is necessary that they should do so, they must exercise

this right in such manner as to cause the least possible inconvenience to the public. Under such right the company does not take the fee of the land covered by the highway where their canal crosses, but simply a right of way, and so long as they are left in the free and unobstructed use and employment of that, though the highway may be appropriated to other purposes than travel, they suffer no wrong and have no cause of complaint. Where two highways meet, neither is entitled to destroy the other, but each must in some degree yield to the other what would be their strict legal rights, if they did not meet and collide. *Lehigh Valley Railroad Co. v. Orange Water Co.*, N. J., 839.

5. **Evidence.**] The defendant brought an action and obtained a judgment against the plaintiff's engineer for injuries to his heifer, claimed to have been caused by negligence in running an engine; and while the writ was being served its train of cars was delayed for a short time. Thereupon the plaintiff commenced this action for malicious prosecution, alleging that the engine was properly managed at the time of the accident; that the defendant instituted his suit for the sole purpose of injuring the plaintiff by delaying its trains; and the declaration was sustained on demurrer. *Held*, that evidence was admissible to prove that the plaintiff had neither fenced its road nor built cattle-guards, to prove a cause of action, and, therefore, probable cause. *St. Johnsbury & Lake Champlain R. R. Co. v. Hunt*, Vt., 714.
6. **Engineer—agent.**] An engineer is an agent within the meaning of the statute imposing a duty on railroads to fence their roads. *Id.*
7. **Evidence—probable cause.**] The judgment in the case of the defendant against the engineer is not admissible as tending to show that defendant had a cause of action against him. *Id.*
8. **Malicious prosecution—legal advice a defense.**] The fact that the defendant, before the commencement of the suit, took competent legal advice on a correct statement of all material facts known to him, or that he had reason to believe existed, and acted honestly upon it, believing that he had a cause of action, affords probable cause, and is a defense. *Id.*
9. **Fires—negligence.**] The owner of personal property cannot recover for damages thereto by fire, communicated by a locomotive, from the railroad company, except upon proof of negligence on the part of the company, and that the fire was caused by such negligence. *Lowney v. New Brunswick Railway Co.*, Me., 639.

RECEIVER.

An order denying an application for an order directing a receiver of rents and profits, pending the foreclosure of a mortgage, to pay therefrom the amount expended by an adjoining lot-owner in "shoring up" the wall of mortgaged building, is matter of discretion with the court below, and from its decision no appeal lies to this court. *Wyckoff v. Schafeld*, N. Y., 624.

RECORDING ACT.

Assignment is "conveyance"—notice.] The assignment of a mortgage and the satisfaction of the same are "conveyances" within the meaning of the recording act. The recording of an assignment of a mortgage is notice to a purchaser of the equity of redemption, and payments made by him to the assignor after the assignment are invalid and do not bind the assignee. *Brewster v. Carnes*, N. Y., 433.

RELIEF SOCIETIES.

Voluntary associations—mutual life insurance—misrepresentation of age—assessments—assignment.] The age of an applicant for life insurance is a material fact, and a misrepresentation of that fact in an application for membership in a voluntary association for life insurance renders void the contract issued thereon. The incorporation of such voluntary association and a vote of the corporation making all of the voluntary associates members of it will not make such a void contract valid. The treasurer of such a corporation cannot ratify and validate such a contract.

The assessment and payment thereof by the members into the corporation treasury, for a death-claim upon such void contract, will not give the claimant an action against the corporation for the amount of the assessment. An assessment so paid into the treasury becomes the money of the corporation; and the members making it cannot, by an assignment to the claimant of the several sums paid in by them, give such claimant a right of action against the corporation. *Sweet v. Citizens' Mutual Relief Society, Me.*, 669.

REPLEVIN.

Tender — payment — notes.] A., who held promissory notes against B., employed C. to go to B. and purchase three horses from him, which he did, paying to B. a small amount down in cash and telling him to take the horses at an appointed time to a certain place and he would pay for them; at the time and place fixed B. was present with the horses, which were tied, whilst B. and C. entered into a hotel to settle; there, C. tendered to B., in part payment, the notes held by A. against B.; these B. -- who had at no time been informed of the agency of C. -- refused to accept; in the meanwhile the horses were taken away by one in the employ of A., whereupon B. brought replevin to recover them. *Held*, that B. could recover as A. was not entitled to the possession of the horses until he had paid for them, and his tender of the notes under the circumstances would not be sanctioned in law as equivalent to a payment. *Bush v. Bender, Penn.*, 338.

Right of street railway to use tracks of another company — contract between railway company and city for exclusive use of streets — construction of statute.] *New Bedford & Fairhaven Street Railway Co. v. Acushnet Street Railway Co., Mass.*, 892.

SALE.

1. **Chattels — valid delivery as to third persons.]** A failure to deliver possession cannot be declared, as a matter of law, sufficient to prevent the passage of the title to chattels, where the purchase has been in good faith and for valuable consideration, and the vendee has assumed such control of the property as to reasonably indicate a change of ownership. *Cesena v. Nimick & Co., Penn.*, 216.
2. **Conditional — rule in Pennsylvania.]** By the law of Pennsylvania, the reservation of title in the vendor upon a conditional sale is valid as between the parties, but is invalid as against creditors of the vendee or *bona fide* purchasers from him. *Murvin Safe Co. v. Norton, N. J.*, 529.
3. **— rule in New Jersey.]** In New Jersey, upon a conditional sale of chattels, followed by delivery of possession to the vendee, the reservation of title in the vendor, until the contract price is paid, is valid as against creditors of, and *bona fide* purchasers from, the vendee, unless the vendor has conferred upon the vendee *indicia* of title beyond mere possession or has forfeited his rights by conduct which the law regards as fraudulent. *Id.*
4. **Purchaser — feigned issue — right of property — security.]** Tyler & Scouller, on December 4, 1879, agreed with William F. Johnson & Co., in substance, as follows: "Said Tyler & Scouller agree to purchase raw hides [and skins sufficient to supply their tannery in North East, Penn., for the time being, and cause the same to be delivered to said Wm. F. Johnson & Co., at said tannery, and will have every hide of the different lots marked with a number, to distinguish the lots, and to send to Wm. F. Johnson & Co., at Boston, bills of said hides and skins as they are being delivered at said tannery. Said Wm. F. Johnson & Co. agree to remit to said Tyler & Scouller such sums of money as shall be requisite to pay for said hides and skins their market value, in North East, Penn., at the time of delivering thereof at said tannery, and as fast as delivered. Said Tyler & Scouller agree to receive and tan for said Wm. F. Johnson & Co. the said hides and skins in a workmanlike manner, with all reasonable dispatch, and to send the same as fast as tanned to said Wm. F. Johnson & Co., at Boston. Said Wm. F. Johnson & Co. agree to sell said tanned hides and skins, and to pay said Tyler & Scouller,

as compensation for said tanning, such sums as shall equal the proceeds of the sales of said leather, after deducting therefrom the said purchase-price of the hides and skins from which the leather was made, also five per cent on the gross amount of the sales, freight on the leather, interest at the rate of seven per cent per annum, and all premiums which said Wm. F. Johnson & Co. may pay for insuring the said hides and skins while in tannery or store-house at North East. Said Tyler & Scouller shall be liable for, and shall pay for, to said Wm. F. Johnson & Co. any loss or damage to said property by theft or otherwise; said hides and skins always, and under every state of the tanning process, to remain the exclusive property of Wm. F. Johnson & Co., and nothing herein contained shall in any way or manner be construed as making said Tyler & Scouller and said Wm. F. Johnson & Co. partners." On February 27, 1885, Tyler & Scouller confessed judgment to W. A. Ensign & Co., upon which a *fi. fa.* issued, under which execution the sheriff levied upon all the hides, etc., in possession of Tyler & Scouller: whereupon Wm. F. Johnson & Co., and others, claimed the property levied upon. In an issue directed to try the question of ownership, it was *held*, that, as far as third persons were concerned, Johnson & Co. were lenders of the money, and not purchasers of the property, and that they could not hold the property as security for their advances against creditors who had taken it in execution. *Johnson v. Ensign*, Penn., 155.

SAVING INSTITUTION.

See PLEADING, 539.

SCHOOLS.

1. Section 84 of the school law—Rev. 1084—requires the township collector to pay all school moneys only on the order of the district clerks, which orders shall specify the objects for which they are given. *Held*, (1) that an order of the district clerk which specifies the object for which it was given, without any designation of the yearly taxes out of which it shall be payable, is a sufficient voucher for the township collector; (2) that the township collector, paying out school moneys on statutory orders, is not responsible for the application the school trustees have made of the money. *Zimmerman v. Mathe*, N. J., 851.
2. **Punishment of pupil.]** In an action for assault and battery by a pupil against his teacher, based upon corporal punishment inflicted in school, the court instructed the jury that the defendant would not be liable unless the punishment was so clearly excessive "that all hands at once say it was excessive," or that "all hands would instinctively rise up and say 'that is excessive, that is beyond judgment.'" *Held* error. *Patterson v. Nutter*, Me., 652.

SCHUYLKILL COUNTY.

Act relative to obtaining leaseholds.] The act entitled "An act to obtain possession of real estate by purchasers at coroners' sheriffs' and orphans' court sales within the county of Schuylkill," approved May 18, 1871, does not apply to leaseholds. *Selster v. Robbins*, Penn., 111.

SHIP AND SHIPPING.

Insurance — action for money collected by one owner for himself and others.] The ship's husband by agreement insured the interests of two other owners with his own and collected the whole insurance for a loss. *Held*, that each of the others whose interest was thus insured could maintain an action against the ship's husband for his proportional part of the insurance money thus collected. *Gray v. Buck*, Me., 638.

SPECIFIC PERFORMANCE.

Doubtful title — assignee for creditors not party to foreclosure of mortgage.] In June, 1885, plaintiff's testator conveyed certain vacant and unproductive lots in New York city to one D., taking from him a mortgage to secure part of the purchase-price. In 1840 D. made a general assignment, recorded June 6, 1840, conveying said lots . . . in trust, to sell the real

estate, etc. In August, 1840, the testator foreclosed the said mortgage, but did not make the assignee of D. a party to the suit. On the foreclosure sale, the testator bought in the premises and received a master's deed, which was duly recorded, and he held the same until 1868, when he died leaving a will, of which the plaintiffs are the surviving executors. By the will the executors were given full power to sell and convey all vacant and unproductive lots. Plaintiffs, as executors, leased said lots from 1867 to 1883 in consideration of the payment of taxes thereon. In 1885 plaintiffs and defendant entered into a written contract of sale of said lots, but defendant refused to complete the purchase, on the ground that the title was defective, because D.'s assignee was not made a party to the foreclosure suit. *Held*, that plaintiffs were entitled to specific performance of the contract of sale. *Kip v. Hirsch*, N. Y., 570.

See EVIDENCE, 657; WILL, 304.

STATUTES.

1. **Interpretation of—declarations at the time of passage.]** The verbal opinions of members of the legislature made at the time of the passage of an act can have no effect in interpreting it. The act of May 8, 1876, entitled "An act to define and suppress vagrancy," is not repealed by the act of April 30, 1879, entitled "An act to define and punish tramps." *County of Cumberland v. Boyd*, Penn., 213.
2. **Retrospective laws.]** The acts, chapter 323, Laws of 1874, and chapter 264, Laws of 1875, relating to the construction of the Buffalo State Asylum, and appropriating money for that purpose, did not abrogate or interfere with existing contracts which had been previously entered into for work upon the buildings. Such acts had reference to future contracts only. Unless the very plain meaning of the language requires it, laws should not be so construed as to have retrospective operation, or to affect existing contracts or acts already done. *McMaster v. State*, N. Y., 680.
3. **Repeal by implication.]** The provisions of the act, chapter 28, Laws of 1833, making the town of Oswegatchie, county of St. Lawrence, a separate and distinct poor district, did not operate as a repeal of the privilege extended to the supervisors of that county, by the act, chapter 245, Laws of 1846, to adopt the "Livingston county act," chapter 334, Laws of 1845. The general policy of the law is adverse to repeal by implication, and special rules of interpretation require the provisions of different statutes to be so construed as to harmonize and avoid conflict, unless the plain meaning of the language is thereby violated. *The People, ex rel. Superintendent of the Poor, v. Board of Supervisors*, N. Y., 687.

STATUTE OF FRAUDS.

Verbal promise of executor to pay legacy.] The mere verbal promise of an executor to pay a legacy confers no right of action against him individually. *Smith v. Carroll*, Penn., 60.

STATUTE OF LIMITATIONS.

1. **Actual and continuous adverse possession of premises for more than twenty-one years bars one able during such period to assert a legal right to the premises and who fails so to do.** *Uhler v. Brua*, Penn., 184.
2. **Payment—account-books.]** The entry of a payment by a debtor on account, in the handwriting of a deceased creditor upon his account-books, is not competent evidence of a payment to remove the bar of the statute of limitations. *Libbey v. Brown*, Me., 640.
3. **Presumption of payment—lien—equity—demurrer.]** After the lapse of twenty years all evidences of debt excepted out of the statute of limitations are presumed to be paid. This is a rule of convenience and policy, the result of a necessary regard for the peace and security of society. Where a bill in equity is so framed as to present the objection, that from lapse of time there is a legal presumption of fact that the debt has been paid, without any attendant circumstances to obviate it, courts of equity act on the analogy

of the law as to the statute of limitations, and will not entertain a suit for relief if it would be barred at law, and this objection may be taken advantage of by demurrer. A contractor had a lien of indefinite duration against a railroad company for the construction of its roadway, twenty-five years after the debt became due and payable, and twenty-three years after a judicial sale of the property of the company, he sought relief through the channel of a bill in equity. *Held*, that after twenty years there was a presumption of payment arising from the lapse of time. *Hayes v. Bald Eagle Valley R. Co.*, Penn., 581.

4. **Promise to pay.]** A clear, distinct and unequivocal acknowledgment of the debt is sufficient to take a case out of the operation of the statute of limitations; the admission must be consistent, however, with a promise to pay, in which event the law implies a promise. *Shaeffer v. Hoffman*, Penn., 167.

See MASTER AND SERVANT, 822; TRUSTEE, 685.

SUBROGATION.

See TAXATION, 860.

SUNDAY.

See CRIMINAL LAW.

SURETY.

Release — foreign bankruptcy — discharge of principal — creditor accepting compromise.] Defendant, a citizen of this country, having drawn a bill of exchange to his own order at sixty days' sight upon J. & Co., English merchants, residing in Liverpool, sold it to plaintiffs, American bankers, residing in New York. The bill was duly accepted, and at maturity, was protested for non-payment. In an action against the drawer, one of the defenses was, and the facts were proved upon the trial, that after the bill had been drawn and accepted, the acceptors had been discharged by their creditors under the authority of the English bankrupt laws, in which the plaintiffs proved this indebtedness, and received their proportionate part of the composition paid by the acceptors. *Held*, that although the foreign discharge would have been in and of itself no defense, yet having voluntarily submitted themselves, and their rights as creditors to the foreign jurisdiction, proved their debt, and accepted the compromise, defendant was released from all liability as surety. *Phelps v. Boland*, N. Y., 313.

TAXATION.

1. **Collectors — bonds — appropriation of deficit — auditor's report — evidence.]** Where the same person was collector of taxes for three years in succession, and there appeared a deficiency not accounted for and paid over by him, the deficit should be divided between the three bonds in the proportion of the sums collected by the collector on each commitment, when there is no evidence showing the time the deficit commenced, or when it occurred, or of appropriation of payments either by the collector or by the town. By Revised Statutes, chapter 82, section 71, an auditor's report may be properly admitted in evidence. *Phipsburg v. Dickinson*, Me., 518.
2. **Corporations — franchise.]** The act of 1868 giving to "The Society for the establishing of Useful Manufactures" the right and power to extend its operations by condemning other lands, etc., did not change the character or attributes of the society, and it is, therefore, exempt from taxation under the law of 1864. *State v. Society for the Establishing of Useful Manufactures*, N. J., 401.
3. **Laws 1874, chapter 483 — subrogation.]** Section 82 of the act of 1874, chapter 483, provides as follows: "All taxes levied for county or city purposes shall be collected by the collectors of the counties or cities, respectively, within four years after the same have been levied, and, if the same shall not be collected within four years, the parties from whom such taxes may be demanded may plead this section in bar of any recovery of the same." *Held*, that said section was intended to apply only to such cases, and such persons, when the collector could, on notice, proceed summarily to sell the debtor's

property for the taxes, and whenever he could do so, and did not resort to his distress and sale, the statute was permitted to be pleaded as a bar after the expiration of four years from the levy of such taxes. It was not intended, and could not have been intended, to be a bar when the law would not allow the collector to resort to his legal remedies for summary enforcement of payment. When a court of equity had taken jurisdiction of the property liable for taxes, it was not admissible for a collector to step in, and by his summary process, sell the property for taxes, and transfer the jurisdiction over the title to another tribunal. In all such cases the collector's summary proceedings are, of necessity, suspended because the court of equity has charge of the property. It is *in custodia legis*, and he must seek payment of his taxes from the funds under the court's control. Where a purchaser is bound, under his agreement for purchase, to pay the taxes thereon, and the trustee of the estate pays the same, the said trustee will be subrogated to the rights of the tax collector's rights as against him. *Hobb v. Moore, Md.*, 860.

4. **Licensed vendor — illegal fine.** The prosecutor, a licensed cartman, at his stand in the city of Plainfield, where he resided, was hired to go into the borough of North Plainfield for furniture, to be carted from the borough into the city. For not obtaining a license from and paying a revenue tax to the borough, he was fined under a borough ordinance. *Held*, that he had not become subject to taxation in the borough, under the provisions of the act respecting licenses, and that the fine was illegal. *Cary v. Mayor, etc., of North Plainfield, N. J.*, 584.

5. **Railroad property — Laws N. J., act 1884, p. 142.** In estimating the value of railroad property the cost of the acquisition of such property is not an absolute criterion of such value but is an important element in the circumstances on which a judgment on the subject is to be formed. The act directs the valuation of the property of these two classes of companies to be made in a distributive mode, that is: 1st. On the main stem; 2d. The other real estate used for railroad purposes; 3d. The tangible personal property; 4th. The franchises. *Held*, that such system was constitutional. Further *held*, that the valuations of such property, including the franchises, is legal, and as there is no clearer evidence showing the same to be exorbitant, they cannot be modified. Section 6 directs, that whenever in any taxing district there are several branch roads, belonging to or controlled by one company, the State board shall designate one of such lines as the main stem, and that the others shall be valued as property used for railroad purposes, thereby subjecting such respective parts of the property thus separated to a different rate of taxation. *Held*, that such system was invalid inasmuch as it left it to the unguided judgment of the State board to decide which of such branches should be subjected to the higher rate of taxation. Section 4 directs that in case the valuations of the State board of railroad and canal property shall be relatively higher than the value of the property of other persons in any taxing district, as ascertained by the local assessors, the said board should accept, as a correct standard of value, the valuations of such local assessors. It was shown that the local assessors illegally took but a percentage of what they deemed the true value of the property appraised by them. *Held*, that the State board could not take such reduced valuations as its standard of value. Section 9 provides that in case of a railroad of this State being under lease to a foreign corporation, any tangible personal property of such foreign company, if used or kept but a part of the time in this State, shall be assessed such proportionate part of its value as the time it is used or kept in this State during the year preceding the first day of January designated in the act bears to the whole year; and it appearing that certain engines and cars that were used on its leased lines in this State by the Philadelphia and Reading Railroad Company in the course of interstate commerce, such company having in use a full local equipment of such leased lines which was duly taxed in this State. *Held*, that the tax upon such property employed in interstate commerce was illegal, being in contravention of that clause of the Constitution of the United States that gives to congress the exclusive regulation of commerce between the several States. *Cent. R. Co. v. Board, etc., N. J.*, 698.

6. Revenue law—act June 30, 1835—Constitution—corporations—assessment—return—punishment—penalty—appeal—supreme court. [The act of 30th of June, 1835, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the 7th of June, 1879," does not extend the tax on moneys at interest, mortgages, etc., to corporations; it is not, however, for this reason unconstitutional. As the first section of the act of 1835 was not intended to apply to corporations, the proviso exempting building associations from the operation of the statute is harmless. The exception in the first section of the act of 1835 of "notes or bills for work or labor done," is a violation of the ninth article of the Constitution, and is void; therefore, such securities are subject to assessment and return under the act, the same as others in the hands of individuals. The Commonwealth, having the right to tax moneys at interest, has the right to require tax payers to make known the extent of their property of that description, as well as the further right to punish a failure to make return, etc. This power can only be denied when it clearly conflicts with some constitutional provision, and if it is a matter of doubt, such doubt must be resolved in favor of the act granting it. Were it not for the fact that, under the act of 1835, an appeal is allowed to the action of the commissioners, in adding the penalty of fifty per centum, it would be a question whether the act would not be in conflict with the fundamental principle that no man can be condemned in his person or property without a hearing. *Appeal of Fox, Penn.*, 93.]

TAX DEED.

Redemption—infancy—parties defendant.] A tax deed regularly recorded given by the collector on a sale for taxes lawfully assessed, conveys to the purchaser a good unincumbered title in fee-simple to the land, which may be conveyed in the same manner as other real property. The statute specifying the parties who may redeem should be construed liberally, but to entitle a party to redeem he must show some interest in the land; and where the plaintiff at the time of bringing the bill to redeem has lost by lapse of time all right to redeem from a purchaser at a prior tax sale of the premises, the bill will be dismissed. The statute limiting the time to redeem to two and five years contains no exception in favor of infancy; and there is nothing in the Constitution requiring such an exception. Where, since the sale to the defendant in a bill to redeem, there has been a subsequent tax sale of the land to another party who has received a deed thereof, the plaintiff is not entitled to redeem from the defendant, except in connection with a redemption from the subsequent purchaser; and the person who holds the estate under the subsequent tax sale and conveyance is an indispensable party to the bill to redeem. *O'Day v. Bowker, Mass.*, 871.

TAX SALE.

Ejectment—onus probandi.] A plaintiff in an action of ejectment, claiming title by virtue of a tax sale, made by a county treasurer, under the forty-first section of the act of April 29, 1844, in order to establish his right to the possession, must show the treasurer's authority to make the sale, and to this end it ought to appear that all material conditions and pre-requisites were complied with; as that a tax had been duly assessed upon the property by the proper officers; that it had not been paid; and that sufficient personal property could not be found on the premises, out of which it could be collected. Of the latter, the return of the collector is *prima facie* evidence, but the only proper proof of the former are the duplicates and assessments found in the commissioners' office. Land can only be sold at a treasurer's sale for its own tax properly assessed upon it, and not for a tax on personal property. A tract of land was sold for a tax assessment, levied jointly upon it and personal property. *Held*, the sale was void. *Stark v. Shupp, Penn.*, 62.

TENANCY.

See LEASE, 728.

TENDER.

See CONTRACT, 837.

TITLE.

See EQUITY, 793.

TOWN.

Committee.] The power of a township committee to assign limits and divisions of the highways under section 37 of the road act could not be exercised in any township where the overseer was elected by the inhabitants of the road district, after such an election, during the year. It is proper for a township committee to refuse to recognize a claim for work done by a road overseer in the absence of, or in excess of an appropriation to his district. *Dunster v. Smith*, N. J., 419.

See COMMON AND UNDIVIDED LANDS.

TRESPASS.

Continuing — damages — equitable relief.] For a simple trespass, which is complete when the force, by which it is committed, ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass, in which the person injured must recover his damages once for all. The jurisdiction of courts of equity in cases of trespass is purely preventive; they may restrain a threatened trespass if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass, but for a completed trespass, which, as a legal wrong, is complete when protection is sought, they can give no redress whatever. A court of equity cannot award pecuniary damages in redress of a trespass, nor has it authority to impose an easement on the land of a trespasser in redress of the wrong done by the trespass. As a general rule, the only legal duty which a trespasser incurs by his wrongful act, where his trespass is complete when judicial aid is invoked, is a liability to reimburse the person injured in money, for the loss which his trespass has caused. If an upper mine-owner breaks through a barrier, which was left by the lower mine-owner for the purpose of protecting his mine against the water which otherwise would flow from the upper into the lower mine, the trespasser is answerable for the damages, including the cost of restoring the barrier, but the trespass, in such case, imposes no legal duty upon the trespasser to either close the opening, or to prevent the water in his mine from flowing through the opening into the lower mine. The flowage of water from the upper mine into the lower, through an opening thus made, is neither the continuance of a trespass, nor of a nuisance, and gives no distinct ground of action. If the damages resulting from a trespass are aggravated or increased by the folly, willful obstinacy, or gross carelessness of the injured person, such part of his loss as is directly attributable to his own fault cannot be recovered. Where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect, and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, shall leave or provide sufficient support for the surface to prevent its subsidence. Land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally. For damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress, such losses being regarded as *damnum absque injuria*, but where one of two adjoining mine-owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to go there at different times and in greater quantities than it would go there naturally, he commits a legal wrong. The owner of mineral land has a right to take away the whole of the minerals in his land, for such is the natural course of user of such land, and if in the course of such user, water accumulates on his land, either on the surface or underground, and then passes off, by the operation of the laws of nature, into the land of his neighbor, his neighbor has no legal

cause of complaint. *Executors of Lord v. Carbon Iron Manufacturing Co.*, N. J., 28.

TRIAL.

1. **Fraudulent conveyance — charge as to good faith.**] Plaintiff's counsel requested the court to instruct the jury in substance, that if the grantor made the deed in question to his son in good faith and without any intention to defraud creditors, and the son afterward permitted the grantor to occupy the premises, it would be conclusive evidence of fraud as to the grantor's creditors. The request was denied. *Held* no error. *Chase v. Horton*, Mass., 865.
2. **Jury — charge that "must get together."**] In an action to recover for personal injuries received at a railway crossing, after the jury had retired to consider their verdict they came into court and one of them stated that there was no probability of an agreement. To this the trial judge said: "I can't take any such statement as that. Gentlemen, you must get together in a matter of this kind. No juror ought to remain entirely firm in his own conviction, one way or another, until he has made up his mind, beyond all question, that he is necessarily right, and the others are necessarily wrong." Defendant excepted and plaintiff had a verdict. *Held*, that the instruction was not a correct statement of the law. If the evidence was so clear as to lead to a conclusion with the degree certainly required by the charge, there was nothing to submit to the jury, and it was the duty of the trial judge to either direct a verdict or to nonsuit the plaintiff. *Cranston, Adm'x, v. New York Central & Hudson River Railroad Co.*, N. Y., 608.
3. **Right to open and close.**] In an action on a promissory note the answer denied none of the allegations of the complaint, but after setting up affirmatively, that defendant was an accommodation indorser and that the note had in fact been paid, continued: "And this defendant says, on information and belief as aforesaid, that the said plaintiffs are not the lawful owners and holders of said note, and that he is not indebted to them thereupon in any sum whatever." *Held*, that said clause was merely an affirmative statement of a conclusion drawn from the preceding new matter; no allegation of the complaint was thereby controverted, and that defendant had the right to open and close, and a ruling to the contrary was error. *Conselyea v. Swift*, N. Y., 612.

TROVER.

Conversion — logs with same mark — demand.] Where two lots of logs of the same kind, quality and value, and having the same mark, though owned by different parties, become intermixed without the fault of either party, each owner will be entitled to his proportional part of the whole lumber sawed from the logs, and if one owner converts to his own use more than his proportional part, he will be liable to the other in trover for the amount so converted, and in this case it was held that the liability attached without a special demand. *Martin v. Mason*, Me., 515.

TRUST AND TRUSTEE.

1. **Life-tenant — remaindermen — dividends on stock.**] The will creating the trust provided that the fund should be invested in funded stock of the United States or of the State of New York, or in good bonds and mortgages on real estate, and the annual interest, income and dividends thereof paid to the testator's daughter during her life, and upon her death, the principal or capital sum aforesaid should be divided among his other children. The interest collectible upon the sum so invested was accordingly paid to the daughter during her life. A sale of the securities after her death resulted in a surplus of about \$20,000 over the amount of the original investment, and this sum was claimed both by the representatives of the life-tenant and by the remaindermen. *Held*, that the increase went to the remaindermen. *Matter of Gerry*, N. Y., 817.
2. **Account — charge — exception — parol trust — orphans' court — jurisdiction.**] A., who was trustee for C. of a fund of \$10,000, under the will of B., filed an account in which she charged herself with certain securities as

held by her as trustee aforesaid. C. filed exceptions to the jurisdiction, and sought to establish a further parol trust of a fund of \$10,000, created by A. and D. after the death of B., in accordance with a suggestion of B. made in her life-time, and further sought to establish that the money paid for such securities belonged to such parol trust, and that other securities had been set apart for the trust under the will of B. *Held*, C. was without footing to except, unless he established the existence of the parol trust. *Held*, also, the orphans' court had jurisdiction to administer full relief. *Appeal of Lorry*, Penn., 368.

3. **Statute of limitations.**] The finding of the trial court upon a question of fact, founded upon sufficient evidence, and affirmed by the general term, concludes this court. The rule that the statute of limitations does not begin to run against the beneficiary of an actual subsisting trust until the trustee has openly, to the knowledge of the beneficiary, renounced the trust, does not apply to a trustee *ex maleficio* or by implication or construction of law. As to such a trustee the statute begins to run from the time the wrongful act was committed. *Lammer v. Stoddard*, N. Y., 685.

4. **Surcharge—account—orphans' court—jurisdiction.**] C., who held two mortgages against D., assigned them to E.; later C. died, and E. was made his administrator; he filed an account by which the estate appeared to be insolvent; exceptions were filed because E. had not charged himself with the two mortgages which, it was alleged, had been assigned for the purpose of collection only, with the understanding that if the money secured by them were collected in the life-time of C., it was to be paid over to him, but if not collected till after his death, it was to be paid over to the sisters and brothers of E. C. died before the collection of the sums so secured. *Held*, if the trust in favor of the sisters and brothers existed, the orphans' court had no jurisdiction of it; further, E. could not be compelled to account in the orphans' court for the fund secured by the mortgages till the trust be stricken down, which could only be done at the instance of the creditors of C. *Appeal of Hamburg Bank*, Penn., 816.

See DEED, 202; EXECUTOR AND ADMINISTRATOR, 677; WILL, 236, 784.

VENDOR AND VENDEE.

Quantity of land conveyed—deficiency—mutual mistake.] A. purchased from B. a tract of land, both parties believing it to contain fifty-six acres and seventeen perches; the purchase-money, viz.: \$185 an acre, was paid and the deed delivered; later it was discovered that the tract contained but fifty acres and fifty perches, whereupon A. brought *assumpsit* against B., averring mutual mistake. *Held*, that A. could recover. *Hoover v. Senseman*, Penn., 151.

VERDICT.

Title of case omitted.] The paper signed by the foreman of the jury was as follows: "June 8, 1886, Verdict for plaintiff in the sum of \$421.78. W. T. George, Foreman." *Held*, a sufficient verdict; that the omission of the name of the case was supplied by the court records. *Miller v. Morgan*, Mass., 849.

WATER AND WATER-COURSE.

Mill-pond—ice.] The owner of a mill-dam across an unnavigable stream has a qualified interest in the water flowed, but none in the ice formed upon it. The ice is the property of the riparian owner in such case. Where the owner of such a dam maliciously and unnecessarily draws the water from the pond and thus destroys the ice formed upon it, he is liable in damages to the owner thereof. *Stevens v. Kelley*, Me., 863.

WAYS.

Constitutional law—appeal—people's ferry, Portland.] A special statute authorized the county commissioners to locate a highway "into tide waters of sufficient depth, with a good ferry way . . . in like manner and effect as in locating other highways." *Held*, (1) that the authority conferred upon the commissioners was not exhausted by their adverse action on one petition;

(2) that the statute was constitutional; (3) that an appeal could be taken from the decision of the commissioners in refusing to locate such a way, on petition therefor; (4) that the committee of the appellate court did not transcend their authority when they decided that the doings of the commissioners should be reversed, and that common convenience and necessity required the location of the way "as prayed for in said petition," though the petition asked for a way "down said Portland pier to the end of said pier and into tide waters a sufficient distance to give a sufficient depth of water." *Cole v. County Commissioners, Me.*, 666.

WILL.

1. **Capacity—physician as witness—Code of Civil Procedure, §§ 834-6.]** The provisions of sections 834-6, Code of Civil Procedure, are applicable to testamentary cases. To bring a case within the statute it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity. On the trial of special issues in a will case the contestant called a physician as a witness, and offered to prove by him what he saw and learned of the condition of the deceased testator while he was attending him. Upon objection of the proponent the testimony was excluded as inadmissible under section 834, Code of Civil Procedure, and the ruling was affirmed at general term. *Held* no error; the witness was incompetent under the statute. *Reinhan v. Denmin, N. Y.*, 568.
2. **Construction of.]** B., a married man, without children, made several bequests on paper to collateral heirs, one of which reads as follows: "I, B., "being of sound mind, and of my own free will, give and bequeath to C.," "son of my sister," D., "only one-sixth of such portion as the law would give to said" D., "and the remaining five-sixths to be divided among my other sisters and brothers, or their heirs" Later B. died; he made no disposition in any of his bequests of his residuary estate, which was large, nor did he make any provision for his wife, who survived him. *Held*, C. took one-sixth of D.'s portion, as it would have been if she had survived B., and he, B., had died intestate. *Held*, further, C. was entitled to participate in the residuary estate which passed by intestacy. *Appeal of Hancock, Penn.*, 189.
3. **Conversion.]** A testator directed in his will: "I desire all my other estate, real, personal or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages." *Held*, that this worked a conversion of the real estate. *Appeal of City of Phila., Trustee, under Will of Stephen Girard, Penn.*, 71.
4. **Devise—annuity.]** An annuity given by a will, to be paid by a devisee under the same will, is a charge upon the real estate devised upon such conditions, and equity will enforce the charge by a sale of such real estate. In case of a sale of real estate for such purpose the costs and expenses of sale, the amount of all annuities due and unpaid with interest, and a sum sufficient to produce the annuity in the future will be taken from the proceeds of sale, and the residue will be paid to the devisee or his grantee. *Merritt v. Bucknam, Me.*, 650.
5. **Executors carrying on business—expenses chargeable to income.]** Executors were authorized to continue the testator's business for such time as they should think most advantageous to his estate, and the profits were to be received by the executors as part of the estate for division and investment as provided by the will. *Held*, that the cost of replacing and restoring personal property worn out and used up in the ordinary course of the business, as also uncollectible credits incurred in carrying on the business were chargeable to the income of the life tenants and not to the principal. *Matter of Jones, N. Y.*, 619.
6. **"Left."] A testator set forth in his will as follows: "I give and bequeath unto my dear wife . . . all my estate, real and personal, and wheresoever found at the time of my death, giving her full power and authority to sell the whole or ny part of my real estate, and execute deed or deeds therefor. And in case any of my said estate be left after the death of my said**

wife, I order it to be divided as follows:" The wife sold the real estate but used no part of the proceeds. *Held*, that she held the proceeds as she held the land, and upon her death it was "left" as a part of the estate of her husband. *Brockley's Appeal*, Penn., 272.

7. **Legacy — interest.**] The act of February 24, 1834, which provides that "legacies, if no time be limited for the payment thereof, shall, in all cases be deemed to be due and payable at the expiration of one year from the death of the testator," supplies a testamentary intent; therefore, where it is claimed a money legacy shall not bear interest from the expiration of one year after the testator's death, the contention must be supported by clear evidence of an intent contrary to the act to be found in the testator's will. *Appeal of Koons and Wright*, Penn., 376.
8. **Legacy — vesting.**] The residuary clause of a testator's will was as follows: "Sixth — And as to all the rest, residue and remainder of my estate, real and personal, wheresoever situate, I do give, devise, and bequeath the same to my said beloved wife," B., "for the term of her natural life, and upon the decease of my said wife, I do order and direct that all the said residue and remainder of my estate be sold by my executor, and that after paying the aforementioned bequests, it is my will, and I do order, that the moneys arising therefrom, and so remaining, shall be divided between my children," C, D., E., F., G., H., and I., share and share alike, and if any of my said last-named children be deceased, leaving issue, then it is my will that the share the parent would have been entitled to, if living, shall go to such issue." *Held*, the interests of the children named in the residuary clause were vested. *Appeal of Charles Richardson et al.*, Penn., 723.
9. **Life estate — limitation of an expectant estate — 1 R. S. 726, § 40.**] The testator gave the residue of his estate to trustees to manage for the following purpose, viz.: To provide a home during the life of his wife for herself and his children, and pay the expenses of maintaining the same out of the trust estate, and then, either semi-annually or quarterly, to make a dividend of the residue of the income equally between his wife and six children so as to give each an equal share of the whole, and each one to defray out of his or her share of said income his or her personal expenses. He directed that upon the death of his wife, his trustees should make an equal division of the trust property between his children then living and the descendants of any deceased child who may have married and died leaving issue, so that such descendants of any deceased child should receive the same share which their parent would have received if living. The testator's widow is still living. After the death of the testator one of the daughters married and subsequently died leaving an infant child, the appellant, and a will in which she gave all her property to her husband for life, and after his death to her children. The husband claimed that after the death of his wife, one-seventh of the surplus income was payable to him under her will. It was claimed on behalf of her child, the appellant, that the one-seventh was payable to him, while the trustees claimed that this share went to the testator's widow and surviving children. *Held*, that the *corpus* of the residuary estate did not vest in the children until the death of the widow; that the testator's widow and children took the surplus income distributively as tenants in common, and that upon the death of the daughter the one-seventh of the income which was payable to her during her life was undisposed of by the terms of the will and, therefore, it devolved upon the appellant under the statute. *Delafield v. Shipman*, N. Y., 426.
10. **Masses for the dead — payment -- trustee — collateral inheritance tax.**] A bequest to purchase masses for the dead is valid in Pennsylvania, and must be interpreted and may be enforced in such a manner as may best accord with the will of the testator. C., a testator, bequeathed as follows: "I also give and bequeath the sum of \$1,000, which my executor shall pay to the pastor at Newry, Blair county, for masses for the repose of my soul, and for the repose of the souls of my relatives, and the repose of the souls of the faithful of my parish." *Held*, the entire \$1,000 became at one time payable by the executor of C. to the incumbent pastor at Newry. *Held*, also, the

bequest was subject to collateral inheritance tax. *Appeal of Bradley*, Penn., 784.

11. **Power to appoint — sale — conveyance — party — husband and wife — fee-simple title.**] A testator by his will disposed as follows: "ITEM. I give and bequeath to my daughter Mary, intermarried with Joseph S. P. Harris [describing the premises] and I do hereby authorize and empower my said daughter Mary to sell and dispose of the same as she may think proper, but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided amongst her children, share and share alike, as they arrive at the age of twenty-one." *Held*, the intention of the testator was to give Mrs. Harris a life estate in the premises with remainder in fee to her children, subject, however, to divesture by the execution of the power of sale given in express terms to the life tenant. Mrs. Harris conveyed the premises to one Stevens, her husband not joining in the deed. *Held*, Stevens took a title in fee. *Diffenbaugh v. Harris*, Penn., 787.
12. **Power of sale — specific performance — dower — delay by vendor — rights of parties.**] Where the executors of a will, empowered by its terms to sell the testator's real estate, enter into an executory contract for a sale thereof, performance of such contract may be enforced in equity at the suit of the purchaser. In such case the contract is in effect an execution of the power and confers upon the purchaser an equitable title which the court will compel the executors to perfect, provided the contract is fair, for a fair consideration, and there is no default or laches on the purchaser's part. In such case the purchaser where he agrees to pay full value, is entitled to a clear title; if there are incumbrances on the land he is entitled to have them removed out of the purchase-money. The purchaser may elect to take the land subject to a dower right and would be entitled to an abatement from the contract price equal to the gross cash value of the dower right. If the widow is not a party to the contract of sale she cannot be compelled to accept in lieu of dower a money compensation out of the proceeds; in such case the purchaser must either elect to take the title subject to the dower right or abandon the purchase; but if the widow joins in the contract of sale without any reservation of dower right, she consents to make a good title and to look to the purchase-money as a substitute. A right of dower may be disposed of before admeasurement. Where, on a contract for the sale of land, the purchaser is ready and willing to perform, and delay is on the part of the vendor, the purchaser is entitled to the rents and profits from the time when, according to the terms of the contract, possession should have been delivered, or if the vendor has remained in possession, he is chargeable with the value of the use and occupation from the same time. The purchaser must pay interest on the purchase-money if it has remained in his hands unappropriated; if it has been appropriated and notice given to the vendor, but the purchaser has received no interest, he is not liable to pay interest to the vendor. *Bostwick v. Beach*, N. Y., 304.
13. **Purchase — descent — orphans' court — partition — jurisdiction.**] A testator devised as follows: "Also, I direct that the small house on lot No. 81 on the corner of Allegheny and Montgomery streets, in the town of Hollidaysburg, now being built, shall be finished as soon as possible, and that my wife Nancy shall have and enjoy the rents and profits of said lot, and all the buildings thereon erected, during her natural life, and after her death the same shall go to her heirs absolutely; but if during the continuance of her life said buildings should be destroyed by fire, in that event she shall have full power to sell said lot and appropriate the proceeds to her own use. . . . The share of my real and personal estate, thus given to my wife, to be in lieu of her dower at common law." He also directed that if a child should be born to them, his will and all the provisions therein contained should be null and void, and that said child should be heir to all his estate, real and personal, subject to the widow's right of dower. No child was born to them. *Held*, the surviving widow, Nancy, took a fee-simple. The widow, Nancy, made a will by which she devised the Hollidaysburg

- property to her sisters and brothers, six in number, naming them; she died, leaving sisters and brothers eight in number. *Held*, the six devisees took by purchase, and the orphans' court had no jurisdiction to decree partition of their interests. *Vowinckel v. Patterson*, Penn., 808.
14. **Vesting of devise — act of April 8, 1833 — trusts.]** A testator devised property to his son A. to hold in trust for his son B. during the natural life of B., and further provided as follows: "I direct the interest thereof to be annually paid to B., and, after his death, his share to be equally divided among his children, if he should have any, or to their issue; the issue in all cases taking the share which their parent would have taken." B. afterward died intestate, unmarried and without issue. In a contest for the fund between B.'s administrator and the representatives of the testator, *held*, that the testator did not intend to vest in B. the *corpus* of the estate, but only the right to receive the interest annually during his life. *McDevitt's Appeal*, Penn., 236.
15. **Vested remainder in fee.]** An estate in fee created by will cannot be cut down or limited by a subsequent clause unless it is as clear and decisive as the language of the clause which devises the estate. Testator by his will made in 1827, devised and bequeathed to his daughter M. a life estate in certain lots of land. Then followed this clause: "And from and immediately after the decease of my said daughter M., I give, devise and bequeath the last aforesaid two lots of ground, houses, buildings and premises, . . . so as aforesaid given unto my said daughter M., during her natural life, unto the lawful child or children of my said daughter, his, her or their heirs forever; if more than one, share and share alike, as tenants in common. And in case any or either of the children of my said daughter M., at the time of her death, be dead, leaving a lawful child or children him or her surviving such child or children shall take the share or portion which his, her or their parents would have been entitled to, if living, to have and to hold to him, her or them, and their heirs forever." The daughter, at the time of testator's death, was the mother of six children; she had five thereafter; in 1888 she died leaving her surviving eight children; three who were living at the time of testator's death having died without issue before their mother. *Held*, that the three children who died during the mother's life, took (as tenants in common, subject to open and let in children born after testator's death), a vested remainder in fee, which was unaffected by their death without issue before their mother. *Byrnes v. Stilwell*, N. Y., 808.

Ex. J. In.

